UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

THOMAS J. COLLI
Plaintiff

v.

C.A. NO.: 1:07-444-ML

MOUNTAIN VALLEY
INDEMNITY COMPANY
Defendant

DEFENDANT'S OBJECTION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56 and Local R. Civ. P. 7, Defendant, Mountain Valley Indemnity Company hereby objects to Plaintiff's Motion for Summary Judgment, as there are genuine issues of material fact concerning liability for the underlying motor vehicle accident. In support hereof, Defendant submits a Statement of Disputed Facts in accordance with Local R. Civ. P. 56(a)(3) and a Memorandum in Opposition to Plaintiff's Motion for Summary Judgment.

WHEREFORE, Defendant respectfully requests that this Court deny Plaintiff's Motion for Summary Judgment as to the issue of liability.

Oral Argument Requested

DEFENDANT
MOUNTAIN VALLEY INDEMNITY
COMPANY

By its attorneys,
Morrison Mahoney, LLP

/s/ Mark T. Nugent
/s/Jeffrey G. Latham

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CERTIFICATION OF SERVICE

I hereby certify that on this 17th day of November, 2008, a copy was electronically mailed per USDC e-filing system to the following:

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/s/ Mark T. Nugent

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

THOMAS J. COLLI
Plaintiff

v. C.A. NO.: 1:07-444-ML

MOUNTAIN VALLEY
INDEMNITY COMPANY
Defendant

DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Defendant, Mountain Valley Indemnity Company {hereinafter "Mountain Valley"}, hereby submits its Memorandum of Law in opposition to Plaintiff's Motion for Summary Judgment pursuant to Local R. Civ. P. 7.

I. INTRODUCTION

Plaintiff's contract action against Mountain Valley to recover underinsured motorist ("UIM") benefits arises out of a motor vehicle accident which occurred at the intersection of Chopmist Hill Road and Central Pike in Scituate, Rhode Island on December 30, 2004. In February of 2008, plaintiff settled his bodily injury claim against the other motorist, Mildred Brown, for the liability policy limits of $250,000. Plaintiff now moves for entry of summary judgment on the issue of liability with respect to his UIM claim against Mountain Valley.

The defendant respectfully submits that plaintiff's motion for summary judgment should be denied because there are genuine issues of material fact regarding Ms. Brown's negligence and plaintiff's comparative fault which directly affect plaintiff's entitlement to UIM benefits and, therefore, necessitate a trial on the issue of liability against Mountain Valley. Moreover, this is a

UIM contract claim which requires the plaintiff to prove damages in excess of $250,000 before any coverage even applies under the Mountain Valley policy.

II. STATEMENT OF FACTS

The defendant's Statement of Disputed Facts is incorporated by reference herein. By way of summary, the defendant offers the following: the plaintiff was traveling southbound on Chopmist Hill Road near the intersection of Central Pike time of the subject motor vehicle accident. The other motorist, Mildred Brown, was traveling westbound on Central Pike toward the Chopmist Hill Road intersection. Plaintiff's lane of travel was not regulated by traffic signs or signals at the intersection. Ms. Brown's lane of travel was controlled by a stop sign at the intersection. Neither motorist recalls the moment of impact. The plaintiff does not even recall events (such as his own actions and observations) during the moments leading up to the impact. See Plaintiff's Statement of Undisputed Facts ("SUF"), para. 11.

Ms. Brown, however, does have a specific recollection of what happened immediately before the crash. She brought her vehicle to a complete stop at the stop sign posted at the intersection. She looked to the left, then to the right (in the direction of the plaintiff's vehicle) and observed no oncoming traffic. See Defendant's Statement of Disputed Facts ("SDF"), para. 1. Ms. Brown was never issued a traffic summons, ticket or citation arising out of the accident, nor was she adjudged guilty or otherwise responsible for having violated any traffic regulations or laws in connection with the accident, contrary to the plaintiff's allegations.

Plaintiff cites the report of his "accident reconstruction specialist," Stephen Benanti, in support of the following propositions: (1) Both vehicles were traveling at approximately 35 mph at the time of impact; (2) Ms. Brown's vehicle did not stop at the stop sign before entering the

intersection; and (3) Plaintiff did not have sufficient time and distance to have avoided the accident due to the estimated speed of the vehicles. See SUF, para. 16. The plaintiff characterizes this evidence as "undisputed," but it is patently obvious that such evidence flies directly in the face of Mildred Brown's sworn deposition testimony that she stopped her vehicle at the stop sign and looked both ways at the intersection. See SDF, para. 1.

If Ms. Brown's testimony is believed, then the plaintiff's evidence is either methodologically unreliable or factually erroneous, or both. If Ms. Brown did, in fact, stop at the intersection and look both ways, then she would have been traveling much slower than the plaintiff contends, which means that the plaintiff would have had more time in which to observe Ms. Brown's vehicle. The plaintiff's expert asserts that both operators had an unobstructed view of each other's vehicles for a distance of over 500 feet, and that there were no signs of evasive action at the accident scene. See SUF, para. 16. If Ms. Brown stopped at the intersection, looked in both directions, and saw nothing, then a rational jury could certainly arrive at the conclusion that the plaintiff was at least comparatively negligent in traveling at an excessive rate of speed, in failing to keep a proper lookout, in failing to react with reasonable promptness and care to avoid the accident, or all of the above.

The only thing that is undisputed is the fact that the plaintiff's expert's opinion is in direct conflict with the testimony of Mrs. Brown under oath. Therefore, since there are factual issues in dispute which directly affect the plaintiff's entitlement to UIM benefits under the Mountain Valley policy, summary judgment must be denied as a matter of law.

III. SUMMARY JUDGMENT STANDARD

On a motion for summary judgment, the moving party bears the initial burden of demonstrating that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Only then is it incumbent on the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). A factual issue is "genuine" if the evidence is sufficient to support a rational and legally sustainable resolution of the issue in favor of the nonmoving party; a fact is "material" if it has the potential to alter the outcome of the litigation. See *Anderson v. Liberty Lobby, Inc.*, *477* U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

In determining whether summary judgment is appropriate, the Court must view all of the facts in the record in a light most favorable to the nonmoving party. See *Springfield Terminal Ry. Co. v. Canadian Pac. Ltd.*, 133 F.3d 103, 106 (1st Cir. 1997). Summary judgment is "not appropriate merely because the facts offered by the moving party seem most plausible, or because the opponent is unlikely to prevail at trial." *Gannon v. Narragansett Elec. Co.*, 777 F. Supp. 167, 169 (D.R.I. 1991). Furthermore, the Supreme Court has declared that :

> "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, *477* U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

IV. ARGUMENT

Summary Judgment Relief is Inappropriate in this Intersection Automobile Accident

"The normal rule is that issues of negligence are not to be resolved by summary judgment." *Hydrogen Technology Corp. v. U.S.A.*, 831 F.2d 1155, 1164 (1st Cir. 1987). Because "negligence and reasonableness are particularly elusive concepts," litigants "should not be deprived of an opportunity to put all their evidence before a jury for factual evaluation." *Id.* The Supreme Court has observed that "[t]he jury's unique competence in applying the "reasonable man" standard is thought ordinarily to preclude summary judgment in negligence cases." *TSC Industries v. Northway, Inc.*, 426 U.S. 438, 450 n.12 (1976)(citing 10 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2729 (1973)).

This diversity action is governed by the substantive law of Rhode Island, where the accident took place, *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78, 822 L. Ed. 1188, 58 S. Ct. 817 (1938); *Marley v. United Parcel Service, Inc.*, 665 F. Supp. 119 (D.R.I. 1987), and the Rhode Island Supreme Court has echoed the federal refrain that "[b]ecause of the peculiarly elusive nature of the concept of negligence, it is the rare personal injury case which may be properly disposed of by summary judgment." *Gliottone v. Ethier*, 870 A.2d 1022, 1028 (R.I. 2005)(quoting *Bland v. Norfolk & Southern Railroad Co.*, 406 F. 2d 863, 866 (4th Cir. 1969).

The general rule in Rhode Island against summary judgment relief in negligence cases applies with even greater force to cases involving motor vehicle intersection accidents. In such cases, the Court has declared:

> "Whether a person was in the exercise of due care at the time of an accident is usually a question for the jury and not for the court. Indeed as this court has many times observed, negligence is rarely a question of law unless the standard of duty is fixed and the negligent acts or omissions are clearly defined and palpable.

> This is especially true in the case of an accident involving a collision between two motor vehicles at intersecting streets. There are so many factors that may enter into the determination of the question of due care in such cases that it is seldom the question presents itself clearly as one of law." *Hevey v. Vieira*, 121 A.2d 657, 661 (R.I. 1956).

The degree of care required of motorists "varies with the conditions reasonably to be observed at an intersection and increases in proportion to the increased danger reasonably to be apprehended." *Malinowski v. United Parcel Service, Inc.*, 727 A.2d 194, 196-197 (R.I. 1999)(quoting from *Dembicer v. Pawtucket Cabinet & Builders Finish Co., Inc.*, 58 R.I. 451, 455 (1937). When approaching an intersection, "a motorist has the duty of observing the traffic and general situation at or in the vicinity of the intersection. He or she must look in the careful and efficient manner in which a person of ordinary prudence in like circumstances would look in order to ascertain the existing conditions for his guidance." *Hefner v. Distel*, 813 A.2d 66, 70 (R.I. 2003)(quoting *Dembicer v. Pawtucket Cabinet & Builders Finish Co., Inc.*, 58 R.I. 451, 456 (1937). However, the "question of when such an observation is consistent with the exercise of reasonable care is one largely dependent upon the circumstances of the particular case." *Westfield v. Yellow Cab Co. of Providence*, 179 A.2d 501, 504 (R.I. 1962). The fact-sensitive nature of the legal duty imposed on drivers raises a jury question as to whether the applicable duty was breached in any given case. Moreover, the fact that Rhode Island is a comparative negligence jurisdiction[1] in which a plaintiff's damages are reduced by his or her degree of fault, poses yet another hurdle to summary disposition. See *Gliottone v. Ethier*, 870 A.2d 1022, 1028-29 (R.I. 2005).

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[1] Rhode Island General Laws 1956 § 9-20-4 states:

"In all actions hereafter brought for personal injuries, or where personal injuries have resulted in death, or for injury to property, the fact that the person injured, or the owner of the property or person having control over the property, may not have been in the exercise of due care shall not bar a recovery, but damages shall be diminished by the finder of fact in proportion to the amount of negligence attributable to the person injured, or the owner of the property or the person having control over the property."

It is important to note that the mere presence of traffic controls or signals facing one driver does not exclude the possibility of negligence on the part of the driver with the right-of-way. The Court has explained that a "driver on a dominant highway does not have an absolute right-of-way; he is not relieved of the duty of exercising due care because of his situation, even where his right-of-way is protected by a stop sign." *Coutanche v. Larivierre*, 264 A.2d 26, 29 (R.I. 1970); see also *Dembicer v. Pawtucket Cabinet & Builders Finish Co.*, 58 R.I. 451, 457 (1937)("The right of way rule is not absolute but relative, and subject to the qualification that a person entitled to claim that right will exercise it with proper regard for the safety of himself and others. Insistence upon the right given by this rule, when ordinary prudence in the circumstances dictates otherwise, may be entirely inconsistent with the exercise of due care"); *Calise v. Curtin*, 900 A.2d 1164, 1168 (R.I. 2006)("Our law regarding drivers at intersections clearly anticipates that a driver with a green light still has a duty to meet a certain standard of care").

There are Genuine Issues of Material Fact

A statement on Page 10 of Plaintiff's Supporting Memorandum establishes beyond any serious doubt that there are genuine issues of material fact. The plaintiff candidly acknowledges that Mildred Brown specifically testified to having stopped on Central Pike at the Chopmist Hill Road intersection. And yet, having conceded this central *factual dispute*, the plaintiff inexplicably goes on to argue that the evidence as to how the accident happened is "undisputed." Plaintiff relies exclusively on the opinions of his accident reconstruction analyst, Stephen Benanti, in support of his assertion that (1) Mildred Brown was solely at fault for the accident and (2) he was not at fault in the slightest because he could not have avoided the accident. What plaintiff fails to grasp is that Ms. Brown's testimony and Mr. Benanti's testimony are mutually exclusive. A rational fact-finder could not believe both accounts any

more than it could square a circle. And if Ms. Brown's testimony is believed (as it must be for purposes of this motion) then not only is there a material factual dispute as to liability, but Mr. Benanti's opinion must be roundly rejected.

Even assuming arguendo that Mr. Benanti is duly qualified by the Court to testify as an expert in this case,[2] his testimony inevitably conflicts with that of Ms. Brown. This is not a case in which an expert has drawn conclusions based on an uncontroverted factual predicate. Mr. Benanti's time, distance and visibility calculations (upon which he relies to exclude any comparative negligence of the plaintiff) are inextricably linked to the "fact" that Ms. Brown's vehicle did not stop and was traveling 35 mph at the time of the collision.

The thrust of Mr. Benanti's testimony is that Ms. Brown's testimony (that she stopped at the intersection) is not *credible*, and credibility is a classic jury question. For purposes of passing on plaintiff's motion, Ms. Brown's testimony must be believed. If she did stop, then even Mr. Benanti would agree that she could not have been traveling anywhere near 35 mph at the time of impact. Therefore, it is perfectly conceivable that Ms. Brown had stopped at the intersection, proceeded to enter the intersection at a much lower rate of speed, and was plainly visible for long enough to allow the plaintiff to perceive and react in order to avoid the accident. If so, the absence of any evasive action by the plaintiff would require a finding of comparative negligence, which would directly affect the outcome of this case.

Furthermore, the plaintiff's expert assumes that the plaintiff was travelling "*approximately* 35 mph" miles per hour, which was the posted speed limit. If, however, the

[2] Pursuant to Rule 702 of the Federal Rules of Evidence, the Court must ensure that an expert is sufficiently qualified to provide expert testimony that is relevant to the issues presented and rests on a reliable factual and methodological foundation. See *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 597 (1993); *Beaudette v. Louisville Ladder, Inc.*, 462 F.3d 22, 25 (1st Cir. 2006).

plaintiff was actually travelling thirty-six (36 mph) miles per hour, it would be in violation of the speed limit, and a jury could conclude that his *prima facie* negligence would reduce any recovery. In other words, the plaintiff's expert cannot be so precise as to say that the plaintiff was traveling *exactly* 35 mph, which is another question of fact.

Summary Judgment Must be Denied in this UIM Contract Claim Until Plaintiff Establishes Damages in Excess of $250,000

Rhode Island's uninsured/underinsured motorist statute provides in pertinent part:

> "No policy insuring against loss resulting from liability imposed by law for property damage caused by collision, bodily injury, or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall be delivered or issued for delivery in this state…unless coverage is provided in or supplemental to the policy…for the protection of persons insured under the policy who are *legally entitled to recover damages from owners or operators of uninsured motor vehicles* and hit-and-run motor vehicles because of property damage, bodily injury, sickness, or disease, including death, resulting from that injury, sickness or disease." R.I.G.L. §27-7-2.1(a)(emphasis added).

In addition, the statute defines an "underinsured motorist" as:

> "[T]he owner or operator of a motor vehicle who carries automobile liability insurance with coverage in an amount *less than the limits or damages that persons insured pursuant to this section are legally entitled to recover because of bodily injury, sickness, or disease,* including death, resulting from that injury, sickness or disease." R.I.G.L. § 27-7-2.1(g)(emphasis added).

Consistent with the language of §27-7-2.1, the relevant portion of the Mountain Valley policy provides:

> "We [Mountain Valley] will pay all sums the 'insured' is *legally entitled to recover as compensatory damages* from the owner or driver of an 'uninsured motor vehicle' because of:
>
> a. "Bodily injury" sustained by an "insured" and caused by an "accident," and
>
> b. "Property damage" caused by an 'accident.'" (emphasis added).

Thus, both the statute and insurance policy require the claimant to affirmatively prove that (1) the underinsured tortfeasor was negligent, and (2) the actual damages he or she is legally entitled to recover from the tortfeasor exceed the limits of the tortfeasor's liability insurance policy. Absent such proof, there is no obligation on the claimant's insurer to pay underinsured motorist benefits. See *Ladouceur v. Hanover Ins. Co.*, 682 A.2d 467, 470 (R.I. 1996).

In order to recover UIM benefits from Mountain Valley under both the statute and the policy, the plaintiff must prove that he is legally entitled to recover damages in an amount which exceeds the limits of Ms. Brown's liability policy ($250,000). See *Liberty Mutual Insurance Co. v. Kaya*, 947 A.2d 869, 873 (R.I. 2008); *General Accident Insurance Co. v. Cuddy*, 658 A.2d 13, 16-17 (R.I. 1995)("In order to invoke uninsured/underinsured coverage, it is necessary to determine whether the tortfeasor's liability policy limit is less than the actual amount of damages sustained by the claimant, damages that the claimant is legally entitled to recover from the tortfeasor"); *Ladouceur v. Hanover Ins. Co.*, 682 A.2d 467, 470 (R.I. 1996)("An insured claimant can recover uninsured/underinsured-motorist benefits from his or her own insurance carrier only if there is evidence that his or her damages exceed the limits of the tortfeasor's liability coverage"); *Thibodeau v. Metropolitan Property & Liability Ins. Co.*, 682 A.2d 474, 475 (R.I. 1996)(reaffirming that the claimant "had to establish the amount that she was 'legally entitled to recover'").

In order to successfully demonstrate such a legal entitlement to UIM benefits from Mountain Valley, the plaintiff must show that his own negligence was not a factor in causing the accident. For the reasoned discussed above, Mildred Brown's testimony raises a material factual dispute which affects the plaintiff's entitlement to UIM benefits pursuant to both the statute and the insurance policy. The issue of the plaintiff's comparative negligence, as well as the

plaintiff's damages, are questions of disputed fact which preclude entry of summary judgment on the claim for UIM benefits.

Judicial Estoppel Does Not Apply to Mountain Valley's Intercompany Arbitration

The doctrine of judicial estoppel does not apply to the inter-company arbitration involving the property damage subrogation claim in this case. Section One, Paragraph 1-3 of the *Inter-Company Arbitration Agreement* expressly provides:

> "A panel's decision on a claim submitted under the Agreement is neither res judicata nor collateral estoppel in any judicial proceeding thereafter. The decision is conclusive only of the issues in the claim submitted to the panel. It lacks legal or moral effect on any other claim or suit arising out of the same accident or occurrence."

Mountain Valley was, therefore, more than justified in the reasonable belief that it could legitimately pursue its subrogation interests through inter-company arbitration without having to waive valid defenses with respect to the plaintiff's UIM bodily injury claim. Application of judicial estoppel to the inter-company arbitration agreement in this case would effectively invalidate all such agreements. The doctrine was not intended to have such application to an insurer who reasonably relies in good faith on a binding contract which secures its right to litigate all aspects of a claim arising out of a single occurrence. See *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1428 (7th Cir. 1993)(holding that court may reject estoppel when prior position was advanced in good faith).

Finally, it is noteworthy that Mildred Brown's sworn deposition testimony was not available to Mountain Valley until several months after the inter-company arbitration was conducted. This crucial information was more than sufficient justification for Mountain Valley

to have adopted a revised liability position even in the absence of the arbitration agreement. See *Alternative System Concepts, Inc. v. Synopsys, Inc.*, 374 F.3d 23, 32 (1st Cir. 2004)(recognizing "good faith" exception to judicial estoppel doctrine where "the new, inconsistent position is the product of information neither known nor readily available to it at the time the initial position was taken"); *Admiral Ins. Co. v. Rushmore*, 70 F.3d 1277 (9th Cir. 1995)("Judicial estoppel should not act as a bar when one party's positions change because [it] subsequently discovered another's fraud or negligence"). Accordingly, plaintiff's judicial estoppel argument is barred by the terms of the Inter-Company Arbitration Agreement, and there is no unfair detriment to the plaintiff in simply requiring him to prove his claim for UIM benefits at trial.

Mountain Valley Need Not Plead Contributory Negligence as an Affirmative Defense Because Plaintiff's Claim for UIM Benefits is Rooted in Contract Law

Plaintiff's final argument is that Mountain Valley should be barred from litigating the issue of his comparative fault because it failed to plead "contributory negligence"[3] as an affirmative defense in accordance with Fed. R. Civ. P. 8(c)(1) which requires a party to "affirmatively state any avoidance or affirmative defense, including...contributory negligence." In making this assertion, the plaintiff misunderstands the nature of his complaint against Mountain Valley. Although his complaint against the tortfeasor (Ms. Brown) sounds in negligence, his claim against Mountain Valley is purely *contractual* in nature. Mountain Valley is not the tortfeasor accused of negligence; it is a party to the insurance contract under which the plaintiff seeks benefits as an insured. The only affirmative defenses Mountain Valley was obligated to raise in response to the plaintiff's complaint were coverage defenses and contract

[3] In 1971, the affirmative defense of contributory negligence was abolished in Rhode Island and replaced with the doctrine of comparative negligence which is not an avoidance or bar to recovery. See *Kay v. Menard*, 754 A.2d 760, 768 (R.I. 2000).

avoidance (such as fraud, mistake, failure of consideration, accord and satisfaction, and illegality).

Here, under both the underinsured motorist statute and the terms of the policy at issue, Mountain Valley has no evidentiary burden to prove comparative negligence. Rather, the plaintiff must demonstrate by competent evidence the amount he is legally entitled to recover from the tortfeasor, which necessarily entails proof that he is not at fault for the damages he is claiming. The plaintiff cites *Marino v. Otis Engineering Corp.*, 839 F.2d 1404 (10th Cir. 1988) in support of its position that comparative negligence should have been plead as an affirmative defense in this action. However, *Marino* did not involve a claim for UIM benefits but rather a product liability claim governed by the substantive law of Oklahoma. It is also noteworthy that the lower court, in excluding evidence of contributory negligence due to the defendant's failure to plead same as an affirmative defense, nevertheless stated that "[t]he burden is still on the plaintiff to prove his case." *Marino*, 839 F.2d at 1407. Here, comparative negligence is a central component of the plaintiff's burden to prove the amount he is entitled to recover under the UIM policy, and the defendant is under no obligation to plead the matter as an affirmative defense.

V. CONCLUSION

For the foregoing reasons, defendant, Mountain Valley, respectfully requests that the plaintiff's Motion for Summary Judgment on the issue of liability be denied.

DEFENDANT
MOUNTAIN VALLEY INDEMNITY
COMPANY

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CERTIFICATION OF SERVICE

I hereby certify that on this 17th day of November, 2008, a copy was electronically mailed per USDC e-filing system to the following:

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UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

THOMAS J. COLLI
Plaintiff

v. C.A. NO.: 1:07-444-ML

MOUNTAIN VALLEY
INDEMNITY COMPANY
Defendant

DEFENDANT'S STATEMENT OF DISPUTED FACTS

In support of its objection to Plaintiff's Motion for Summary Judgment as to the issue of liability in this action, Defendant, Mountain Valley Indemnity Company {hereinafter "Mountain Valley"}, hereby submits its Statement of Disputed Facts in accordance with Local R. Civ. P. 56(a)(3).

7. Contrary to the findings of plaintiff's "accident reconstruction specialist," the sworn deposition testimony of the underinsured motorist, Mildred Brown, establishes that she did in fact bring her vehicle to a complete stop at the intersection of Central Pike and Chopmist Hill Road and looked in both directions on Chopmist Hill Road moments before the collision. See Transcript of Deposition of Mildred H. Brown, **Exhibit A**, at 18:5-12; 20:11-13; 25:7-22.

8. Plaintiff *alleges* that Mildred Brown violated Rhode Island General Law Sections 31-20-9 and 31-17-4, by failing to obey a stop sign, but Ms. Brown was not cited or adjudged guilty or otherwise responsible for either offense as a result of the subject accident. Moreover,

her deposition testimony establishes that she complied with Section 31-20-9 by coming to a complete stop at the intersection. See **Exhibit A**, at 20:11-13.

9. Plaintiff *alleges* that Ms. Brown violated Rhode Island General Law Section 31-17-4 by failing to yield the right of way, but she did not receive a traffic citation, ticket or summons, and was never adjudged guilty or otherwise responsible for said violation arising out of the subject accident.

10. The severity of plaintiff's injuries and substantiality of his damages attributable to the subject accident is not an issue on which plaintiff has requested summary judgment relief, and therefore remains a contested issue of fact to be decided at trial.

12. Although Mildred Brown does not have a recollection of the collision itself, she does have a specific recollection of events which bear directly on the issue of liability and the plaintiff's comparative negligence. See **Exhibit A**.

16. According to Stephen R. Benanti, plaintiff's "accident reconstruction specialist," Ms. Brown's vehicle did *not* stop at the intersection. See **Plaintiff's Exhibit 3**, Collision Reconstruction Analysis, p.19. Ms. Brown's deposition testimony that she brought her vehicle to a complete stop at the intersection directly controverts Mr. Benanti's findings.

17. Mr. Benanti has not been qualified as an expert and the "facts" recited in his report conflict irreconcilably with Ms. Brown's deposition testimony.

19. Ms. Brown's deposition testimony directly contradicts the factual opinions and conclusions offered by Mr. Benanti.

22. Plaintiff's own expert concludes that the plaintiff was traveling "approximately" the posted speed limit of 35 mph on impact. This finding does not exclude plaintiff's speed as a contributing factor in causing the accident. If plaintiff was traveling 36 mph at the time, his speed would constitute *prima facie* evidence of comparative negligence.

23. Defendant does not have the burden of proving comparative negligence. Under the terms of the insurance policy, the plaintiff has the burden of proving that he is legally entitled to recover damages from the underinsured motorist as a result of the accident. See Rhode Island Uninsured Motorist Coverage Form, **Exhibit B**, p. 1, Section A(1).

25. Mountain Valley pursued inter-company arbitration solely with respect to its property damage subrogation claim against Mildred Brown's liability insurer, American Commerce Insurance Company. Mountain Valley was awarded $8,806.00 by the arbitration panel. Those proceedings were governed by an Automobile Subrogation Arbitration Agreement, as well as the Automobile Subrogation Arbitration Rules and Regulations. Section One, Paragraph 1-3 of the Rules and Regulations provides:

> "A panel's decision on a claim submitted under the Agreement is neither res judicata nor collateral estoppel in any judicial proceeding thereafter. The decision is conclusive only of the issues in the claim submitted to the panel. It lacks legal or moral effect on any claim or suit arising out of the same accident or occurrence." See Automobile Subrogation Arbitration Agreement/Rules and Regulations, **Exhibit C**, Section One, Paragraph 1-3, p.5-6.

DEFENDANT
MOUNTAIN VALLEY INDEMNITY COMPANY

By its attorneys,
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/s/ Mark T. Nugent

EXHIBIT A

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

THOMAS J. COLLI
Plaintiff,

VS. CA. NO. 1:07-444-ML

MILDRED H. BROWN and MOUNTAIN VALLEY INDEMNITY COMPANY,
Defendants.

CONDENSED COPY
"MINI"

DEPOSITION OF MILDRED H. BROWN,

taken on behalf of the Plaintiff, pursuant to the Federal Rules of Civil Procedure, on April 10, 2008, at the offices of Higgins & Slattery, Turks Head Building, 76 Westminster Street, Suite 1150, Providence, Rhode Island, before Frances D. Young, Notary Public, convening at 2:15 p.m.

FRANCES D. YOUNG
COURT REPORTER
(401) 831-8033

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A. No, that isn't correct.
Q. Okay. I'm sorry.
A. I'm not familiar with it.
Q. So you're not familiar?
A. No.
Q. So once you made that right-hand turn, you were in unfamiliar territory to yourself?
A. Well, I guess you'd say that it's not a road that I would take to go to my home.
Q. And I take it there's nowhere else you go with any regularity that would have taken you on that road?
A. No.
Q. Talking about the day of the accident, as you were driving down that road -- and just so the record can be clear, at least per the police report, that road you made the right-hand turn on was Central Pike.
A. Okay.
Q. So if it's okay with you, I'm going to refer to it as Central Pike. Okay?
A. Yes.
Q. Prior -- withdrawn.
At the time of the accident as you were driving down Central Pike, were you aware that you

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were going to reach a stop sign?
A. I could see it. I wouldn't be aware of it like a mile down the road, but I could see that I was coming to a stop sign.
Q. Can you describe for me what you recall -- at the point that you recall that you saw that there was a stop sign in front of you on Central Pike, can you take me from there as to what your recollections are?
A. I stopped. I looked to the left and to the right. There was nothing around, and that's it. That's all I remember.
Q. When you made that stop on Central Pike -- and just for the record, the road that it intersects with, per the police report, is Chopmist Hill Road, also known as Route 102. Does that make sense to you? Were you aware of either of those roads?
A. No, not really.
Q. Okay. So I'm just going to, again, ask you to assume based upon the police report that you were driving on Central Pike and the intersecting street is Chopmist. Okay?
A. Okay.
Q. As you stopped at the stop sign of Central Pike,

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were you aware whether or not Chopmist
governed by any type of stop sign or signal?
A. I -- I -- I can't remember anything else. I know I came to the stop sign. I looked in both directions. There was nothing. I can't -- that was it.
Q. As you were stopped at that stop sign, were you under the belief that you had to yield to traffic on the intersecting street?
A. No, I was -- there was just the stop sign and that was it. And I really -- it wasn't anything else. That's all I remember.
Q. What was your intent from the stop sign? Where were you going to go next?
A. I believe we would have gone straight, but as to actually saying yes, for sure, we were, I can't say that.
Q. So when you pulled to the stop sign, you said you looked to the left and to the right, and I take it then you started to move forward?
A. Probably.
Q. So you don't remember moving forward?
A. I don't remember that. I really don't.
Q. Do you remember Miss Fiore telling you that you

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were to go straight, left, or right?
A. No, I don't remember that.
Q. But Miss Fiore was aware that you did not know how to get to her home from that path of travel, is that correct?
A. I would say so.
Q. Do you remember, did Miss Fiore tell you -- did she let you know that there was a stop sign as you approached it?
A. No. No. I could see it.
Q. Is it your recollection that you made a complete stop at that stop sign on Central Pike?
A. Yes, I did.
Q. Before you started to decelerate to make that stop, do you recall what speed you were traveling on Central Pike?
A. I don't recall, but I wouldn't say it was excessive because it was just a country road, two lanes, and we were enjoying the view.
Q. And you said two lanes. So one in each direction?
A. Yes.
Q. Do you remember anything about your conversation with Miss Fiore while you were driving on that particular road?

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other words, something that you can say to me, you know -- take a different situation -- I remember seeing that the light was yellow. I'm trying to see what you actually remember as opposed to things that you think must have happened, but yet you can't visualize them in your memory anymore.

A. Stopping at the stop sign is what I remember. Checking to see if it was clear, and it was, is all I can remember. I don't -- I can't remember the truck, I can't remember the impact, I can't remember flying through the air. I can't remember any of that. Only what people have told me.

Q. So you are telling me, though, as you sit here today, you can remember looking to the left?

A. I looked both ways, yes.

Q. And can you tell me when you looked to your left, did you see any traffic coming from your left?

A. Nothing.

Q. And you have a memory of looking to your right?

A. I do.

Q. And do you remember seeing any traffic?

A. That was it. I really don't.

Q. So you don't remember seeing any other cars on the road?

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A. I don't remember -- that was it. I just can't.

Q. Do you have any memory that when you were stopped at that stop sign that you had to wait for cars to go by you?

A. It was clear.

Q. When you were stopped at the stop sign, do you remember if anything was obstructing or hindering your vision either to your left or to your right?

A. Not that I can recall.

Q. So to your recollection, did you have a clear view to your left down the road that we've identified as Chopmist Road?

MR. BAGLINI: Chopmist Hill.

MS. GRAVES: Sorry. Chopmist Hill.

A. When you say "clear view," to proceed? If I were to proceed? Yes.

Q. Well, what I'm making sure of is that when you looked to your left, you could see for what you believe to be a safe distance down Chopmist Hill Road. In other words, to determine whether or not there was any traffic coming.

A. If I were to move forward, it was safe.

Q. What I'm asking you is as you sit here, though, do you remember -- can you remember what you saw when you looked to your left?

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A. No, I can't remember.

Q. And when you -- do you know in which direction the truck that collided with your car, do you remember what direction he was coming from?

A. I didn't see it. I don't know where he came from.

Q. All right. When you were at the stop sign and you were looking to your right, do you remember having any problems with anything obstructing your vision?

A. No.

Q. Do you recall anything as you sit here today about what types of structures were to your right as you were at that stop sign?

A. No, I don't.

Q. As you looked to your right, do you recall how far down Chopmist Hill Road you could see?

A. No, I don't recall that.

Q. Do you remember thinking at any point while you were at that stop that you couldn't see well in one direction or the other?

A. No.

Q. Do you have a memory that you thought -- that you specifically thought it was safe to proceed?

A. Well, at the time, at the time I stopped and checked both ways, yes, I thought it was safe.

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Q. I take it from your answer, you don't have any sense of how fast your vehicle was moving at the time it was struck?

A. I cannot say whether it was moving. I cannot say what happened. I just don't know.

Q. And you've already told me that you have no memory of seeing the truck. Do you have any memories of hearing anything?

A. No.

Q. So you don't have any recollections of hearing a horn?

A. Nothing.

Q. Any recollections of hearing screeching tires?

A. No, nothing.

Q. Did you ever have any occasion to see your van after the accident? And by that I mean any chance to assess the damage to your vehicle.

A. My brother-in-law took me to see it. We were able to get some things out of the compartment, luckily.

Q. Do you know how long that was after the accident that you did that?

A. I can't say specifically how many days. I don't know how long they keep the vans at -- what do I

EXHIBIT B

POLICY NUMBER:

COMMERCIAL AUTO
CA 21 43 01 03

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

RHODE ISLAND UNINSURED MOTORISTS COVERAGE

For a covered "auto" licensed or principally garaged in or "garage operations" conducted in Rhode Island, this endorsement modifies insurance provided under the following:

BUSINESS AUTO COVERAGE FORM
GARAGE COVERAGE FORM
MOTOR CARRIER COVERAGE FORM
TRUCKERS COVERAGE FORM

With respect to coverage provided by this endorsement, the provisions of the Coverage Form apply unless modified by the endorsement.

This endorsement changes the policy effective on the inception date of the policy unless another date is indicated below:

Endorsement Effective:	Countersigned By:
Named Insured:	(Authorized Representative)

SCHEDULE

"Bodily Injury" and "Property Damage"	$	Each "Accident"
	or	
"Bodily Injury"	$	Each "Accident"
This endorsement provides "bodily injury" and "property damage" uninsured motorists coverage unless an "X" is entered below.		
☐ If an "X" is entered in this box, this endorsement provides "bodily injury" uninsured motorists coverage only.		

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

A. Coverage

1. We will pay all sums the "insured" is legally entitled to recover as compensatory damages from the owner or driver of an "uninsured motor vehicle" because of:
   a. "Bodily injury" sustained by an "insured" and caused by an "accident", and
   b. "Property damage" caused by an "accident".

   The owner's or driver's liability for these damages must result from the ownership, maintenance or use of an "uninsured motor vehicle".
2. Any judgment for damages arising out of a "suit" brought without our written consent is not binding on us.

B. Who Is An Insured

If the Named Insured is designated in the Declarations as:

1. An individual, then the following are "insureds":
   a. The Named Insured and any "family members".
   b. Anyone else "occupying" a covered "auto" or a temporary substitute for a covered "auto". Any "auto" that is owned by the Named Insured or any "family member" is not a temporary substitute for a covered "auto". The covered "auto" must be out of service because of its breakdown, repair, servicing, "loss" or destruction.

c. Anyone for damages he or she is entitled to recover because of "bodily injury" sustained by another "insured".

2. A partnership, limited liability company, corporation or any other form of organization, then the following are "insureds":

a. Anyone "occupying" a covered "auto" or a temporary substitute for a covered "auto". Any "auto" that is owned by the Named Insured is not a temporary substitute for a covered "auto". The covered "auto" must be out of service because of its breakdown, repair, servicing, "loss" or destruction.

b. Anyone for damages he or she is entitled to recover because of "bodily injury" sustained by another "insured".

c. The Named Insured for "property damage" only.

C. Exclusions

This insurance does not apply to any of the following:

1. Any claim settled without our consent.

2. The direct or indirect benefit of:

a. Any insurer or self-insurer under any workers' compensation, disability benefits or similar law, or

b. Any insurer of property.

3. The first $200 of the total amount of "property damage" as a result of any one "accident". This exclusion does not apply if the covered "auto" is:

a. Parked and unattended at the time of the "accident";

b. Struck by an "uninsured motor vehicle" being driven the wrong way on a one way street;

c. Struck in the rear by an "uninsured motor vehicle"; or

d. Struck by a stolen vehicle.

4. "Bodily injury" sustained by an individual Named Insured or any "family member" while "occupying" or struck by any vehicle owned by such Named Insured or any "family member" that is not a covered "auto".

5. Anyone using a vehicle without a reasonable belief that the person is entitled to do so.

6. Punitive or exemplary damages.

D. Limit Of Insurance

1. Regardless of the number of covered "autos", "insureds", premiums paid, claims made or vehicles involved in the "accident", the most we will pay for all damages resulting from any one "accident" is the Limit Of Uninsured Motorists Insurance shown in the Schedule or Declarations. If there is more than one covered "auto", our limit of insurance for any one "accident", if "bodily injury" is sustained by an individual Named Insured or any "family member", is the sum of the limits applicable to each covered "auto". Subject to the maximum limit of liability for all damages:

a. The most we will pay for all damages sustained in such "accident" by an "insured", other than an individual Named Insured or any "family member", is that "insured's" pro rata share of the limit shown in the Schedule or Declarations applicable to the vehicle an "insured" was "occupying" at the time of the "accident".

b. The individual Named Insured or any "family member" who sustains "bodily injury" in such "accident" will also be entitled to a pro rata share of the limit described in Paragraph **a.** above.

A person's pro rata share is the proportion that that person's damages bear to the total damages sustained by all "insureds".

2. However, any amount we pay for a damaged "auto" will be limited to the lesser of the following amounts:

a. The actual value of the damaged "auto" as of the time of the "accident"; or

b. The cost of repairing the damaged "auto" or replacing it with other of like kind and quality.

3. No one will be entitled to recover duplicate payment for the same elements of "loss" under this Coverage and any Liability Coverage Form, other property or physical damage insurance or Medical Payments Endorsement attached to this Coverage Part.

We will not make duplicate payment under this Coverage for any element of "loss" for which payment has been made by or for anyone who is legally responsible.

We will not pay for any element of "loss" if a person is entitled to receive payments for the same element of "loss" under any workers' compensation, disability benefits or similar law.

E. Changes In Conditions

The Conditions are changed for Rhode Island Uninsured Motorists Coverage as follows:

1. **Other Insurance** applies except as follows:
   a. For "property damage", this insurance is excess over all collectible insurance of any kind.
   b. For "bodily injury", the reference in **Other Insurance** to "other collectible insurance" applies only to other collectible uninsured motorists insurance.
2. **Duties In The Event Of Accident, Claim, Suit Or Loss** is changed by adding the following:

   The Named Insured and any involved "insured" must:
   a. Promptly notify the police if "bodily injury" results from an "accident" involving a hit-and-run driver;
   b. Promptly send us copies of the legal papers if a "suit" is brought; and
   c. If "property damage" is involved, provide us with the name and address of the owner or driver of the "uninsured motor vehicle".
3. The **Legal Action Against Us** provision is replaced by the following:
   a. No one may bring a legal action against us under this Coverage Form until there has been full compliance with all the terms of this Coverage Form; and
   b. Any legal action against us under this Coverage Form must be brought within three years after the date of the "accident". However, this Paragraph **3.b.** does not apply to an "insured" if, within three years after the date of the "accident", we or the "insured" have made a written demand for arbitration in accordance with the provisions of this Coverage Form.
4. **Transfer Of Rights Of Recovery Against Others To Us** is changed by adding the following:

   We shall be entitled to recover payment on a loss only after the insured has been paid the deductible portion of the loss less the prorated share of the subrogation expense.
5. **Two Or More Coverage Forms Or Policies Issued By Us** does not apply.
6. The **Arbitration** Condition is replaced by the following for uninsured motorists coverage:

   ARBITRATION
   a. If we and an "insured" disagree whether the "insured" is legally entitled to recover damages from the owner or driver of an "uninsured motor vehicle" or do not agree as to the amount of damages, either party may make a written demand for arbitration. In this event, each party will select an arbitrator. The two arbitrators will select a third. If they cannot agree within 30 days, either may request that selection be made by a judge of a court having jurisdiction. Each party will pay the expenses it incurs and bear the expenses of the third arbitrator equally.
   b. Unless both parties agree otherwise, arbitration will take place in the county in which the "insured" lives. Local rules of law as to arbitration procedure and evidence will apply. A decision agreed to by two of the arbitrators will be binding.

F. Additional Definitions

As used in this endorsement:

1. "Family member" means a person related to an individual Named Insured by blood, marriage or adoption who is a resident of such Named Insured's household, including a ward or foster child.
2. "Occupying" means in, upon, getting in, on, out or off.
3. "Property damage" means injury to or destruction of the covered "auto", including its loss of use, and any property, excluding business property, owned by the "insured" while contained in the covered "auto".
4. "Uninsured motor vehicle" means a land motor vehicle or "trailer":
   a. For which no liability bond or policy at the time of an "accident" provides at least the amounts required by the applicable law where a covered "auto" is principally garaged;
   b. Which is an underinsured motor vehicle. An underinsured motor vehicle is a land motor vehicle or "trailer" for which the sum of all liability bonds or policies at the time of an "accident" does not provide at least the amount an "insured" is legally entitled to recover as damages;

c. For which an insuring or bonding company denies coverage or is or becomes insolvent;

d. That is a hit-and-run vehicle and neither the driver nor owner can be identified; or

e. That causes "bodily injury" or "property damage" to an "insured" without physical contact with the "insured", a covered "auto" or a vehicle the "insured" is "occupying". However, in such cases, the "insured" must prove by a fair preponderance of evidence that the "bodily injury" or "property damage" resulted from the negligence of an unidentified motorist.

However, "uninsured motor vehicle" does not include any vehicle owned or operated by a self-insurer under any applicable motor vehicle law, except a self-insurer who is or who becomes insolvent and cannot provide the amounts required by that motor vehicle law.

EXHIBIT C

AUTOMOBILE SUBROGATION ARBITRATION AGREEMENT

Whereas, it is the object of companies which are now or may hereafter be signatories to arbitrate disputes among themselves, the undersigned hereby accepts and binds itself to the following Articles of Agreement for inter-company arbitration:

ARTICLE FIRST

Signatory companies are bound to forego litigation and in place thereof submit to arbitration any questions or disputes which may arise from any automobile physical damage subrogation or property damage claim not in excess of $100,000.

This Article shall not apply to:

(a) any claim for the enforcement of which a lawsuit was instituted prior to, and is pending, at the time this Agreement is signed;

(b) any claim as to which a company asserts a defense of lack of coverage on grounds other than

(1) delayed notice

(2) no notice

(3) noncooperation;

(c) claims involving policies written under Retrospective Rating Plans unless prior written consent is obtained from the companies in interest;

(d) any claim not involving a signatory as a party.

ARTICLE SECOND

Any controversy, including policy coverage and interpretations, between or among signatory companies involving any claim or other matter relating thereto and not included in Article First hereof or which involves amounts in excess of those stated therein may also be submitted to arbitration under this Agreement with the prior consent of the parties.

For matters within Article First, if the law on the issue is in doubt and has not been interpreted by the courts of the jurisdiction, a party

to the controversy may petition AF's Board of Directors to authorize the disputing party to proceed through litigation rather than arbitration. The Board's validation will be influenced by the effect on the industry through litigation to clarify the law. The decision to waive the mandatory provisions of the Agreement and proceed through litigation will be at the sole discretion of the Board.

ARTICLE THIRD

Arbitration Forums, Inc., representing the signatory companies, is authorized:

(a) to make appropriate rules and regulations for the presentation and determination of controversies under this Agreement;

(b) to select the places where arbitration facilities are to be available, and adopt a policy for the selection and appointment of arbitration panels;

(c) to prescribe the territorial jurisdiction of arbitration panels;

(d) to make appropriate rules and regulations to apportion equitably among arbitrating companies the operating expenses of the arbitration program;

(e) to authorize and approve as signatories to the Agreement such insurance carriers, self-insurers and commercial insureds with large retentions as may be invited to participate in the arbitration program and also to compel the withdrawal of any signatory from the program for failure to conform with the Agreement or the rules and regulations issued thereunder.

ARTICLE FOURTH

Arbitration panels, appointed by AF from among full-time salaried representatives of signatory companies, shall function in the following manner:

(a) Arbitration panel members shall be selected annually on the basis of their experience and qualifications. They shall serve without compensation.

(b) Each arbitration roster shall have at least three members, at least one-third of whom shall be retired annually.

(c) Any one member of an arbitration roster shall constitute an arbitration panel, except when controverting parties agree to three arbitrators in a specific case, if the damages exceed $2,500.

(d) No panel member shall serve on a panel hearing a case in which his/her company is directly or indirectly interested, or in which he/she has an interest.

(e) The decision of the majority of an arbitration panel shall be final and binding upon the parties to the controversy without the right of rehearing or appeal.

ARTICLE FIFTH

Any signatory company may withdraw from this Agreement by notice in writing to Arbitration Forums, Inc. Such withdrawal will become effective sixty (60) days after receipt of such notice except as to cases then pending before arbitration panels. The effective date of withdrawal as to such pending cases shall be upon final settlement.

AUTOMOBILE SUBROGATION ARBITRATION RULES AND REGULATIONS

PREAMBLE

The following rules and regulations were created under the authority of Article Third of the Automobile Subrogation Arbitration Agreement (referred to as the "Agreement" in the rules). The insurance company, self-insurer, or commercial insured with a large retention (known as a "member" in the rules) signs the Agreement with Arbitration Forums, Incorporated (referred to as "AF" in the rules). As a condition precedent to using these rules and regulations, local representatives of the controverting parties must make contact and exchange information.

SECTION ONE
GENERAL

1-1 The Automobile Subrogation Arbitration Agreement (Agreement) with Arbitration Forums, Incorporated (AF) does not create any cause of action or liabilities that do not currently exist in law or equity.

1-2 Any member filing a claim or any member with a claim which has been made against it shall identify itself and inform all interested parties of the pending claim.

Members shall always determine if the controverting party is also a member before entering into litigation on claims. If a member discovers that it has inadvertently entered litigation with another member, it must withdraw from that litigation within 30 days of notice. Failure to dismiss an action improperly placed in litigation shall subject the responsible member to payment of the other party's reasonable court costs and the attorney's fees expended to cause removal from litigation.

1-3 A panel's decision on a claim submitted under the Agreement is neither res judicata nor collateral estoppel in any judicial proceeding thereafter. The decision is conclusive only of the issues in the claim submitted to the

panel. It lacks legal or moral effect on any other claim or suit arising out of the same accident or occurrence.

1-4 If a matter is placed in litigation before the Statute of Limitations expires which should have been referred to arbitration under the Agreement, AF will apply the date of filing in litigation to arbitration.

1-5 The members, directors, officers, staff, agents, and employees of Arbitration Forums, Incorporated, and the arbitrators under the Agreement may not be held liable to any party for any negligence, act or omission concerning the processing, administration or hearing of any arbitration conducted under these rules.

SECTION TWO
JURISDICTION

2-1 The Agreement between member companies and AF limits jurisdiction to accidents, insured events or losses occurring within the territorial limits of the United States, Puerto Rico, and the United States Virgin Islands.

2-2 Qualified panelists for the state or territory where the accident or other occurrence arose will hear the case. Parties may unanimously transfer jurisdiction to any other AF field office.

2-3 The Agreement, Article Third, subsection (e), between the members and AF limits this forum to controversies involving insurance companies, self-insurers, and commercial insureds with large retentions. Under the Agreement, AF may not arbitrate the interests of other parties.

2-4 Member and nonmember companies may arbitrate controversies provided one or more of the following conditions exist:

(a) The nonmember agrees in writing to binding arbitration. If the nonmember answers an application filed by a member, all parties are bound by the panel's

decision, unless the answer is an objection to jurisdiction;

(b) The nonmember files against a member if the member agrees to allow the nonmember to file. The nonmember must agree to accept the panel's decision as binding; or

(c) The nonmember files against a member and the member files a counterclaim. The nonmember, filing by permission, now becomes the Respondent to the counterclaim and will be bound by any decision based upon the counterclaim.

2-5 Compulsory arbitration pursuant to the Agreement's Article First does not apply to a situation in which a claim causes any one member's exposure to exceed $100,000. AF considers:

(a) a claim and counterclaim as two separate claims within the meaning of this rule, and

(b) a claim and companion claim for different lines of coverage as separate claims within the meaning of this rule.

2-6 The Agreement between the member companies and AF does not apply to cases in which there are two or more tortfeasors (wrongdoers), one or more of which are not subject to the provisions of the Agreement. The existence of a tortfeasor is a question of fact and as such must be determined by the panel.

As with all affirmative defenses, the Respondent must raise the issue on the Contentions Sheet. The arbitration can continue if the unnamed party was not a tortfeasor. The panel must withdraw the matter from arbitration if the unnamed party was a tortfeasor, unless such tortfeasor cannot be brought into litigation.

A matter involving a "phantom vehicle" will not be removed from arbitration if removal results in litigation between

members. The same applies to a known party that cannot be brought into litigation.

SECTION THREE
PROCEDURE

3-1 The company initiating the proceeding by filing an application ("A" Form) is the "Applicant." The "Respondent(s)" is the company or companies against whom the "Applicant" initiates arbitration.

Upon filing, the Applicant incurs a filing fee payable to Arbitration Forums, Incorporated. A Respondent who files a counterclaim shall also pay the prescribed fee.

3-2 The Applicant commences an arbitration proceeding by filing an original and one (1) copy of the application ("A" Form) and Contentions Sheet with the proper AF field office. The "A" Form must list all Respondents in a case, and the Applicant must send three (3) copies to each Respondent company.

3-3 Applications and Counterclaims shall include the following information where applicable:

(a) Applicant's company code, complete names of Applicant and Respondent(s), including the exact names of subsidiary companies, with the names and addresses of local representatives having supervision over the case in controversy;

(b) Names of Applicant's and Respondent's insured;

(c) Claim file numbers of Applicant and Respondent;

(d) Date and place of alleged accident, loss or other insured event;

(e) Amount of company's claim payment, e.g., collision payment, towing, storage, rental reimbursement, etc. (excluding normal operating expenses) as allowed by its policy and amount of any applicable insured's deductible interest;

(f) An arbitration Contentions Sheet outlining a brief statement of all matters at issue and listing all evidentiary material; and

(g) Signature and telephone number of Applicant's representative and date signed, attesting to the fact that the Applicant's representative has sent the required copies to AF and all other interested parties.

3-4 The Respondent(s) may file an answer within thirty (30) days by completing its portion of the application. The proper field office must receive all documents by the close of business prior to three (3) full business days before the hearing date. The Respondent(s) shall directly transmit a copy of the application ("A" Form) and its Contentions Sheet to the Applicant's local representative and any other Respondent(s).

Personal representation will not be allowed on those cases when an answer has not been filed as outlined above.

3-5 The answer filed by the Respondent shall include the following where applicable:

(a) Supplementary information, as necessary, such as the Respondent(s)' company code, complete name, local representative, address, name of insured, and file number;

(b) A mark in the appropriate box on the application ("A" Form), indicating as to whether coverage as alleged by the Applicant is admitted. Difficulty in confirming coverage is not a coverage denial. The Respondent(s) must state the exact basis for a coverage denial under its contentions;

(c) A mark in the appropriate box on the application ("A" Form), indicating as to whether liability as alleged by the Applicant is admitted and the amount of alleged damages contested by the Respondent;

(d) Information about the amount of Respondent's insured's

interest in the case, such as liability deductible, if any;

(e) A statement fully setting forth grounds for an objection when it is based upon lack of jurisdiction;

(f) An arbitration Contentions Sheet outlining a brief statement of allegations on the issue in controversy and listing all evidentiary material; and

(g) Signature and telephone number of Respondent's representative and date signed, attesting to the fact that Respondent's representative has sent the required copies to AF and all other interested parties.

If a Respondent questions a decision, the burden of proving delivery of an answer through a third party is upon the Respondent(s).

3-6 If a Respondent fails to answer within 30 days after an Applicant files, AF will consider the case ready for hearing.

3-7 The Respondent must give written notice of affirmative defenses on the Contentions Sheet. The panel shall consider only those affirmative defenses included on the Contentions Sheet.

3-8 The procedure set out in the preceding paragraphs of this section also applies to counterclaims. The application ("A" Form) must clearly indicate that it is submitted as a counterclaim and the original arbitration case to which it pertains must be clearly identified.

Unless a counterclaim is filed and heard with the original arbitration case, the Respondent company with the counterclaim is thereafter precluded from pursuing its counterclaim against the adverse member company.

If the counter applicant can show, through documentary evidence, that its claim was created by payment to its insured less than five (5) business days prior to the original hearing date or any time thereafter, it is not precluded from pursuing its claim against the adverse company.

3-9 The Applicant must immediately notify the proper AF field office of settlement. Upon notification, the field office will withdraw the case from arbitration.

3-10 A party may request deferment of arbitration until the conclusion of all companion claims or suits not subject to arbitration. Each deferment request must be in writing, sent by certified mail, and must be received by the AF field office at least three (3) business days before the hearing date. Deferments shall be for one year from date of filing. AF shall hear a deferred case at the expiration of that time unless it receives a request for further deferment. The requesting party must pay a fee for each deferment.

3-11 A party may challenge a deferment. A panel will examine the reason for deferment, and if it determines that the deferment is for good cause, the case will remain deferred for one year.

If the challenge to deferment is upheld, the panel will then decide the matters at issue. Therefore, it is imperative that all file materials are sent to AF along with any deferment requests.

3-12 Deferment of a hearing under 3-10 does not relieve a Respondent company from its obligation to file a written objection to jurisdiction. The proper AF field office must receive an application at least 120 days before the expiration of the applicable Statute of Limitations. The Respondent's answer must also be received at least 60 days before the expiration of the applicable Statute of Limitations. If a Respondent fails to answer within the stated period, it thereby waives any objection to jurisdiction, unless Respondent can show that the applicable Statute of Limitations expired before Respondent's right to object to jurisdiction accrued.

A Respondent must file an objection to jurisdiction in its contentions on the application ("A" Form) and/or Contentions Sheet, even when applying for deferment

hearing under Rule 3-10. When the Respondent raises a jurisdictional issue, AF will set the matter for hearing on the jurisdictional question. The panel will then rule upon the merits of the jurisdictional question, and will defer determination of liability and damage issues for subsequent hearing.

A party must also be able to provide proof of mailing objections to jurisdiction to the proper AF field office.

3-13 The following directives apply to coverage denial:

(a) A Respondent's objection to jurisdiction based on a coverage denial, except those based upon delayed notice, no notice or noncooperation, must:

(1) set out the objection to jurisdiction for arbitration in its written answer to Applicant's filing; and

(2) send the answer with the objection to the proper AF field office and to the Applicant by Certified Mail.

(b) A failure to plead an affirmative defense based upon a coverage denial pursuant to this rule, before a hearing, is not a waiver of the defense if the:

(1) Applicant made its original filing at least 120 days before the running of the Statute of Limitations; and

(2) Respondent pleads its defense in writing to AF at least 60 days before the running of the Statute of Limitations, but in any event no longer than 120 days from the publication of the decision.

(c) Upon notifying the proper AF field office of a coverage denial following the arbitration hearing, the Respondent will be assessed a charge equal to the filing fee.

3-14 If a Respondent, through its answer, raises an objection to jurisdiction as a proper affirmative defense to compulsory

arbitration and the panel or AF withdraws the case from arbitration in response to that pleading, the proper AF field office will remove the case from its active docket.

In the event that, after removal, the case is discovered to have been properly placed in arbitration and the Applicant refiles the case in arbitration, the Respondent must reimburse Applicant for all reasonable legal expenses and court costs incurred because of the improper objection to jurisdiction.

Upon restoration of the case to the active docket, AF will bill the Respondent for a reinstatement charge equal to the case filing assessment charge.

3-15 If both Applicant and Respondent waive Notice of Hearing on the application ("A" Form) and their files have been received, the panel will hear the matter at the next available hearing date.

SECTION FOUR
HEARINGS

4-1 AF shall schedule all cases for hearing at the earliest practical date. The panel will hear a counterclaim with the original claim except as stated in Rule 3-8.

4-2 AF shall determine the hearing dates and the panel(s) will hear one or more cases at any scheduled hearing. It shall appoint one arbitrator to serve as the panel in each case where the company claim amount is $2,500 or less. However, where the damages exceed $2,500, more than one arbitrator may constitute a panel upon written request from one of the involved parties.

4-3 AF shall send notice of date and place of hearing at least 21 calendar days before the hearing date, except where Applicant and Respondent waive notification in writing. AF will send the Notice of Hearing by First Class Mail. If the Respondent has not submitted an answer and the:

(a) Applicant's damage claim is $5,000.00 or less, the proper AF field office staff will send a Notice of Hearing to the Respondent under the United States Postal Service's Certificate of Mailing Procedures, or

(b) damages exceed $5,000.00, the proper AF field office staff will send the Notice of Hearing by Certified Mail.

4-4 The AF hearing officer may grant adjournments for cause.

4-5 Arbitrators shall examine all evidence which parties properly submit in support of their allegations. Evidence not related to allegations contained in the contentions shall not be considered.

If a party fails to produce evidence at a scheduled arbitration hearing after due notice as provided in Rule 4-3, the arbitrators shall consider such party's information on the AF application ("A" Form) and render a decision accordingly.

4-6 The panel shall consider only those affirmative defenses or objections to jurisdiction included in the contentions section of the application ("A" Form) and/or the Contentions Sheet.

4-7 Procedure at arbitration hearings is informal. Controverting parties will present the facts of their respective cases in a brief, concise, and direct manner. Applicants or Respondents may be represented at an arbitration hearing in the manner they choose so long as representation is consistent with Rules 3-4 and 4-9.

4-8 Controverting parties may submit briefs of law for consideration by the arbitrator(s). The arbitration panel has the discretion to adjourn the hearing and require the controverting parties to provide briefs of law.

4-9 A party may present witnesses or attend an arbitration hearing. If a party desires to present witnesses or attend arbitration it must notify the other party or parties and the AF field office at least five (5) business days before the

hearing date by Certified Mail, unless the party's intent to appear or present witnesses was indicated on its application ("A" Form). Insured or witnesses may not appear without the presence of the company representative.

If representatives of the Applicant or Respondent attend an arbitration hearing, they must withdraw after presentation of the case. Representatives may not be present while the arbitration panel is considering its decision.

SECTION FIVE
DECISIONS

5-1 Arbitration panels may not render default judgments. The Applicant must establish a prima facie case based upon evidence submitted.

5-2 A decision of an arbitration panel on issues of fact or law is final and binding with no right to rehearing or appeal. However, Article Fourth, subsection (e) does not preclude AF from correcting a clerical or jurisdictional error of a panelist or local AF staff. The arbitrating companies must provide written notice of the error to AF within sixty (60) days after the decision's publication. AF can find and correct errors without notice from the arbitrating companies within sixty (60) days after the publication of the decision.

Jurisdictional error occurs when a panel improperly assumes jurisdiction, proceeds with a hearing, and makes a decision without resolving a potential jurisdictional impediment.

Upon confirmation of a critical jurisdictional or clerical error, the AF home office will void or amend the decision.

5-3 Local substantive law will control the decision on all issues.

5-4 Arbitration findings as to the amount of damages at issue must be based on the facts presented to the arbitrator.

5-5 After rendering a decision, arbitrators shall complete the following on the AF application ("A" Form):

(a) date closed

(b) panel member's name (written legibly)

(c) basis of findings

(d) denote appearance of Applicant and Respondent in space provided

(e) amount claimed

(f) awards, if any

5-6 The decision will be mailed to all interested parties by the AF field office by First Class Mail.

SECTION SIX
AWARDS

6-1 Respondent(s) shall pay all awards within thirty (30) days of publication.

6-2 When an Applicant receives an award and Respondent does not pay the award within thirty (30) days after publication, the Applicant's local representative must immediately send a written request for payment to the Respondent's local senior claims representative addressing them by name.

If the award remains unpaid thirty (30) days after written request for payment, the Applicant company should send a copy of the letter to the office of Arbitration Counsel, Arbitration Forums, Incorporated for processing.

The Arbitration Counsel will then bring the matter to the attention of the highest level within the Respondent company. Thirty (30) days after Arbitration Counsel responds to the matter, the Applicant company is free to file in litigation for collection. The prevailing party in litigation shall be entitled to attorney's fees and costs incurred in pursuing collection.

6-3 Respondent must pay any deductible interests of the Applicant's insured if the latter receives a favorable

arbitration award. Such payment is made in the interest of good public relations and goodwill. Respondent shall pay the deductible in proportion to the percentage of the liability award if the amount of damages exceeds the amount of the Respondent's insured's deductible interests. If the Respondent's insured's deductible interests exceed the amount of damages, no award shall be made.

A payment is to be made payable only to the Applicant company. The payment issued to the Applicant must include its insured's deductible payment. By accepting the award and deductible, the Applicant agrees to hold the Respondent harmless from any claim by the Applicant's insured equal to the panel's finding on the negligence issue.

SECTION SEVEN
ADMINISTRATION

7-1 Member companies shall cominate arbitrators by providing AF with completed profile forms of local claims representatives. Upon request, AF will supply the profile forms.

7-2 Membership entitles Home Office and local representatives of member companies to copies of the Rules and Regulations, Directory of Participating Companies and Directory of Field Offices. These documents are the property of Arbitration Forums, Incorporated and are subject to copyright and proprietary use guidelines.

7-3 By resolution of its Board of Directors, AF will prescribe the filing fees for administering the Automobile Subrogation Arbitration Forum.

7-4 The AF field office will retain the application ("A" Form), answer, contentions, and post-decision correspondence for six months after closure. It will destroy all other material following the hearing. AF will return photographs if notified prior to the hearing and a self-addressed and stamped envelope of sufficient size and postage is provided by the requesting party.