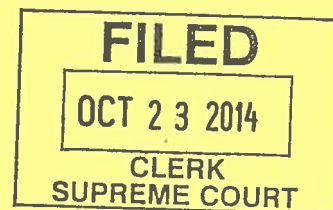


SUPREME COURT OF KENTUCKY
2013-SC-000555-D



STATE FARM MUTUAL
AUTOMOBILE INSURANCE
COMPANY

APPELLANT

v.

APPELLANT'S REPLY 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's Reply Brief were served via regular U.S. mail, postage prepaid this 22nd day of October, 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.

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I. INTRODUCTION

This Court accepted review of a split decision by the Kentucky Court of Appeals that found a contractual limitations provision for underinsured motorist (“UIM”) benefits contained in the policy of the Appellant, State Farm Mutual Automobile Insurance Company (“State Farm”), unreasonable and unenforceable as it applied to a UIM claim pursued by State Farm’s insured and the Appellee, Lonnie Riggs (“Riggs”). State Farm submits this Reply Brief in response to Riggs’ Appellee Brief.

The dispositive issue is whether State Farm’s UIM contractual limitations provision, which follows the statutory limitations period for tort claims found in Kentucky’s Motor Vehicle Reparations Act (“MVRA”), KRS 304.39-230(6), is reasonable and enforceable. Riggs argues that a UIM claim is a contract claim to which the contract statutory limitations period applies and references accrual law regarding contract claims, but cites to *not one* Kentucky decision – or *any* decision in other jurisdictions – that holds that a UIM contractual limitations provision which follows the tort limitations statute is unreasonable. Like the decision of the Court of Appeals, Riggs’ arguments are misplaced, have no support in the law, would cause a contractual limitation provision that is clear, unambiguous and reasonable to be unenforceable, and would provide UIM claimants with substantially more rights than tort claimants.

II. ARGUMENT

A. **State Farm’s UIM Contractual Limitations Provision Which Follows the Tort Limitations Period is Consistent With Kentucky Law.**

Riggs first contends that Kentucky law has held that the contractual limitations provision contained in State Farm’s policy is unreasonable and invalid under Kentucky law. In support, Riggs cites to no Kentucky decision that holds that a UIM contractual

limitations period which follows the MVRA tort limitations period is unreasonable and unenforceable. Rather, the cases that Riggs relies on do not address this issue and in fact support State Farm's position.

Riggs first cites to *Gordon*,¹ a 1995 Kentucky Supreme Court decision, which simply ruled that a UIM claim is a contract claim and should be governed by the 15-year statute of limitations for general actions on a written contract, KRS 413.090(2), instead of the flexible two-year limitations period for tort claims in the MVRA. In *Gordon* the policy contained a one-year contractual limitations provision which was unenforceable. The Court noted that it reached its ruling “[i]n the absence of the contractual provision, invalid due to the ruling in *Elkins* . . .” and specifically held that its ruling “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.”²

The Court held that such a contractual provision must be reasonable “as required under *Elkins*, which required at least two years to file a contractual claim.”³ Thus, *Gordon* expressly did not reach the issue of whether the type of contractual limitations provision contained in State Farm's policy is reasonable and enforceable but instead actually invited insurance companies to draft such provisions.

Riggs next relies on a 2005 Kentucky Supreme Court decision, *Ryan*,⁴ in which the Court addressed the applicability of Kentucky's apportionment statute, KRS 411.182, to UIM claims. The Court in its reasoning noted that a UIM claim is a contract claim generally subject to the 15-year statute of limitations for contracts. Like *Gordon*, the

¹ *Gordon v. Kentucky Farm Bureau Ins. Co.*, 914 S.W.2d 331 (Ky. 1995).

² *Id* at 332-33.

³ *Id* at 333.

⁴ *Kentucky Farm Bureau Mut. Ins. Co. v. Ryan*, 177 S.W.3d 797 (Ky. 2005).

Court in *Ryan* in no manner addressed the enforceability of a contractual limitations provision like the one contained in State Farm's policy.

Riggs finally cites to a 2001 United States District Court decision, *Brown v. State Auto.*⁵ Unlike *Gordon* and *Ryan*, the Court in *Brown* did address the reasonableness of a UIM contractual limitations provision under Kentucky law. The UIM contractual limitations provision examined in *Brown*, however, was two years from the date of the accident and did not follow the MVRA limitations period for tort claims which extends the two years if basic reparation benefits are paid. Because the contractual limitations period did not likewise extend the time for the UIM claim to be filed, the Court concluded that it would be unreasonable to require an insured to sue her insurer "prior to being required to sue the tortfeasor."⁶

Nor do the concerns addressed in *Gordon* about requiring a UIM plaintiff "to sue his own insurer before discovering whether or not the tortfeasor is in fact an uninsured motorist"⁷ apply. Here, State Farm's UIM contractual limitations period does not require a UIM claimant to sue State Farm before it is required to sue the tortfeasor. Instead, it provides the same limitations period which the Kentucky legislature and multiple courts have found reasonable for tort claimants. This Court should thus decline to create new law and instead follow those decisions by Kentucky courts applying Kentucky law in the Kentucky Court of Appeals⁸, Sixth Circuit⁹ and United States District Court for the

⁵ 189 F.Supp.2d 665 (W.D.Ky. 2001).

⁶ *Id.* at 671 (emphasis added).

⁷ *Gordon, supra*, 914 S.W.2d at 332 (emphasis added).

⁸ *Perry v. Kelty*, 2012 Ky. App. Unpub. LEXIS 326 (May 4, 2012).

⁹ *Pike v. Governmental Employees Ins. Co.*, 174 Fed. App'x. 311 (6th Cir. 2006).

Eastern District of Kentucky¹⁰ expressly and implicitly finding that UIM contractual limitations provisions which follow the MVRA tort limitations period are reasonable as a matter of law.

B. State Farm's Contractual Limitations Provision is Consistent With the UIM Statute.

Riggs next argues that State Farm's contractual limitations provision is inconsistent with the UIM statute, KRS 304.39-320, which Riggs claims provides that a UIM cause of action is not created until settlement of the underlying liability claim. The cited provision simply codifies the procedure whereby a UIM insurer can preserve its subrogation interest against the underinsured tortfeasor and has no relevance to the enforceability of State Farm's contractual limitations period.

First and foremost, this is one of several issues Riggs raises in his Brief that Riggs did not raise before the trial court or the Court of Appeals and which neither the trial court nor the Court of Appeals addressed. A party on appeal cannot raise an argument before the appellate court not raised before the trial court because this would deprive the trial court – and the opposing party – a reasonable opportunity to consider the question raised avoiding the need for any appeal.¹¹ Similarly, a party cannot raise an issue on appeal before the Kentucky Supreme Court which was not addressed by the Court of Appeals unless it is an alternative ground for affirming the Court of Appeals *and* was an issue presented to the Court of Appeals.¹² Riggs therefore did not preserve these issues to argue on appeal.

¹⁰ *Hill v. State Farm Mut. Auto. Ins.*, 939 F.Supp.2d 754 (E.D. Ky. 2013)

¹¹ *Fischer v. Fischer*, 348 S.W.3d 582, 588 (Ky. 2011).

¹² *Petzold v. Kessler Homes*, 303 S.W.3d 467, 475-77 (Ky. 2010).

Even if the Court considered this argument, Riggs is incorrect. The cited UIM statute simply codifies the *Coots*¹³ procedure whereby a UIM carrier is required to be given notice of a settlement of the underlying liability claim in order to give the UIM insurer an opportunity to substitute its funds and preserve its subrogation claim against the underinsured tortfeasor motorist.¹⁴ These statutory provisions do not state that there can be no UIM claim until the underlying liability claim is settled much less that a UIM claim cannot be pursued until the liability claim is settled. In fact, in the *Ryan* case cited by Riggs, this Court noted as follows:

While a UIM insurer's liability to its insured is fault-based to the extent the claimant has any comparative fault, there is no requirement that any other tortfeasor be named and/or served as a party in the action. In fact, Kentucky courts have refused to enforce insurance policy provisions requiring an insured to obtain a judgment or even sue the uninsured/underinsured motorist in order to determine liability under the contract.¹⁵

Riggs' suggestion that a contractual limitations period should begin to run upon the date of settlement with the tortfeasor is thus inconsistent with Kentucky law. Doing so would give a UIM claimant *greater* rights than a claimant where the tortfeasor was fully insured by permitting a UIM claimant to delay the running of the limitations period until such time as he settled his liability claim. "The 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.*"¹⁶

¹³ *Coots v. Allstate Ins. Co.*, 853 S.W.2d 895 (Ky. 1993).

¹⁴ *True v. Rains*, 99 S.W.3d 439, 445 (Ky. 2003).

¹⁵ *Ryan, supra*, 177 S.W.3d at 801.

¹⁶ *Cincinnati Ins. Co. v. Samples*, 192 S.W.3d 311, 316 (Ky. 2006) (emphasis added).

C. A Contractual Limitations Period Which Accrues on the Date of Injury is Consistent With Kentucky Law.

Riggs next contends that because a cause of action for breach of contract generally accrues at the time of breach of the contract, State Farm's contractual limitations period is unreasonable in that the limitations period runs from the date of the injury and not the breach which Riggs argues should be when the insurer denies a UIM claim. Again, because Riggs did not raise this argument with the trial court or the Court of Appeals, this issue has not been properly preserved.

Should this argument be considered, Riggs' position ignores the basic elements of a contractual limitations provision which essentially does two things. First, the provision identifies an event from when the limitations period will begin to run, whether that event is an injury, accident, loss or other designated occurrence. The provision then identifies the time period after the designated event in which a party to the contract can file suit for breach of contract which is typically shorter than the corresponding statute of limitations for contracts. Contending that State Farm's contractual limitations provision should only accrue upon denial of a claim and not at the time of injury as stated in the policy refuses to recognize the basic premise of contractual limitations provisions that parties can agree to a specified time of accrual.

Such a position would also be contrary to a long line of cases upholding contractual limitations provisions even if the contractual limitations period commences running before the alleged breach and before a party would normally be permitted to file

suit. Kentucky courts have consistently rejected the theory that there must be a breach for a contractual limitations period to commence.¹⁷

The Sixth Circuit in *Smith v. Allstate Ins. Co.*,¹⁸ addressed this very issue. The Court recognized that a cause of action under a contract of insurance may not accrue until plaintiff has the right to file suit following submission of proof and a decision by the insurer. After examining Kentucky law, however, the Court held that “Kentucky courts have repeatedly enforced insurance contract provisions under which the time for suit began to run before the insured had a right to sue.”¹⁹

The Court specifically rejected the same theory proffered by Riggs that the limitations period should be tolled until the insurer receives notice of and refuses to pay the claim and noted that there is *no* Kentucky case which “suggests that the limitations period can be tolled until the denial of the insured’s claim.”²⁰ The result urged by Riggs would effectively overrule long-established Kentucky precedent and hold that, even where the parties agree that the limitations period begins to run on a date other than the date of denial or breach, said provision is unenforceable.

In claiming that a majority of jurisdictions have found that a UIM claim accrues at the time of breach which begins the running of the limitations period, Riggs misapplies this law to the current case. Namely, these decisions mostly do not specifically address

¹⁷ See, e.g., *Simmons Construction Co. v. American States Ins. Co.*, 426 S.W.2d 441 (Ky. 1968) (rejected argument that claim did not accrue until later payment); *Ashland Finance Co. v. Hartford Accident & Indemnity Co.*, 474 S.W.2d 364 (Ky. 1971) (enforcing limitation provision that ran from date of loss and not later date when claim could be brought); *Hale v. Blue Cross & Blue Shield of Kentucky*, 862 S.W.2d 905 (Ky. App. 1993) (rejected argument that limitation ran from date of denial and not date of filing of claim).

¹⁸ 403 F.3d 401 (6th Cir. 2005).

¹⁹ *Id.* at 405.

²⁰ *Id.* at 406.

the effect of a contractual limitations provision which identifies a specific date when the limitations period is triggered which is typically different than the date of breach or denial. Indeed, the law review article cited by Riggs briefly discusses the effect of contractual limitation provisions and specifically notes as follows:

Because UIM coverage was meant to supplant the tortfeasor's insurance coverage, in regard to excess damages, most courts have held that the insured is not prejudiced by a contractual limitation provision equivalent to the statutory limitation period governing the underinsured's third-party tort claim. Of the few courts that have addressed the issue, *most have enforced those provisions in which the limitation period is at least as long as the statutory period the injured plaintiff would have had to bring an action against the underlying tortfeasor.*²¹

Thus, not only does Riggs not cite one Kentucky case on point, but Riggs cites to no decision in another jurisdiction which held that a UIM contractual limitation provision which follows the tort limitations period is unreasonable and unenforceable. In contrast, State Farm cited the Court to numerous cases that support its position and even Riggs' own law review article contradicts his position that State Farm's limitations provision is unreasonable.

D. State Farm's Contractual Limitations Period is Unambiguous and is Supported by Sound Public Policy Reasons.

Riggs ends his Brief with two arguments related to the contractual language (not raised below) and underlying public policy reasons. Riggs first claims that State Farm's UIM contractual limitations provision is ambiguous in that it begins the running of the

²¹ Insurance Law Annual: 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 (1999), pp. 13 and 14 (emphasis added).

limitations period at the time of the “injury” which Riggs contends is undefined and could refer to a breach of the contract.

Because the UIM claim by its very nature relates to injuries sustained in a motor vehicle accident, the reference to “injury” is clear and unambiguous. Words employed in insurance policies, if clear and unambiguous, should be given their plain and ordinary meaning.²² If no ambiguity exists, a reasonable interpretation of an insurance contract is to be consistent with the plain meaning of language in the contract.²³ Indeed, in an effort to make the limitations provision crystal clear, State Farm adopted nearly verbatim the language contained in the MVRA limitations period for tort claims set forth in KRS 304.39-230(6) which reads as follows:

An action for tort liability not abolished by KRS 304.39-060 may be commenced not later than two (2) years after the injury, or the death, or the last basic or added reparation benefit payment made by any reparation obligor, whichever later occurs.

As courts have had no trouble finding the MVRA period running from the date of “injury” to be clear and unambiguous, similarly there is no ambiguity in State Farm’s policy provision.

Riggs further argues that UIM claimants would have no choice but to file “protective lawsuits” and claims that Kentucky law does not permit a tolling agreement between the policyholder and insurer to toll the running of the contractual limitations period to permit the claimant to further explore the underlying tort claim. This is false. KRS 413.265 specifically provides that written agreements to extend limitations period for the filing of civil actions “shall be valid and enforceable according to their terms.”

²² *Nationwide Mut. Ins. Co. v. Nolan*, 10 S.W.3d 129, 131 (Ky. 1999).

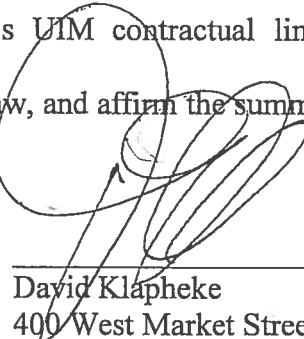
²³ *Brown v. Indiana Ins. Co.*, 184 S.W.3d 528, 540 (Ky. 2005).

Finally, Riggs contends that State Farm has not shown that it will be prejudiced by the Court adopting a UIM contractual limitations period which is longer than the tort limitations period. A showing of prejudice is not required for the enforcement of clear and unambiguous contractual provisions including limitations provisions.

Nonetheless, it is patently clear that insurers, tortfeasors and perhaps even claimants would suffer prejudice if the limitations period did not begin to run until the time of denial of a UIM claim. The amicus brief filed by the insurance associations in this case details the adverse consequences to all involved if the Court accepted this theory. Such a ruling would permit a UIM claimant to unilaterally delay the beginning of the running of the contractual period perhaps indefinitely by simply declining to present a UIM claim until a time of its own choosing. The usual public policy reasons underlying any limitations period – to spare the courts from litigation of stale claims and parties from being put to a defense after memories have faded, witnesses have died or disappeared, and evidence has been lost²⁴ – apply equally to contractual limitations provisions.

III. CONCLUSION

For the foregoing reasons, and as more fully set forth in State Farm's initial Brief, State Farm respectfully requests that this Court reverse the decision of the Kentucky Court of Appeals, find that State Farm's UIM contractual limitations provision is reasonable and enforceable as a matter of law, and affirm the summary judgment in State Farm's favor rendered by the trial court.



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²⁴ *Mills v. Habluetzel*, 456 U.S. 91, 102 (1982).

