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**Prudential Property and Casualty Insurance Co.**

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**IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

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| **THOMAS BREMER,** | : | |
| | : | |
| **Plaintiff** | : | |
| | : | |
| **vs.** | : | **3:CV-03-1810** |
| | : | **(CHIEF JUDGE VANASKIE)** |
| **PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY,** | : | |
| | : | |
| | : | |
| **Defendant** | : | |

**BRIEF OF PRUDENTIAL PROPERTY AND CASUALTY COMPANY IN OPPOSITION TO PLAINTIFF'S PETITION TO MODIFY OR CORRECT ARBITRATION AWARD**

The Defendant, Prudential Property and Casualty Insurance Company [hereinafter "Prudential"], by and through its attorneys, FOLEY, COGNETTI, COMERFORD & CIMINI, respectfully files this Brief in Opposition to Plaintiff's Petition to Modify or Correct Arbitration Award as follows:

## I. STATEMENT OF FACTS

The sole issue before the Court raised by the Plaintiff's Petition to Modify and/or Correct the Award entered in an underinsured motorist arbitration involves the amount of the credit Prudential was entitled to apply to the Claimant's UIM arbitration award.

The underlying facts establish that the Claimant, Thomas Bremer, was insured with Prudential Property & Casualty Insurance Company on the date of the subject motor vehicle accident of February 1, 1996. It is undisputed that the Prudential policy provided for underinsured motorist coverage for the Claimant in the total amount of $200,000.00. **See Exhibit "A": Declarations Page and Policy**.

At the time of the subject accident, the Claimant, Thomas Bremer, was operating his wife's 1988 Oldsmobile, which was covered under the subject policy. Mr. Bremer was traveling on the Scranton Expressway heading from his home in Olyphant to his place to of employment in Scranton. As Mr. Bremer proceeded in the left hand lane, a vehicle being operated by Christina Howells approached from his right. As the Claimant drove alongside Ms. Howells' vehicle, Ms. Howells traveled from a stop sign and came into contact with the right front fender of Mr. Bremer's vehicle. After that impact, Mr. Bremer's car was struck from the rear by a vehicle operated by the other responsible tortfeasor, Stacy Gist.

In the underlying third party litigation, the Claimant sued both Christina Howells and Stacey Gist as joint tortfeasors.[1] Plaintiff's Complaint alleged that both tortfeasors were liable for Mr. Bremer's injuries in that Ms. Howells failed to yield the right-of-way to Claimant and that Ms. Gist was speeding and following too closely. **See Exhibit "B": Complaint at para. 26**. After discovery was completed in the third party suit, the carrier for Christina Howells paid its policy limits of $50,000.00 in exchange for a joint tortfeasor release. Thereafter, the carrier for Stacy Gist paid $15,000.00 of a $100,000.00 liability policy to settle Mr. Bremer's claim asserted against Ms. Gist.

[1] The Claimant also sued Howell's Garage, which was later voluntarily dismissed. Prudential did not and does not seek any credit for any limits under the Howell's Garage policy.

The Claimant, Thomas Bremer, then turned to his own policy with Prudential and asserted a claim for underinsured motorist benefits. The subject Prudential Car Policy contains the following exhaustion clause under the UIM portion of the policy:

> No payment will be made under this part until liability insurance and bonds of *all responsible* **motor vehicles** are exhausted by payment of settlement or judgment. This is a coverage of last resort.

**See Part 5 at p. 7 of Policy in Exhibit "A" [emphasis in original; italics supplied].**

The subject Prudential Car Policy also contains a "Payments Reduced" clause under the UIM portion of the policy which provides, in pertinent part, as follows:

> **PAYMENTS REDUCED**
>
> Payments will be reduced by any amount paid or payable by *persons responsible* for the accident….

**See Part 5 at p. 11 of Policy in Exhibit "A." [emphasis added].**

During the pendency of the UIM matter, Prudential placed the Claimant's attorney on notice of Prudential's position that, under the above provisions and under Pennsylvania law, it was entitled to a credit of the liability limits under both responsible tortfeasor's liability policies, for a total credit of $150,000.00. It was the erroneous position of the Claimant that Prudential was only entitled to a credit for the $50,000.00 policy limits of the Howells' policy and for the percentage of legal liability the Claimant believed should be assessed to Stacy Gist. More specifically, it was the Claimant's argument that Prudential was only entitled to a $15,000.00 credit on the Gist policy because that was the portion of the $100,000.00 limits that the Claimant had decided to accept from Gist's carrier in the settlement of the third party action.

On August 27, 2003 and September 15, 2003, the UIM Arbitration hearing was held at which both parties were freely permitted to present all of the evidence and legal argument they desired on the issues presented. The neutral arbitrator was Robert D. Mariani, Esquire, the Plaintiff's arbitrator was Scott Schermerhorn, Esquire, and the defense arbitrator was James A. Doherty, Esquire.

On September 15, 2003, the arbitrators entered an award in which they indicated that they had "considered the arguments of counsel for the parties, both oral and written," and further found in favor of the Plaintiff in the gross amount of $200,000.00, "which amount [was] reduced by appropriate credit of $150,000.00, leaving a net Award to the Plaintiff of $50,000.00…." **See Exhibit "B" attached to Plaintiff's Petition [insert added].**

Despite receiving an award at the arbitration, the Claimant's filed a Petition to Modify or Correct Award of Arbitrators at issue, erroneously arguing that an improper amount of a credit was granted to Prudential. This Brief is offered by Prudential to provide the court with the following legal authority in support of Prudential's entitlement to a credit for the full policy limits of the two respective policies of the two sued as tortfeasors responsible for the accident, i.e., a credit of $150,000.00. For the reasons stated herein, it is respectfully requested that the Plaintiff's Petition be denied and that the Arbitrator's Award be confirmed.

## II QUESTION PRESENTED

**Whether the Plaintiff's Petition should be denied and the Arbitrator's Award confirmed where the Arbitrators did not commit an error of law in finding that Prudential is entitled to a credit of the $150,000.00 in available liability limits afforded to the two motor vehicle operators responsible for the accident.**

**SUGGESTED ANSWER: YES.**

## III. ARGUMENT

### A. STANDARD OF REVIEW[2]

Consistent with the policy provision, the arbitration in this matter was "conducted in accordance with the Provisions of the Pennsylvania Uniform Arbitration Act and the Pennsylvania Arbitration Act of 1927." **See part 5 at p. 11 of policy in Exhibit "A."**

The Pennsylvania Uniform Arbitration Act is also known as the Uniform Arbitration Act of 1980. **See Aetna Casualty and Surety Co. v. Deitrich, 803 F. Supp. 1032, 1034 (M.D. Pa. 1992)**. Thus, the policy provision makes reference to both the 1980 Act and the 1927 Act. Where a policy makes reference to both Acts, the Court has construed the applicable standard of review as that being contained in the 1927 Act. **See Allstate Ins. Co. v. Clymer, 1993 WL 274237 at *2 (E.D. Pa. 1993)**. As noted below, additional provisions of the policy confirm that the standard of review under the 1927 Act was expressly agreed upon by the parties.

The subject Prudential policy of insurance follows the law in terms of the standard of review under the 1927 Act, by providing, in pertinent part, as follows:

> Following the entry of an arbitration award, either party may file a Petition to Vacate or Modify the Award in the Court in the county where the arbitration was conducted. The Court may modify or correct the award where:
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> **********

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[2] It is initially noted that, although the Plaintiff has entitled his Petition as a "Petition to Modify or Correct an Arbitration Award Pursuant to 42 Pa. C.S.A. *§7314 and §7315*," the Petition only requests relief in the form of a modification or correction under 42 Pa. C.S.A. §7315, and does not request any vacation of the Award as allowed by Pa. C.S.A. §7314. **[Emphasis added]**. The Court will note that 42 Pa. C.S.A. §7314 relates only to a request by the party for a vacation of an Arbitration Award. Nowhere in the Plaintiff's Petition is there any request for a vacation of the Award. As such, §7314 is inapplicable and need not be considered by the Court. Even if the Court were to consider §7314, the Plaintiff's Petition should be denied and the Arbitrator's Award confirmed for the reasons stated below and due to the fact that none of the grounds for vacation of the Award set forth in §7314 have been established.

5. The arbitrators committed an error of law such that had it been a verdict of a jury the court would have entered a different or other judgment notwithstanding the verdict.

**See Part 5 at p. 11 of the Policy in Exhibit "A".**

The Plaintiff has requested a modification or correction of an award under 42 Pa. C.S.A. §7315. Under §7315, an arbitrator's award is also subject to judicial correction if it is against the law, and is such that, if it had been the verdict of the jury, the court would have entered a different or other judgment notwithstanding the verdict. **See 42 Pa. C.S.A. §7315; McDonald v. Keystone Ins. Co., 459 A.2d 1292 (Pa. Super. 1983)**.

When faced with a motion for judgment notwithstanding the verdict, a court has two bases upon which such a motion may be granted. First the motion may be granted when, the moving party is entitled to a judgment as a matter of law, and/or, second, the evidence is such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the moving party. **Lanning v. West, 803 A.2d 753, 756 (Pa. Super. 2002)**. With the first basis, the Court reviews the record and determines whether, even with all factual inferences decided adverse to the moving party, the law nonetheless requires a verdict in his favor. **Id.** With the second basis, the Court reviews the evidentiary record and determines whether the evidence was such that a verdict for the moving party was beyond peradventure. **Id.** In their respective filings, the parties have essentially agreed that the issue before the Court is whether or not the arbitrators committed an error of law in the amount of the credit that was granted to the Defendant, Prudential. Thus, only the first basis noted above applies, i.e., whether the moving party is entitled to a decision in his favor as a matter of law.

Moreover, a judgment notwithstanding the verdict should only be entered in a clear case and any doubts must be resolved in favor of the verdict winner. **Birth Center v. St. Paul Cos., 787 A.2d 376, 383 (Pa. Super. 2001) [citations omitted]**. In this case, Prudential should be considered to be the verdict winner in that it prevailed on the issue presented. Thus, the arbitrator's decision on the issue of the credit can only be reversed upon a finding of an error of law. **Fanning v. Davne, 795 A.2d 393 (Pa. Super. 2002)**. For the reasons stated below, Prudential asserts that the arbitrators acted properly under Pennsylvania law with respect to the credit allowed and, therefore, the Plaintiff's Petition should be denied and the Arbitrator's Award confirmed under the above standard of review.

### B. THE ARBITRATORS PROPERLY APPLIED ESTABLISHED PENNSYLVANIA LAW IN GRANTING PRUDENTIAL A $150,000.00 CREDIT AGAINST THE AWARD ENTERED IN FAVOR OF THE CLAIMANT.

The Arbitrators properly applied established Pennsylvania law in concluding that, under the exhaustion clause and the "Reduced Payment" provisions of the policy, Prudential was entitled to a credit of the amount of the available liability limits under the tortfeasors' respective policies, i.e., $150,000.00. It is emphasized that there is no dispute between the parties that Prudential is entitled to a $50,000.00 credit related to the Howells' policy. However, the Claimant puts forth the erroneous argument that Prudential was entitled to a credit on the $100,000.00 policy issued to Stacy Gist only to the extent of the percentage of liability the Claimant himself attributed to Ms. Gist, i.e., the $15,000.00 the Claimant decided to accept from Stacy Gist by way of settlement. As noted below, the Claimant's position is without support under Pennsylvania law.

**1. Public Policy**

The rationale underlying the law concerning the proper credit to be afforded to the UIM carrier is grounded in the recognized public policy of cost containment of automobile insurance. Prior to 1990, the courts were guided by a markedly different public policy than that recognized by the July 1, 1990 amendments to the Motor Vehicle Financial Responsibility Law ("MVFRL"). Prior to that time, the public policy was one of "maximum feasible restoration."

The Courts of this Commonwealth have recognized that the purpose of the 1990 amendments of the MVFRL was to contain and control the cost of automobile insurance. **Donnelly v. Bauer, 720 A.2d 447 (Pa. 1998); Salazar v. Allstate Ins. Co., 702 A.2d 1038 (Pa. 1997)**. The once recognized public policy of "maximum feasible restoration" that existed prior to the 1990 amendments has been discredited. **Burstein v. Prudential, 809 A.2d 204, 207 (Pa. 2002) quoting Paylor v. Hartford Ins. Co., 640 A.2d 1234, 1235 (Pa. 1994).** The Supreme Court has defined the newer public policy in this fashion:

> The legislative concern for the increasing cost of insurance is the public policy that is to be advanced by statutory interpretation of the MVFRL. This reflects the General Assembly's departure from the principle of "maximum feasible restoration" embodied under the now defunct No-Fault Act.

**Paylor v. Hartford Insurance Co., 640 A.2d at 1235.** Perhaps the most explicit statement of the Supreme Court's position in this regard can be found in its decision in the matter of **Hall v. Amica Mutual Insurance Co., 648 A.2d 755, 760-761 (Pa. 1994)**, where it stated:

> Although UIM motorist coverage serves the purpose of protecting innocent victims from irresponsible UIM

> motorists, that purpose does not rise to the level of a public policy, overriding every other consideration of statutory construction.

**648 A.2d at 760-761**. In other words, "the policy of liberal interpretation of the underinsured motorist law is not limitless" and decisions by the Court should be made consistent with the recognized policy of cost containment. **See Id. at 761**.

Accordingly, the arbitrators properly applied the exhaustion clause and the "Payments Reduced" clause of the insurance contract in accordance with the above public policy of containing and controlling the cost of automobile insurance. Application of public policy concerns to the matter at hand required that Prudential be given a full credit of $150,000.00. The granting of a credit to Prudential for the full amount of the tortfeasor's policy limits ensures that the Claimant is not entitled to UIM benefits from his own carrier until he first establishes that his damages exceeded the maximum liability coverage provided by the liability carriers of the drivers who caused in the accident. **See Boyle v. Erie Ins. Co., 656 A.2d 941, 943 (Pa. Super. 1995). appeal denied 668 A.2d 1120 (Pa. 1995)**. Thus, the granting of a credit for the full amount of the tortfeasors' liability limits furthers the public policy of cost containment by preventing a UIM recovery until the value of the Claimant's damages is found to exceed the available liability limits of the tortfeasor.

**2. The Exhaustion Clause and Payments Reduced Clause entitle Prudential to a credit of the full amount of the tortfeasors' limits**

In the instant case, the two (2) tortfeasors responsible for the subject accident had respective liability policies that, when added together, amounted to $150,000.00 in liability coverage. The Arbitrators properly found under Pennsylvania law that Prudential was

entitled to a credit of that amount under the exhaustion and "Payments Reduced" clauses found in the policy.

The subject Prudential Car Policy contains the following exhaustion clause under the UIM portion of the policy:

> No payment will be made under this part until liability insurance and bonds of *all responsible* **motor vehicles** are exhausted by payment of settlement or judgment. This is a coverage of last resort.

**See Part 5 at p. 7 of Policy attached hereto as Exhibit "A" [emphasis in original; italics supplied].**

The above exhaustion clause specifically and literally requires an exhaustion of the liability limits ***"of all responsible motor vehicles"*** before a claimant may proceed on to a UIM claim. **[Emphasis added].** However, as noted below, Pennsylvania law will not allow the exhaustion clause to preclude a UIM claim; rather, a claimant may proceed on the claim but must give the carrier a credit for the full amount of the liability limits. **Boyle v. Erie Ins. Co., 656 A.2d 941 (Pa. Super. 1995). [numerous other citations omitted]**

The underinsured motorists portion of the Prudential policy also contains the following pertinent language entitling Prudential to a credit for the available liability limits:

> **PAYMENTS REDUCED**
>
> Payments will be reduced by any amount payable by *persons responsible* for the accident. * * *

**See Part 5 at p. 11 of Policy attached hereto as Exhibit "A." [emphasis supplied].**

In terms of the "Payments Reduced" clause, the word "payable" is generally defined as "capable of being paid; suitable to be paid; admitting or demanding payment; justly due; legally enforceable." **Black's Law Dictionary 1916 (5th ed. 1979); Schroeder v.**

**Schrader, 682 A.2d 1305, 1310 Pa. Super. 1996)**. Under the "Payments Reduced" clause, which can be viewed as a supplementation of the exhaustion clause, it is required that any payments owing under the UIM coverage be reduced by ***"any amount payable,"*** not merely paid, by persons responsible for the accident. **[Emphasis added].**

In this case, one of the persons responsible, Stacy Gist, paid a portion of her available insurance policy limits. Nevertheless, since the amount "payable" governs, in the determination of the credit due under the "Payments Reduced" clause, Prudential is entitled to a credit of the full amounts of coverage that were payable under both of the tortfeasors' respective liability policies. **See Boyle v. Erie Ins. Co., 656 A.2d 941 (Pa. Super. 1995)**; **Kester v. Erie Insurance Exchange, 582 A.2d 17 (Pa. Super. 1990)**.

In the controlling case of **Boyle v. Erie Ins. Co.**, the requirement of the need to exhaust liability limits before obtaining a UIM recovery arose in the same context of a single Claimant injured by multiple tortfeasors. The question presented in the **Boyle** matter was whether an insured must exhaust the automobile liability limits of all potential tortfeasors before proceeding with an underinsurance claim. In **Boyle**, the case was settled with one of the two tortfeasors for the limits of his coverage, and the settlement with the other tortfeasor was a compromise that exhausted only 50% of that tortfeasor's liability coverage. When the Claimant presented his UIM claim, the UIM carrier denied coverage under the terms of its policy by asserting that the insured had not exhausted the limits of the second tortfeasor's liability policy.

The Court in **Boyle** was faced with an interpretation of an unlimited exhaustion clause which provided, as follows:

> With respect to underinsured motor vehicles, we will not be obligated to make any payment until the limits of all bodily injury insurance policies and liability bonds applicable at the time of the accident, including other than motor vehicle insurance, have been exhausted by payment of settlements or judgments.

**Boyle 656 A.2d at 942.**

The Superior Court in **Boyle** court analyzed its decision in the case of **Kester, supra**., where an exhaustion clause was ruled invalid because it expanded the possible field of liable parties to anyone from whom the insured could make a recovery. **Id.** The **Kester** Court found the all-inclusive language of the clause in its case, as well as the carrier's argument that the claimant should have also sued PennDOT in the underlying automobile litigation, to be overly broad and beyond the intent of the MVFRL. Thus, in reliance on the **Kester** decision, the **Boyle** court concluded that "exhaustion clauses are not per se invalid, but they cannot validly be interpreted to require an insured to seek recovery from other than the owners and operators of vehicles involved in the accident." **Id. at 943. [emphasis added].**

In **Boyle**, as here, there were only two tortfeasors, both of whom were motor vehicle operators. The **Boyle** court refused to literally enforce the above exhaustion of limits clause and allowed the claimant to pursue a UIM claim, stating that "to enforce the policy language strictly would have the effect of failing to provide the protection intended by the legislature for an insured driver." **Id.** However, consistent with the public policy of cost containment, the court went on to note that the "exhaustion clause must be interpreted to provide protection to an insurance company against a demand by its insured to fill the "gap" after a

weak claim has been settled for an unreasonably small amount," which is precisely what occurred in this matter. **Id.**

In this matter, as admitted by the Claimant on page 1 of his Brief, the liability to be assessed to one of the tortfeasors in the underlying matter, Stacy Gist, ***"was determined by counsel for Thomas Bremer,"*** who assessed 15% of the fault to Ms. Gist and accepted a settlement for that amount from Ms. Gist's carrier. **See Claimant's Brief at p. 1 [emphasis added].** There has never been a judicial determination of Ms. Gist's percentage of liability for this matter.

Having settled a claim against Ms. Gist for an amount which Claimant now feels is inadequate, the Claimant is now impermissibly turning to his own carrier, Prudential, with a demand to fill the "gap" between the $15,000 settlement figure and the $100,000 policy limits available under the Gist liability policy with UIM benefits from the Prudential policy. This is exactly what **Boyle** and its progeny guard against and prohibit by requiring that the UIM carrier be given a full credit of the liability limits available to the responsible tortfeasor. **Id.**

The **Boyle** court therefore held that the conflicting interests of an insured and an insurer can best and most fairly be served by construing the exhaustion clause as a "threshold requirement and not a barrier to underinsured motorist insurance coverage." **Id. at 943**. The court went on to state:

> When the insureds settled their claim against the tortfeasor's liability carrier for less than the policy limits, the underinsured motorist carrier was entitled to compute its payment to its injured insureds as though the tortfeasor's policy limits have been paid. Under this view, the insureds will not be allowed underinsured motorist benefits unless their damages exceed the maximum

> liability coverage provided by the liability coverage provided by the liability carriers of the other drivers involved in the accident; and their insurer will, in any event, be allowed to credit the full amount of the tortfeasors' liability coverage against the insureds' damages.

**Id.**

The underinsured carrier was therefore allowed to claim a credit for the full extent of the liability limits afforded to both tortfeasors. **Id.** In other words, in **Boyle**, the claimant was only permitted to recover underinsured benefits for damages in excess of both tortfeasors' policy limits even though one of the tortfeasors paid less than his policy limits. **Id. at 943-944.** This is the same scenario presented and result reached in this matter before the Arbitrators.

As noted in the oft cited treatise, **Pennsylvania Motor Vehicle Insurance**, the "practical effect of the **Boyle** decision is that when an insured settles a claim for less than the policy limits, the underinsured motorist carrier is entitled to compute its payment to its insured as though tortfeasor's policy limit had been paid." **Ronca, J., et al., Pennsylvania Motor Vehicle Insurance (Second Edition 2000), at §11.2, citing Chambers v. Aetna, 658 A.2d 1346 (Pa. Super. 1995); (Plaintiff accepted 91% of Defendant's coverage) Kelly v. State Farm, 668 A.2d 1154 (Pa. Super. 1995); (insured had accepted $12,500.00 of a $50,000.00 policy) Harper v. Providence Washington Ins. Co., 753 A.2d 282 (Pa. Super. 2000); Krakower v. Nationwide, 790 A.2d 1039 (Pa. Super. 2001). See also Sorber v. American Motorists Ins. Co., 680 A.2d 881 (Pa. Super. 1996) (Claimant had accepted $40,000.00 of a $50,000.00 policy).** Significantly, the above treatise offered the following example, which is very similar to the facts at hand:

> Another issue likely to come before courts involved the insurer's contractual right to require exhaustion of an applicable liability policy. For example, what happens in a situation where a tortfeasor offers to settle with the insured for only 10% of the liability limits? Is this sufficient to trigger an insured's right to pursue underinsured motorist coverage? **Boyle** and the appellate cases following this decision suggest that any offer by the liability insurer is sufficient to satisfy the exhaustion clause, ***as long as the UIM insurer is given credit for the full liability limits***.

**See Pennsylvania Motor Vehicle Insurance, at §11.2 [bracket inserted]**. Here, the Claimant essentially settled for 15% of the limits under the Gist policy, i.e. $15,000 of $100,000 in available coverage. Under **Boyle** and its progeny, the Arbitrators properly ruled that Prudential was entitled to a credit of the $100,000 policy limits offered by the Gist policy in addition to, as undisputed between the parties, a credit of $50,000.00 under the Howell policy, for a total credit of $150,000.00.

**3. The Claimant's reliance on Overfield Decision is misplaced as that case is factually distinguishable and involves significantly different policy language rendering that case inapplicable to the matter at hand**.

The Claimant, Thomas Bremer, asserts a misplaced reliance upon the Court of Common Pleas case of **Overfield v. Ohio Casualty Ins. Co., 39 Pa. D. & C. 4th 548 (Lacka. Co., Nealon, J. 1998)**. The **Overfield** case involved significantly different policy language and, as noted by the Court itself in **Overfield**, a factual scenario readily distinguishable from the facts of the controlling case of **Boyle**. Therefore, the **Overfield** case is inapplicable to the facts at hand. Rather, this case is controlled by the **Boyle** decision.

A decisive factual and legal distinction between this case and the **Overfield** case can be found in the policy language at issue before each court. The exhaustion clause in the

subject policy in this matter refers specifically to the exhaustion of the liability insurance limits applicable to "***all*** responsible motor vehicles," which is all that Prudential seeks in this matter by way of a credit. **See Part 5 at p. 7 of Policy attached hereto as Exhibit "A."**[3] In contrast, the UIM policy in **Overfield** only obligated the UIM carrier to pay benefits for damages "arising out of an accident with ***an*** underinsured motor vehicle only after the limits of liability under ***any*** applicable bodily injury liability bonds or policies have been exhausted by payment of judgments or settlements." **Overfield at 569 [emphasis added]**.

The **Overfield** Court, construed this provision, emphasizing the policy's use of "an" and "any," to be in the singular form, and found the policy before it to state that whenever a claimant, in a multiple plaintiff scenario, had exhausted all of any one of multiple liability policies available in the underlying lawsuit, the Claimant was then permitted to turn to his or her UIM carrier and pursue a UIM recovery. **Id. at 569-70 citing Werntz v. Gen'l Acc. Ins. Co., 1 Pa. D. & C. 4th 386 (Lanc. Co. 1988) appeal dismissed 564 A.2d 1014 (Pa. Super. 1989)**.

In **Werntz**, the Court, construing language similar to that before the **Overfield** court, indicated that if an insured has exhausted all of any one underinsured motorist's coverage, the insured may then pursue recovery of UIM benefits from the insured's own underinsured policy. The **Werntz** court specifically stated that the policy provision before it did "not

[3] Significantly, Prudential has never asserted in this matter that the Claimant, Thomas Bremer, was required to pursue the liability limits of all hypothetical tortfeasors. Rather, Prudential is only seeking a credit for the liability limits from those two (2) motor vehicle operators actually responsible for the subject accident who the Claimant sued in the third party litigation and from whom he obtained a settlement payment. **See Boyle, supra; See also John v. American Family Mutual Ins. Co., 426 N. W. 2d 419, 423 (Minn. 1988) ("since [all tort-feasors] each could be liable for the entire amount [recoverable by the insured], the liability insurance limits of each must be considered in any setoff allowed the underinsurance carrier. We hold that underinsured motorist benefits cover only those damages in excess of the combined liability insurance limits of all tort-feasors.").**

state that an insured may recover '[o]nly after the limits of liability under any applicable bodily injury bond or policies which insure *any and all* parties to an accident have been exhausted by payment of judgments or settlements.' If General Accident [Insurance Company] had wanted an insured to exhaust any and all policies of parties to an accident, General Accident could or should have included the italicized phrase or a similar phrase in its policy language." **Werntz, at 390 [emphasis in original].**

Relying on this language from the **Werntz** decision, the **Overfield** court ruled that because the UIM carrier's policy required the claimant to exhaust "any" liability policy applicable to "an" underinsured vehicle, the plain language of the insurance contract that the UIM carrier drafted did not enable that carrier to assert an offset for the full amounts of all potential tortfeasors' liability limits. **Overfield at 572**. Rather, a Claimant in the **Overfield** case could pursue UIM benefits when any one of a tortfeasors' policy was exhausted.

In contrast to the language before the Court in **Overfield**, the policy provision in this matter provides, as follows:

> No payment will be made under this part until liability insurance and bonds of *all* responsible **motor vehicles** are exhausted by payment of settlement or judgment. This is a coverage of last resort.

**See Part 5 at p. 7 of policy in Exhibit "A" [emphasis in original; italics added].** Note the requirement of the exhaustion of the liability insurance limits of "all responsible motor vehicles."

The subject Prudential car policy also contains a "Payments Reduced" clause under the UIM portion policy which provides, in pertinent part, as follows:

**PAYMENTS REDUCED**

> Payments will be reduced by any amount paid or *payable by persons* responsible for the accident….

**See Part 5 at p. 11 of policy in Exhibit "A." [Italics added].** Note the use of the term "payable" and the use of the plural form in the word "persons."

The plain language of the above provisions confirms that the Claimant was required to exhaust "all" liability insurance policies that were "payable" by "all" motor vehicle operators responsible for the subject accident before he or she could obtain a UIM recovery. As such, the language at issue in this matter is readily distinguishable from the language at issue in **Overfield**, rendering that case inapplicable to the case at hand. Additionally, the language in this matter is analogous to the language at issue in the case of **Boyle,** which controls the outcome of this matter. In **Boyle**, the policy language did not obligate the UIM carrier to pay benefits "until the limits under *all* bodily injury insurance policies and liability bonds applicable at the time of the accident" had been exhausted. **Boyle, 656 A.2d at 942 [emphasis added]; See also, Kelly, 668 A.2d at 1155 (UIM policy mandated exhausting of "all" liability policies)**. Thus, under an application of **Boyle** and its progeny to the similar terms of the subject policy, the Arbitrators correctly found that Prudential was entitled to the credit for the full amount of the limits payable under the policies applicable to all responsible motor vehicles, that is, the $150,000.00 of coverage afforded under the Howells and Gist policies.

Another important distinction between this matter and the **Overfield** case, is that **Overfield** involved the significantly different factual context and "narrow issue" of a claimant who was seeking UIM coverage from her own carrier after being involved in an underlying third party litigation that involved multiple Plaintiffs who had amicably

apportioned the available liability insurance limits of multiple tortfeasors after the limits were interpleaded into court for that purpose. **Id. at 566.** In such a case, it would have been virtually impossible for the claimant to have acquired the total liability limits available as there were numerous other plaintiffs, including some decedent's representatives, who were dividing up among themselves the interpleaded policy limits of the tortfeasors. **See Id. at 562**.

In contrast, the **Boyle** decision involved, as does this matter, a single plaintiff who had an opportunity to recover the full liability limits afforded to multiple tortfeasors. Faced with the different factual scenario of multiple plaintiffs, the court in **Overfield** noted that "[t]he **Boyle** ruling does not accurately reflect the realities present in a multiple Plaintiffs scenario in which a tort-feasor's liability limits have been interpleaded into court to be apportioned among the Claimants." **Overfield, 39 Pa. D. & C. 4th at 561**. The **Overfield** court went on to explain that the claimant before it obviously did not have a realistic ability to procure the liability limits of the various tortfeasors due to the fact that there had been numerous plaintiffs in the underlying matter seeking the same money, "and for that reason, the **Boyle** method [had] no application" under the facts presented in **Overfield**, which are readily distinguishable from the facts at hand.

As emphasized by the **Overfield** court, the "**Boyle** offset procedure does have relevance with regards to a single Claimant…." **Id. at 562**. As such, it follows that, since the **Overfield** court found that **Boyle** was inapplicable to the multiple claimant scenario presented to the **Overfield** court, and also noted that **Boyle** does apply to a single claimant scenario, it follows that the **Overfield** decision is inapplicable to this case involving only one claimant. Rather, as noted by the Court in **Overfield,** the **Boyle** decision governs the

issue presented herein involving a single Claimant who had the ability to fully exhaust each of the tortfeasor's limits, and **Boyle** requires that Prudential be given a full credit of $150,000.00 for the liability limits that were available in the underlying matter. **See Id.**

Thus, under an application of **Boyle** and its progeny to the similar terms of the subject policy, the Arbitrators correctly found that Prudential was entitled to the credit for the full amount of the limits payable under the policies applicable to all responsible motor vehicles, that is, the $150,000.00 of coverage afforded under the Howells and Gist policies. Consequently, it can not be said that the arbitrators committed an error of law such that a court would have entered a judgment notwithstanding the verdict and the Claimant's Petition to Modify or Correct the Award of Arbitrators must be denied.

## IV. CONCLUSION

For all of the foregoing reasons, it is requested that this Court find that the Arbitrators did not commit any error of law in finding that Prudential was entitled to a credit of $150,000.00 and that, therefore, the Plaintiff's Petition should be denied and the Arbitrator's Award confirmed.

Respectfully Submitted
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