**COURT OF COMMON PLEAS OF MONROE COUNTY**
**FORTY-THIRD JUDICIAL DISTRICT**
**COMMONWEALTH OF PENNSYLVANIA**

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| **KENNETH NEWHOOK,** | **: NO. 10711 CIVIL 2014** |
| **Plaintiff** | **:** |
| **vs.** | **:** |
| **ERIE INSURANCE EXCHANGE,** | **:** |
| **Defendant** | **: CROSS MOTIONS FOR : SUMMARY JUDGMENT** |

**ORDER**

**AND NOW,** this 11th day of May, 2017, on the Cross Motions for Summary Judgment we find as follows:

1. Summary Judgment is GRANTED as to Plaintiff and against the Defendant on the claim for Declaratory Judgment. We expressly find that the Plaintiff is entitled to stacked UM benefits under the policy with Defendant in the total amount of $400,000 per person. The Prothonotary shall enter judgment accordingly.

2. Defendant's Motion for Summary Judgment on the claim for Declaratory Judgment is DENIED.

3. Defendant's Motion for Summary Judgment as to Count III, Bad Faith, is GRANTED and Plaintiff's Count III claim is DISMISSED.

4. Defendant's Motion for Summary Judgment as to Count IV, Unfair Trade Practices and Consumer Protection Law violations is GRANTED and Plaintiff's Count IV claim is DISMISSED.

**BY THE COURT:**

**DAVID J. WILLIAMSON, J.**

cc: Andrew E. DiPiero, Jr., Esq.
Eric R. Brown, Esq.
Prothonotary

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A. DiPiero, Jr. Esq

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| **ERIE INSURANCE EXCHANGE,** | : | |
| **Defendant** | : | **CROSS MOTIONS FOR SUMMARY JUDGMENT** |

## OPINION

The parties have both filed Motions for Summary Judgment. Plaintiff, Kenneth Newhook, seeks an order that he is entitled, as a matter of law, to stacked uninsured motorist (UM) and underinsured motorist (UIM) coverage. This would allow for potential recoverable damages up to the limits of the policy for UM/UIM benefits multiplied by the number of vehicles insured. (Here $100,000 x 4 vehicles = $400,000 of coverage). Defendant, Erie Insurance Exchange ("Erie") seeks an Order that stacked coverage does not apply as a matter of law, as Plaintiff failed to elect UM/UIM stacked benefit coverage on his policy, and waived such benefits.

The facts of the case are not in dispute. Plaintiff had an original policy with Erie on three (3) vehicles (a Volkswagen, Mazda, and Ford). In 2007, he signed a waiver of stacked

UM/UIM benefits. In July 2012, Plaintiff added a Suzuki and Plymouth and removed the Mazda and Ford from the policy. At that same time, the Plaintiff again signed a waiver of stacked UM/UIM coverage and the policy so reflected there was no stacked UM/UIM coverage. The policy provided for a maximum of $100,000 of UM/UIM coverage unstacked, covering three (3) vehicles.

Then in October 2012, Plaintiff purchased a fourth vehicle, a Ford Fusion, and added it to the Erie policy. No new waiver of stacked UM/UIM coverage was signed by the Plaintiff. On July 15, 2013, the Plaintiff dropped the Suzuki from the policy and added a Nissan Versa. No new waiver of stacked UM/UIM coverage was signed by the Plaintiff. Four days later, on July 19, 2013, Plaintiff removed the Nissan from the policy and added a Honda Civic. No new waiver of stacked UM/UIM coverage was signed by the Plaintiff.

On August 21, 2013, an amended declaration was issued with the four (4) vehicles above listed thereon. This was also the date of the policy renewal which had been running on one (1) year intervals. The amended declaration set forth UM/UIM coverage of $100,000 per person – unstacked. No new waiver of stacked UM/UIM coverage was signed by the Plaintiff. On or about August 22, 2013, the Plaintiff was involved in an accident in one of the insured vehicles, when he was rear-ended by an uninsured, intoxicated driver. As a result, the Plaintiff suffered severe injuries. Erie has paid Plaintiff $100,000 in UM benefits for single vehicle coverage, but has denied Plaintiff's request for stacked benefits of up to $400,000 total. Plaintiff has filed suit for Declaratory Judgment, Breach of Contract, Bad Faith and Violation of Unfair Trade Practices and Consumer Protection Law.

Summary Judgment is appropriate when the record shows there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Coleman v. Coleman, 663 A.2d 741 (Pa. Super. 1995); Pa. R.C.P. 1035. The record is to be viewed in the light most favorable to the non-moving party. Ertle v. Patriot-News Co., 674 A.2d 1038 (Pa. 1996). The interpretation of an insurance policy is a question of law. Rourke v. Pennsylvania Nat. Mut. Cas. Ins. Co., 116 A.3d 87 (Pa. Super. 2015).

The single issue raised by the Plaintiff in his Motion is whether or not he is entitled to stacked UM benefits under the policy with Defendant. If not, Plaintiff's other claims are moot. The Defendant has filed a cross-motion for summary judgment asserting there is no stacked coverage, and that several of Plaintiff's other causes of action be dismissed even if there is stacked coverage. The issue comes down to an interpretation of the policy language in relation to existing case law and Section 1738 of the Pennsylvania Motor Vehicle Financial Responsibility Law ("MVFRL").

It appears that the existing case law varies regarding availability of stacked UM/UIM coverage when it is not selected by an insured, but also not specifically waived in writing. The cases are fact-specific to the terms of the policy and resulting interpretation. In the recent case of Pergolese v. The Standard Fire Insurance Co., 2017 Pa. Super. 96 (April 11, 2017), the Pennsylvania Superior Court held that the addition of a vehicle to the policy of insurance constituted a new "purchase" of UM/UIM coverage under Section 1738 of the MVFRL and required the execution of a new UM/UIM stacking waiver. In so doing, the Superior Court found the after-acquired-vehicle provision in the policy was similar to that of Bumbarger v. Peerless Indem. Ins. Co., 93 A.3d 872 (Pa. Super. 2014) (*en banc*), and was

inapplicable. Id. An after-acquired vehicle provision extends an existing coverage until the insured notifies the insurer he wishes to insure a new vehicle under the existing policy. Id. Such a clause would extend temporary, or stop-gap coverage. Id. The holding in Bumbarger was that with regard to stacking, when the insured takes ownership of a vehicle and immediately informs the insurer, the language and the purpose of the after-acquired vehicle provision was never triggered under the policy. Bumbarger, supra. In Pergolese, as in Bumbarger, the policy in question included an after-acquired-vehicle clause which did not apply to any of the vehicles shown in the Declaration page. Pergolese, supra. The parties notified the agent of the purchase of the additional vehicle, requested proof of coverage, and the coverage was given at an increased premium. Id. A new waiver should have been signed, but was not, and stacked coverage was deemed to apply. Id.

In so finding, the Pergolese Court differentiated the Shipp and Toner findings. In Shipp v. Phoenix Ins. Co., 51 A.3d 219 (Pa. Super. 2012) an identical after-acquired vehicle clause to that in Pergolese applied to a replacement on the policy of an existing vehicle, and not the addition of another vehicle in additional to those already insured. Id. The Shipp policy had provided for continuing, uninterrupted coverage on a replacement vehicle, and the change to the identity of a vehicle by replacement of one vehicle for another meant no new insurance coverage was purchased. Id. In Pergolese, the last vehicle added was not a replacement vehicle; rather, it was another vehicle added 44 days after the removal of a prior vehicle. Id. The purchase and addition of another vehicle, thereby increasing the number of vehicles covered, distinguished Pergolese from Shipp. As such, Pergolese held the after-acquired-vehicle clause of the policy never applied in that case. Id.

The Pergolese Court also determined that Toner v. Travelers Home and Marine Ins. Co., 137 A.3d 583 (Pa. Super. 2016) alloc. granted 2016 Pa. LEXIS 1990 (Pa. Sept. 8, 2016) was distinguishable. The Court viewed the issue in Toner (which held a new waiver of stacking for an additional vehicle was not required) to be that an after-acquired-vehicle clause applied which did not require the need to purchase new insurance. Id. As such, the Court found Toner did not apply because the after-acquired-vehicle clause in Pergolese was not triggered. The issue came down to the language of the policy and the intent of Section 1738 applied to each specific policy. In so finding, the Court in Pergolese followed prior Pennsylvania Supreme Court rulings in Sackett I,[1] Sackett III,[2] and the Superior Court decision in Bumbarger. Plaintiff argues that Pergolese is directly on point in this action.

Defendant argues that at no time after the original issuance of the policy, including at the time of the addition of the fourth vehicle and again at purchase of the Honda, was there a duty to have the plaintiff sign another waiver of stacked benefits. The Defendant relies on Sackett v. Nationwide Material Ins. Co., 940 A.2d 329 (Pa. 2007), commonly referred to as Sackett II, and Toner, supra. The Sackett II holding differs, due to specific factual events, from Sacket I, Sackett III, Bumbarger, supra, and now Pergolese, supra. In Sackett II, the Pennsylvania Supreme Court clarified the holding of Sackett I, finding that enforcement of an initial waiver of stacked UM/UIM coverage can be extended under an after-acquired-vehicle provision of an existing multi-vehicle policy when a new vehicle is purchased. Sackett II, supra. Specifically, the Court held that the after-acquired-vehicle provision of the policy in question did

[1] Sackett v. Nationwide Ins. Co., 591 Pa. 416, 919 A.2d 194 (2007).
[2] Sackett v. Nationwide Ins. Co., 4 A. 3d 637 (Pa. Super. 2010) app. denied, 34 A.3d 83 (Pa. 2011).

not equate to the purchase of new coverage under Section 1738 (c) of the MVFRL which would have required that a new stacking waiver be obtained. Id.

However, the Court stated that whether or not a new written waiver was required depended upon whether or not the policy provided "continuing coverage" or "finite coverage" in the after-acquired clause of the policy. Id. "Continuing Coverage" is coverage that continues until the end of the policy period, or the notification period of the policy without any further requirements. "Finite Coverage" lasts until the end of the policy period or the notification period and terminates, requiring a new policy. If the coverage was "continuous," no new waiver was required; and, if it was "finite," it would require new stacking waivers. Id. Following that reasoning, the courts in Shipp v. Phoenix Ins. Co., 51 A.3d 219, and Toner v. Travelers Home and Marine Ins. Co., 137 A.3d 583 both held in favor of no stacked benefits despite no new written waiver because no new vehicle was added under the after-acquired-vehicle language of the policy that would require a newly signed waiver of coverage. In both cases, the issue hinged on whether or not the after-acquired-vehicle clauses applied.

In this case, the Plaintiff added his last vehicle to the policy, a Honda, on July 19, 2013, and simultaneously dropped the Nissan added on July 15, 2013. With the exception of the new fourth vehicle added in December 2012, the other vehicles added to the Plaintiff's policy all involved dropping another vehicle at the same time which qualifies as "replacement" of a vehicle.[3] The Erie policy contains the following after-acquired-vehicle coverage:

[3] The parties do not reference why a 1998 Saturn appears on the Declaration page after December 2012 and assume it had replaced the 1998 Volkswagen at some point.

"Additional auto" or "additional trailer":

1. "Additional auto" means any "private passenger auto" other than a "replacement auto" that "you" acquire, purchase or lease during the policy period. For coverage to apply "we" must insure all "private passenger autos" "you" own on the date "you" acquire, purchase or lease an "additional auto."

* * *

"You" must notify "us" during the policy period of "your" intention to have this policy apply to an "additional auto" or an "additional trailer." If "you" obtain an "additional auto" or an "additional trailer" within 30 days prior to the end of the policy period "you" have 60 days after acquisition to notify "us."

Should a loss occur involving an "additional auto" or "additional trailer" prior to "you" notifying "us" the additional vehicles will have the broadest coverage "you" have purchased for any one vehicle listed on the "Declarations."

* * *

"Replacement auto" means any "private passenger auto" that "you" acquire, purchase or lease within the policy period to replace an "auto" described on the "Declarations."

* * *

We also note the following additional definitions of the policy:

- "Auto we insure" means –
  1. "owned auto we insure";
  2. "temporary substitute," or
  3. "non-owned auto." ....

* * *

- "Owned auto we insure" means any:
  1. "auto" or "trailer" described on the "Declarations" for the coverages "you" have purchased;

2. "additional auto" or "additional trailer"; or
3. "replacement auto" or "replacement trailer."

* * *

There was no dispute that the Plaintiff added and replaced certain vehicles to the policy and notified Defendant when he did so. The loss occurred after notice of ownership of all vehicles, including the Honda, added July 19, 2013. Pursuant to the definitions of the policy, the fourth vehicle added in December 2012 (Ford Fusion) was an "additional vehicle" as it did not replace any other vehicle. It added a new fourth vehicle to the policy. The removal of the Mazda and Ford previously, and addition of the Suzuki and Plymouth were replacement vehicles pursuant to the policy definitions. The removal of the Suzuki on July 15, 2013, for the Nissan, and then removal of the Nissan for the Honda on July 19, 2013 were replacement vehicles pursuant to the policy. The clear terms of the policy cited above support this finding.

First, we must determine if the after-acquired-vehicle language of the policy applies in light of Bumbarger and Pergolese. Both cases held that when an insured takes ownership of a vehicle and simultaneously informs his insurer of the new vehicle, the language and purpose of the after-acquired-vehicle provision of the policy was not triggered. The reason cited was that an after-acquired-vehicle provision merely extends existing coverage until an insured notifies the insurer of a need for coverage and thereby extends temporary, or stop-gap coverage, until the policy can be amended. Pergolese, supra, *citing* Toner v. Travelers Home and Marine Ins. Co., 137 A.3d 583. In Bumbarger, the Court specifically found no need to analyze "continuous" or "finite" coverage under Sackett II, because it only applied if an after-acquired-vehicle clause was triggered. Bumbarger, supra. In Pergolese, as in Bumbarger, a new vehicle

was added to the policy, that was not replacing any other vehicle. (emphasis added) Coverage was requested and given immediately. The after-acquired-vehicle language in the policy did not apply to such transactions. Id. As such, the analysis of Sackett II, of whether or not the after-acquired-vehicle provision was "continuous" or "finite" did not apply.[4]

We agree with the Defendant that the policy in this case has a "continuous" coverage period for an after-acquired-vehicle as contemplated in Sackett II. However, we find that consistent with Bumbarger and Pergolese, the after-acquired-vehicle clause does not apply. An amended Declaration page was issued October 11, 2012 at the time that the new additional fourth vehicle was added to the previous three (3) vehicles covered. Amended Declarations were also issued for the replacement vehicles in July 2013 (Nissan and then Honda). Finally, Amended Policy Declarations were issued and a policy renewal took effect from August 21, 2013 to August 21, 2014. The accident occurred a few days after the policy renewal.

In Bumbarger, the Court specifically found that the addition of a new vehicle, effectively added to the policy's declarations, was not covered under the newly-acquired-vehicle clause. Bumbarger, 93 A.3d at 874. In Bumbarger, the after-acquired-vehicle clause applied to any vehicle in addition to any vehicle shown in the Declarations. The insured had to ask to be covered within fourteen (14) days after becoming the owner. Bumbarger, Id. Similar facts occurred in Pergolese, including an increase in the premium as a result of the additional vehicle. Pergolese, 2017 Pa. Super. 96. In Pergolese, the time period to request coverage was thirty (30)

[4] However, we note that if a vehicle was subject to the provisions for an after-acquired-vehicle, a "continuous" policy coverage would not require a new written waiver of stacked benefits; but, a "finite" clause would require a new written waiver. Sackett II, supra.

days after becoming the owner of the new vehicle. Pergolese, Id. In both cases, coverage was requested and granted immediately.

Here, the policy stated notice must occur "during the policy period" for after-acquired-vehicle coverage to apply. As in Bumbarger and Pergolese, amended declarations were issued, signifying coverage under the general policy, and not under the after-acquired-vehicle language. When the Ford Fusion was added by an Amended Declaration on October 11, 2012, the policy premium also went up from $1183 to $2691. The addition of the new fourth vehicle in October 2012 would also have allowed for an increase in available stacked benefits from $300,000 to $400,000 if chosen. From a pure public policy standpoint, and in conformity with the intent of Section 1738 of the MVFRL, it would seem that when more benefits are available, a written waiver of those benefits should be given. Clearly, a significant change was made when the Ford Fusion was added to the policy. No stop-gap insurance was needed because Erie was informed and issued a new Declaration and also renewed the insurance policy prior to the accident. No new waiver was executed. Pursuant to Pergolese and Bumbarger, the stacking of UM/UIM benefits was not effectively waived by the Plaintiff in this case. Such facts and findings are consistent with the Section 1738 of the MVFRL.

We note that Plaintiff also argues for stacked UM/UIM coverage because no waivers were signed when the Nissan, and then the Honda were covered by the policy. On both occasions, an Amended Declaration page was issued. Both vehicles appear to be replacement autos, and not an additional auto like the Ford Fusion. This is one of the distinctions discussed in Sackett II, and Shipp, which involved after-acquired-vehicle clauses applying with continuing uninterrupted coverage on a replacement vehicle without notice due to language of the policy.

The issue still becomes whether or not the after-acquired-vehicle language of the Defendant's policy applies or not. For the same reasons as above, we find the after-acquired clause does not apply with regard to the Nissan and Honda. In addition to issuance of an "Amended Declaration" page, the amount of the premium changed shortly thereafter, and on August 21, 2013, the entire policy was subject to renewal. It was renewed without obtaining any new waiver of stacked UM/UIM coverage. The policy language for "replacement auto" mirrors that of "additional auto" for after-acquired-vehicles. It provides coverage on a continuing basis, if notice is given of the purchase during the policy period, with coverage provided specifically if a loss occurs prior to notification. The language clearly contemplates coverage being applied until "notice is given," provided that notice is then given prior to the end of the "policy period." Here, the policy period ended on August 20, 2013. A new policy period began thereafter and no new waivers were signed. This is most analogous to Pergolese and Bumbarger in which the after-acquired-vehicle clause did not apply.

In support of its own Motion for Summary Judgment, the Defendant argues that the after-acquired-vehicle language of the policy applies, that the coverage is continuous and not finite, and that no new stacking waivers were required. In support thereof, Defendant cites Sackett II and Toner, 137 A.3d 583. The Defendant also seeks dismissal of Plaintiff's bad faith and Consumer Protection Law claims.

The cases cited by the Defendant involve a finding that the after-acquired-vehicle clause of a policy applied. Toner is cited (in conformity with Sackett II) as not requiring a new waiver of stacked benefits because the after-acquired-vehicle clause applied and it was of a continuous, and not finite nature. The Defendant is correct that the after-acquired-vehicle clause

is continuous in this case. However, the issue is whether or not the after-acquired clause applies. We agree with Plaintiff it does not, as the language of the policy and facts are more similar to Pergolese and Bumbarger. The after-acquired language of the policy considers an "additional auto" to be one ""you" acquire, purchase or lease during the policy period." The "owned auto we insure" definition means any:" 1. auto . . . described on the "Declarations" for the coverages you have purchased; 2. "additional auto. . .". The vehicle added to the policy in this case, the Ford Fusion, was described on the "Declaration" page immediately after purchase and again at policy renewal. This is more analogous to the facts of Pergolese, and Bumbarger, and less like Toner (and the requirements of Sackett II in which an after-acquired-vehicle clause applied so no new waivers were required). Here, it is much more like the new purchase of insurance when the Ford Fusion was added to the policy, both at the time the Amended Declaration was issued in October 2012, and certainly at the renewal of insurance on August 21, 2013. This is consistent with the intent of section 1738 of the MVFRL that would require the signing of new waivers. Again, in finding the after-acquired vehicle clause does not apply herein, Toner is distinguishable.

We do find that the Plaintiff has failed to adduce facts necessary to proceed with the bad faith and Consumer Protection Law claims. It is clear that Erie made a reasonable legal conclusion based on an area of the law that is uncertain or in flux as contemplated by Brown v. Progressive Insurance Co., 860 A.2d 493 (Pa. Super. 2004). The existing case law interpreting section 1738 of the MVFRL is very fact specific, and at least one case that could have a potential impact on this matter, Toner, supra, was awaiting a final decision by the Pennsylvania Supreme

Court.[5] The Defendant's refusal to provide stacked coverage cannot be interpreted under the facts set forth to meet the bad faith standard. As such, the claim will be dismissed.

We also find that the Plaintiff has failed to produce sufficient facts to recover under the Consumer Protection Law. Such a recovery requires a plaintiff to prove common law fraud. *See* Toy v. Metro. Life Ins. Co., 928 A.2d 186 (Pa. 2007). No facts exist that Defendant engaged in any fraudulent conduct. As a matter of law, the Defendant is entitled to summary judgment on the Consumer Protection Law claim.

[5] It appears that decision will not take place as the parties in Toner recently reached a settlement and it appears the case will be withdrawn from consideration. It is possible the Defendant in Pergolese will seek review with the Pa. Supreme Court, so that matter is not necessarily final.

2014-10711

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