

THE STATE OF NEW HAMPSHIRE

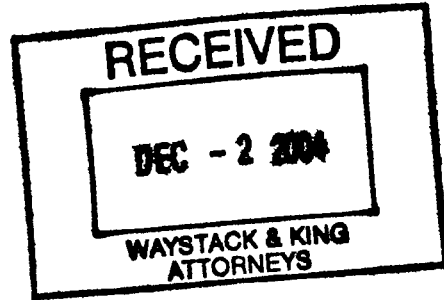
Coos Superior Court

55 School St., Suite 301

Lancaster, NH 03584

603 788-4702

NOTICE OF DECISION



JONATHAN S FRIZZELL ESQUIRE  
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03-E-0103 Sue Ann Connary v. Onebeacon Insurance Company

Please be advised that on 12/01/2004 Judge Perkins made the following order relative to:

**Order on Merits ; Issued**

12/01/2004

David P. Carlson  
Clerk of Court

cc: Douglas N. Steere, Esquire

# THE STATE OF NEW HAMPSHIRE

COOS, SS.

SUPERIOR COURT

SUE ANN CONNARY

vs.

ONEBEACON INSURANCE COMPANY

No. 03-E-103

## ORDER ON THE MERITS

The plaintiff, Sue Ann Connary, filed a petition in this Court for declaratory judgment and attorney's fees regarding her entitlement to recover benefits for uninsured motorist coverage from the defendant, OneBeacon Insurance Company. The plaintiff's petition alleges that: (1) the defendant has wrongfully denied her coverage under the terms of the insurance policy; (2) the defendant has failed to act to protect its subrogation rights, and should therefore be estopped from asserting that plaintiff has jeopardized its subrogation rights; (3) the defendant should estopped from denying uninsured motorist benefits to the plaintiff; and (4) the plaintiff is entitled to attorney's fees under RSA 491:22-b.<sup>1</sup> The defendant objects. A merits hearing was held on October 25, 2004. After considering the parties' arguments and reviewing the pleadings, the Court finds that the plaintiff was wrongfully denied uninsured motorist coverage, and is entitled to declaratory judgment. Because the Court finds for the plaintiff, she is entitled to receive attorney's fees.

### Factual Background

For the purpose of this Order, the Court finds the following facts relevant. On March 25, 2000, the plaintiff was driving her vehicle in a northerly direction on Route 3 in Groveton, New Hampshire. While the plaintiff was lawfully stopped at an intersection, she was rear-ended by Brent Tarbox. As a result of the collision, the plaintiff suffered physical injuries, particularly to her left shoulder. In addition to physical injuries, the plaintiff alleges

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<sup>1</sup> The parties stipulated, however, that the hearing on the merits is limited to argument on the issues of whether or not the defendant wrongfully denied coverage and whether or not the plaintiff is entitled to attorney's fees. Therefore, the Court will not consider the merits of the plaintiff's estoppel claims.

CLERK'S NOTICE DATED

12/1/04  
cc: Hizzell  
Sleese

economic damages, pain and suffering, and loss of enjoyment of life. The record is unclear as to whether or not the plaintiff is or was pursuing a claim for property damage.

The plaintiff was operating a 1999 Saab sedan, which was insured by the defendant. Part of the insurance policy provided underinsured/uninsured motorist coverage, in accordance with RSA 264:15. The limit of the uninsured motorist coverage was in the amount of \$250,000.00 for a single vehicle occupant.

Although Brent Tarbox was driving the vehicle that struck the plaintiff, the owner of the vehicle was Nancy Tarbox. At the time of the accident, the vehicle was insured by Reliance National Insurance Company. However, on October 12, 2001 the plaintiff was notified that the Pennsylvania Department of Insurance placed Reliance Insurance Company into liquidation on October 3, 2001. On October 31, 2002 the defendant was notified by the plaintiff's attorney that the plaintiff was making a claim for uninsured motorist coverage under the policy, in addition to continuing her claim for medical payments coverage.

On December 3, 2002, Mr. George Hahn, a claims representative for the defendant, acknowledged the plaintiff's claim, but questioned the issue of causation between the plaintiff's shoulder injury and the motor vehicle accident. Mr. Hahn suggested that the plaintiff present herself for an independent medical examination (IME), which was performed in April of 2003. Also in December of 2002, the plaintiff submitted a Proof of Claim to the statutory liquidator of Reliance Insurance Company, in order to protect her rights to receive insurance proceeds from Reliance.

On June 3, 2003 counsel for the plaintiff received a letter from Mr. Hahn denying the plaintiff's claim for uninsured motorist benefits. According to the defendant, the plaintiff was denied coverage because she neglected to file a lawsuit against the tortfeasor within the applicable statute of limitations, thus prejudicing the defendant's subrogation rights. Despite the fact that the defendant denied coverage, in November of 2003, the defendant conducted a background check on Brent Tarbox.

## Discussion

The plaintiff asserts that this Court should adopt the Court's (Smith, J.) reasoning in its October 10, 2004 Order on the defendant's motion to dismiss. In addition, the plaintiff argues that the subrogation clause of the insurance policy is ambiguous, and all undefined terms and ambiguities should be construed against the defendant.

The defendant argues that the plaintiff's insurance policy's subrogation provisions required her to do whatever was necessary to preserve its right to subrogate against the responsible tortfeasor, and that a reasonable person in the plaintiff's position would read the policy as requiring them to file a lawsuit against the tortfeasor within the applicable limitations period. The defendant asserts that the plaintiff's duty to avoid prejudicing its subrogation rights arose at the time of the loss, and that actual payment of uninsured motorist benefits was not a condition precedent to her own obligation to exhaust all avenues of recovery against the negligent tortfeasor. Furthermore, the defendant alleges that an insured's failure to file a timely lawsuit against the responsible tortfeasor is analogous to an insured's failure to obtain consent to settle with the tortfeasor, because both forms of conduct deprive the insurer of the ability to pursue its right to subrogation. Finally, the defendant argues that RSA 264:15, IV does not prohibit it from exercising its right of recovery from the tortfeasor for a claim arising from personal injury to the insured.

The Court proceeds with its analysis by examining the language of the insurance and the statutory provisions of RSA 264:15. The relevant portion of the plaintiff's insurance policy pertaining to uninsured motorist benefits provide as follows:

We will pay compensatory damages which an insured is legally entitled to recover from the owner or operator of:

1. an uninsured motor vehicle . . . because of bodily injury sustained by an insured and caused by an accident; and
2. an uninsured motor vehicle because of property damage caused by an accident . . . .

If we make a payment under this policy and the person to or for whom payment was made has a right to recover damages from another we shall be subrogated to that right. That person shall do:

1. Whatever is necessary to enable us to exercise our rights; and
2. Nothing after loss to prejudice them.

If we make a payment under this policy and the person to or for whom payment is made recovers damages from another, that person shall:

1. hold in trust for us the proceeds of the recovery; and
2. reimburse us to the extent of our payment.

Although the policy does require the plaintiff to do “whatever is necessary” to enable the defendant to exercise its rights, the language of the policy does not specify that the plaintiff must file a lawsuit against the tortfeasor as a condition to receiving payment of benefits. Nor does it state that failure to do so will constitute a forfeiture of the defendant’s subrogation rights.

The interpretation of an insurance policy is a question of law for the Court to resolve. Lebroke v. U.S. Fid. & Guar. Ins. Co., 146 N.H. 249, 250 (2001). When construing the terms of a policy, the court examines “the plain and ordinary meaning of the policy’s words in context,” construing the terms of the policy “as would a reasonable person in the position of the insured based on more than a casual reading of the policy as a whole.” Id. at 250 (quoting Whitcomb v. Peerless Ins. Co., 141 N.H. 149, 150 (1996)) (quotations and brackets omitted). “[W]here, however, the language of the policy reasonably may be interpreted more than one way and one interpretation favors coverage, an ambiguity exists in the policy that will be construed in favor of the insured and against the insurer.” EnergyNorth Natural Gas v. Underwriters at Lloyd’s, 150 N.H. 829, 832 (2004).

Turning to the plain language of the policy, the Court observes that the language suggests that the defendant’s subrogation rights do not attach until *after* a payment has been made to the policyholder. In particular, the policy states: “*If we make a payment under this policy and the person to or for whom payment was made has a right to recover damages from another we shall be subrogated to that right.*” (Emphasis added.) While the defendant has made a payment to the plaintiff for medical coverage, it has not forwarded any payment of uninsured motorist benefits. A reasonable person in the position of the insured would likely conclude that a payment of benefits must occur before the defendant’s subrogation rights attach.

The policy further states that the policyholder shall do “whatever is necessary to enable [the defendant] to exercise [its] rights; and nothing after loss to prejudice them.” Although the defendant argues that this language is clear and unambiguous, the Court finds that the language is overly broad. A reasonable person in the plaintiff’s position would probably question whether she is supposed to pursue an action against the tortfeasor herself, or file a claim for benefits and then wait to see what course of action the insurance company wants her to take. Moreover, it appears that the plaintiff did everything that she was supposed to do in this case. Upon learning that Brent Tarbox’s insurance company was in the process of being liquidated, she notified the defendant that she was seeking uninsured motorist benefits, and filed a proof of claim form to the statutory liquidator of the Tarboxs’ insurance company. When the defendant suggested that the plaintiff submit to an independent medical examination, she did so. From there, it appears that the defendant sat on the plaintiff’s claim.

Furthermore, the language of RSA 264:15 supports the Court’s finding that the defendant’s right of subrogation attaches after a payment of uninsured motorist benefits is made to the insured. Specifically, section IV provides in pertinent part:

In the event of payment to any person under the coverage required by this section and subject to the terms and conditions of such coverage, the insurer making such payment shall, to the extent thereof, be entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such person against any person . . . legally responsible for the bodily injury for which such payment is made, including the proceeds recoverable from the assets of the insolvent insurer . . . .

RSA 264:15, IV (Supp. 2003).

The Court stresses the following phrases contained in this section: “in the event of payment,” and “the insurer making such payment.” The plain meaning of this language signifies that the insurer has a right to subrogation upon the *occurrence* of the event of payment of uninsured motorist benefits—not before payment. In this case, the defendant’s right of subrogation was not prejudiced, because no payment of benefits was ever made to the plaintiff.

Although the New Hampshire Supreme Court has not addressed the issue of

whether a policyholder must file a lawsuit against the uninsured tortfeasor as a precondition to recovering uninsured motorist benefits, the Court has specifically held that an insurance carrier may not assert its subrogation rights under RSA 264:15, IV until the insured has been fully compensated for his or her injury. See Bonte v. American Global Ins. Co., 136 N.H. 528, 532 (1992); RICHARD D. McNAMARA, 9 NEW HAMPSHIRE PRACTICE, PERSONAL INJURY § 594, at 215 (1988). Furthermore, other states have taken the position that filing a lawsuit is not a condition precedent to recovery. See Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d, § 124:20 (2000); see also Aetna Casualty & Sur. Co. v. Sullivan, 607 A.2d 879 (R.i. 1992) (under Rhode Island law, the insurer was not entitled to avoid paying uninsured motorist benefits on ground that the insured had failed to bring suit against the uninsured motorist, where insurer did not request that insured file such action at any time prior to expiration of statute of limitations), Everaard v. Hartford Acci. & Indem. Co., 824 F.2d 1186 (10<sup>th</sup> Cir. 1988) (pursuant to Oklahoma law, the insured is not required to adjudicate tort claims against uninsured motorist as a prerequisite to recovery).

The purpose of the uninsured motorist statute "is to ensure that those who have purchased automobile insurance whose losses would otherwise go uncompensated . . . because the tortfeasor lacked liability coverage . . . can receive compensation for their injuries." Matarese v. New Hampshire Mun. Ass'n Property-Liability Ins. Trust, Inc., 147 N.H. 396, 402 (2002). In light of this principle, the Court is unwilling to rule that a policyholder must file a lawsuit against an uninsured tortfeasor as a prerequisite to receiving payment of uninsured motorist benefits from their insurance provider.

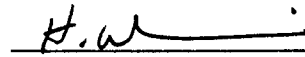
Based on the Court's careful examination of the insurance policy and the language of RSA 264:15, in addition to a consideration of the facts and circumstances of this case, the Court finds that the plaintiff was wrongfully denied uninsured motorist coverage, and is entitled to declaratory judgment.

Finally, the Court addresses the plaintiff's request for attorney's fees. RSA 491:22-b states that "[i]n any action to determine coverage of an insurance policy pursuant to RSA 491:22, if the insured prevails in such action, [s]he shall receive court costs and reasonable attorney's fees from the insurer." Because the plaintiff is entitled to declaratory

judgment, and her attorney's fees are reasonable, she is entitled to receive payment of attorney's fees from the defendant.

SO ORDERED.

Dated: November 29, 2004



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Harold W. Perkins  
Presiding Justice