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Back from the dead: Pa. Supreme Court revives “regular use” exclusion

INSIGHTSARTICLE

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In October 2021, the Pennsylvania Superior Court invalidated the “regular use” exclusion in Rush v. Erie Ins. Exch., 265 A.3d 794 (Pa. Super. 2021), finding that this exclusion violated the plain language of § 1731 of Pennsylvania’s Motor Vehicle Financial Responsibility Law (“MVFRL”), 75 Pa. C.S.A. §1701, et seq. Since then, both Pennsylvania insurers and insureds have waited with bated breath to see if the Pennsylvania Supreme Court would affirm or reverse this unprecedented decision. On Monday, January 29, 2024, that wait ended with a resounding reversal from the Pennsylvania Supreme Court. Rush v. Erie Insurance Exchange, No. 77 MAP 2022 (Pa. Jan. 29, 2024)(Maj. Op. by Donohue, J.)(Concurring Op. by Wecht, J.).

Generally speaking, the “regular use” exclusion protects an insurer from providing uninsured and underinsured motorist (“UM/UIM”) coverage for bodily injury its insured sustained while occupying a vehicle the insurer does not insure and its insured does not own, but the insured is nonetheless using regularly. The most common scenario involving this exclusion is an accident where the insured is driving an employer-owned vehicle, which the insured uses regularly as part of his or her employment.

This was the scenario in Rush where the insured, a police officer, was injured while driving his police car, a vehicle he regularly used. After settling with both tortfeasors and collecting the $35,000 UIM limit of the policy insuring the police car, Mr. Rush sought UIM benefits under his own auto policies with Erie, one being a personal policy providing $250k in stacked UIM benefits for a single vehicle and a second being a commercial policy providing $250k in stacked UIM benefits for two vehicles. No waiver of UM/UIM coverage was ever signed for either policy.

Erie denied Mr. Rush’s UIM claims under both policies based upon their identical “regular use” exclusion. Mr. Rush responded by filing a declaratory judgment action in the Court of Common Pleas of Northampton County, arguing that the regular use exclusion violates the MVFRL and is, therefore, void and unenforceable. The trial court agreed and granted Mr. Rush’s Motion for Partial Summary Judgment, analogizing the “regular use” exclusion to the household vehicle exclusion invalided by the Supreme Court in Gallagher v. GEICO Indem. Co., 201 A.3d 131, 135 (Pa. 2019), under § 1738 governing the stacking of UM/UIM benefits. The trial court further found that the regular use exclusion ran afoul of § 1734, mandating UM/UIM coverage equal to the policy’s bodily injury limit absent a written waiver signed by the insured. An appeal to the Superior Court ensued.

While the Superior Court unanimously affirmed the trial court’s order in a published opinion, its reasoning differed. Specifically, in what the Superior Court considered to be a case of “first impression,” it found that the “regular use” exclusion improperly limits UIM coverage under § 1731, which provides such coverage for “persons who suffer injury arising out of the maintenance or use of a motor vehicle and are legally entitled to recover damages therefor from owners or operators of underinsured motor vehicles” absent a written rejection of UIM coverage. (emphasis in original opinion). According to the Superior Court, the “regular use” exclusion improperly limits UIM coverage to only those injuries arising out of the maintenance or use of an owned or occasionally used motor vehicle without any signed rejection form from the insured, thus violating the express language of §1731.

The Superior Court rejected Erie’s reliance upon Williams v. GEICO Govt. Emp. Ins. Co., 32 A.3d 1195, 1199 (Pa. 2011), in which the Supreme Court held that the regular use exclusion, as it applied to a state trooper, was not void as against a public policy in favor of protecting first responders. The Superior Court acknowledged that the Supreme Court in Williams expressly stated that the regular use exclusion did not violate the terms of the MVFRL, but dismissed this statement as mere dicta and, thus, nonbinding. The Superior Court further reasoned that Williams was premised upon Erie Ins. Exch. v. Baker, 972 A.2d 507 (Pa. 2008), a decision later abrogated by Gallagher.

On appeal, the Supreme Court reversed, holding that the “regular use” exclusion did not violate the MVFRL under the facts presented. In doing so, the Supreme Court carefully examined Williams, in addition to Burstein v. Prudential Prop. & Cas. Ins. Co., 809 A.2d 204 (Pa. 2002), which upheld the “regular use” exclusion based upon the MVFRL’s public policy goal of cost containment and rejected the insured’s claims that UIM coverage is universally portable the same way that first party benefits are, analyzing the material difference between the priorities of coverage between the two under §§ 1713 and 1733.

In reviewing the Superior Court’s decision below, the Supreme Court was highly critical of how broadly the Superior Court interpreted § 1731, finding that such interpretation was done “in a vacuum” resulting in the erroneous conclusion that UIM coverage is owed in virtually all circumstances absent a signed waiver by the insured. Citing both Burstein and Williams, the Supreme Court reiterated that the portability of UIM coverage is limited under the MVFRL, and that the MVFRL's express language does not preclude the "regular use" exclusion. According to the Supreme Court, the Superior Court here mistakenly adopted the argument that UIM coverage is universally portable despite rejection of this exact argument by the Supreme Court more than two decades ago in Burstein. In short, under the MVFRL, UIM coverage does not follow the person in all circumstances, so any argument that § 1731 prohibits all exclusions of UIM benefits fails. Upholding precedent that has existed for decades, the Supreme Court concluded that the "regular use" exclusion remains a permissible limitation of UIM coverage under the MVFRL.

Notably, the Supreme Court found that the facts of the case did not implicate stacking under § 1738. Similarly, the Supreme Court declined to analogize the requirement of a waiver under §1731 to the waiver requirement under § 1738, which the Supreme Court found to be dispositive in invalidating the household vehicle exclusion in Gallagher. According to the Supreme Court, any argument that Gallagher controls the enforceability of the "regular use" exclusion to UIM coverage "conflates issues surrounding stacking UIM coverage under Section 1738 with the issue of portability of UIM coverage arising under Section 1731."

Further, citing to its recent and unanimous decision in Erie Ins. Exch. v. Mione, 289 A.3d 524, 528 & n.10 (Pa. 2023), the Supreme Court reiterated that the scope of its holding in Gallagher was limited to those facts, and that the household vehicle exclusion remains valid and enforceable under certain circumstances. The Supreme Court found "particularly salient…the Mione Court's implicit rejection of the notion that UIM coverage is universally portable and not susceptible to exclusions from coverage. We unanimously rejected Mione's argument that because he was an insured under the automobile policy, its UIM coverage was applicable to him while operating his motorcycle, i.e., the coverage followed him regardless of the vehicle he was driving." In the same way, the "regular use" exclusion remains a valid way to limit UIM coverage under the MVFRL.

The Rush decision is undoubtedly a significant victory for insurers, especially in a post-Gallagher world. Coming on the heels of Mione, Rush would seem to suggest a renewed conservatism in how the validity of longstanding exclusions, like the regular use exclusion and household vehicle exclusion, are viewed. While challenges to policy exclusions will certainly continue, the Supreme Court's decision in Rush dealt a major blow to those claiming an unfettered right to UIM coverage under the MVFRL.

If you have questions about the "regular use" exclusion and the recent court decision, please contact any of the attorneys in our Insurance Group.

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