Pa. Ruling Leaves Auto Policy Stacking Questions

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The Pennsylvania Supreme Court recently issued its opinion in *Donovan v. State Farm*,[1] a decision that adds yet another layer to an already complicated coverage issue first raised in the Supreme Court's 2019 decision *Gallagher v. GEICO Indemnity Co*.[2]

In *Gallagher*, the Pennsylvania Supreme Court was faced with the question of whether a household vehicle exclusion in an auto policy providing coverage for underinsured motorist, or UIM, benefits acted as an impermissible waiver of inter-policy stacking.

Brian Gallagher had two policies issued by Geico, one for his motorcycle and one for his automobiles. After an accident, Gallagher sought UIM benefits under both policies.

Geico denied under the automobile policy citing the household vehicle exclusion. The exclusion precludes UIM coverage when the insured is, at the time of an accident, operating a vehicle owned by them or anyone else in their household, which is not insured for UIM coverage under that policy.

The court determined that, since Geico had issued both policies, and Gallagher had specifically paid for stacked UIM coverage under his auto policy, the household vehicle exclusion was operating as a de facto stacking waiver and impermissibly depriving him of paid-for stacked benefits.

Since the issuance of *Gallagher*, federal and state courts in Pennsylvania have struggled to apply its holding to the various permutations of fact presented by UIM claims. The recent *Donovan* decision is the first time the Pennsylvania Supreme Court has revisited Gallagher.

In *Donovan*, the court was tasked with determining the sufficiency of a stacking waiver as to either intra-policy stacking, stacking of UIM benefits among the vehicles listed on a sole policy, or inter-policy stacking, stacking of UIM benefits among multiple policies, and then applying its previous *Gallagher* h0olding to the result.

After a motor vehicle accident between a motorcycle operated by Corey Donovan and another vehicle, Donovan made claims against the liability policy of the other driver, the policy issued to him insuring his motorcycle, and the automobile policy issued to his mother by State Farm.

Donovan received full limits under the liability policy and his policy insuring his motorcycle. State Farm, however, denied the second-tier UIM claim based upon the household vehicle exclusion and the stacking waiver signed by his mother at the inception of the State Farm policy.

After Donovan filed suit, State Farm removed the case to the U.S. District Court for the Eastern District of Pennsylvania, the parties

filed a joint stipulation of facts, and then filed cross-motions for summary judgment on the coverage issues. Donovan argued that the stacking waiver only waived intra-policy stacking — stacking of the multiple vehicles on his mother's policy — and not inter-policy stacking — stacking of the coverages available on multiple policies.

Therefore, Donovan argued, the stacking waiver was invalid as to stacking between his motorcycle policy and his mother's auto policy with State Farm. Donovan further argued that the household vehicle exclusion should not operate as an unacknowledged waiver of stacking. Finally, Donovan argued that the coordination of benefits provision did not apply, as it only applied to unstacked UIM coverage.

The Eastern District granted summary judgment in favor of Donovan and denied State Farm's cross-motion. The Eastern District agreed that the stacking waiver signed by Donovan's mother was only sufficient to waive intra-policy stacking, not inter-policy stacking.

The Eastern District then followed the Pennsylvania Supreme Court's decision in *Gallagher*, which was issued while the cross-motions for summary judgment were pending, and determined that the household vehicle exclusion was void since the stacking waiver was invalid as to inter-policy stacking.

Finally, the Eastern District determined that, since the stacking waiver was invalid when applied to inter-policy stacking claims, the policy reverted to inter-policy stacked coverage, and the coordination of benefits provision in the stacked coverage portion of the policy applied.

State Farm appealed to the U.S. Court of Appeals for the Third Circuit and requested certification of these issues to the Pennsylvania Supreme Court. The Supreme Court agreed to review these questions.

First, the Supreme Court considered the issue of the stacking waiver and whether it was sufficient to waive inter-policy stacking, as well as intra-policy stacking.

It looked to its previous decision in *Craley v. State Farm Fire and Casualty Co.*[3] and reiterated its decision that, when a stacking waiver is signed at the inception of a policy insuring a single vehicle, the stacking waiver is sufficient to waive inter-policy stacking.

Resolving the question left unanswered in its *Craley* decision, the Supreme Court — for the first time — determined that a stacking waiver signed at the inception of a policy insuring multiple vehicles is only sufficient to waive intra-policy stacking, since the insured could not make a knowing waiver of inter-policy stacking based upon the language in the waiver itself.

The court did acknowledge that the stacking waiver form used by State Farm in this case had complied with the mandated language set forth by Pennsylvania's Motor Vehicle Financial Responsibility Law, or MVFRL. It once again implored the General Assembly to amend the language of the MVFRL to provide for waiver of inter-policy stacking on multi-vehicle policies.

Next, the Supreme Court rejected State Farm's contention that *Gallagher* was distinguishable, and thus inapplicable, because Donovan's mother had rejected stacking and paid lower premiums as a

result, while Gallagher had purchased stacking on his policies.

The Supreme Court determined that the logic of *Gallagher* was indistinguishable from the case before it. It stated that, while Gallagher had not signed a stacking waiver at all, Donovan had signed a waiver defective as to inter-policy stacking — and thus, the result is the same: The household vehicle exclusion was void.

Finally, the Supreme Court reviewed the coordination of benefits provision issue and determined that, since the stacking waiver was invalid as to inter-policy stacking and the policy defaults to stacked coverage, the coordination of benefits provision in the UIM coverage for stacked benefits applies.

The Supreme Court further stated that the coordination of benefits provision contained within the UIM coverage for unstacked benefits was just the kind of de facto waiver of stacking that the court had previously negated in Gallagher.

Justice David Wecht filed a concurring opinion. He stated that, though he was bound to agree with the result and reasoning of the majority, he continued to believe that *Gallagher* had been wrongly decided and the majority opinion in Donovan represents another in the long line of fallout from that "blunder," as Justice Wecht characterized it.

Justice Thomas Saylor filed a dissenting opinion, reiterating his dissent in *Gallagher*. While he recognized that *Gallagher* is binding precedent, he disagreed with the majority's extension of *Gallagher* to a situation where two different individuals had purchased the policies in question.

Donovan also settled, albeit implicitly, a disagreement regarding the interpretation of *Gallagher* that had arisen between insureds and insurers: Whether *Gallagher* was limited to the specific facts of the case before it or, as insureds had argued, that *Gallagher* was a complete abrogation of the household vehicle exclusion in all cases.

In *Donovan*, the Pennsylvania Supreme Court implicitly confirmed that a household vehicle exclusion will remain valid so long as the insured had validly waived inter-policy stacking, i.e., executed a stacking waiver when there was only a single vehicle on the policy at the time of execution. Thus, *Gallagher* does not represent a complete rejection of the household vehicle exclusion across the board.

Gallagher and *Donovan* are not the end of the story, however. Other UIM exclusions in Pennsylvania policies are also being challenged by insureds using this same roadmap.

Most recently, in *Rush v. Erie Insurance Exchange*,[4] a three-judge panel of the Pennsylvania Superior Court broke away from decades of precedent, and determined that the regular use exclusion violates the MVFRL. That exclusion precludes coverage for UIM benefits where the insured is injured in a motor vehicle accident while operating a vehicle that was available for her regular use — this issue often arises when an insured is injured while operating a vehicle owned by her employer.

While the trial court in *Rush* had determined the regular use exclusion was invalid based upon *Gallagher* and the exclusion's supposed effect as a de facto waiver of stacked

benefits, the Superior Court sidestepped those issues entirely.

Instead, the Superior Court held that the regular use exclusion was invalid as it violated the MVFRL, which, according to the court, requires UIM coverage be extended unless a valid UIM coverage rejection form has been executed by the insured. It is unclear at this point whether *Rush* will be appealed to the Pennsylvania Supreme Court, and/or reconsideration or *en banc* reargument before the Superior Court will be sought.

Moving forward, in the absence of legislative action by the General Assembly, it is unclear exactly what the court expects insurers to do with regard to stacking waivers.

On the one hand, the *Donovan* decision indicates that the type of stacking the insured is waiving depends on how many vehicles are on the policy at the time the waiver is executed. On the other hand, insurers are still required to comply with the wording for stacking waivers set forth in the MVFRL.

It is reasonable to expect that, as a way of minimizing the effect of *Donovan*, some insurers will begin to use two stacking waivers: one that complies with the language mandated by the MVFRL and one that expressly rejects stacking of both inter- and intra-policy stacking. The validity of such an approach, however, has yet to be tested before a court interpreting Pennsylvania law.

Ultimately, the insurers' concern is that there is an incalculable number of vehicles that their insureds are operating of which the insurers are completely unaware. Without being able to limit that unknown risk through exclusions, such as the household vehicle and regular use exclusions, insurers may have no choice but to reevaluate how they calculate premiums for UM/UIM coverage.

[1] *Donovan v. State Farm Mut. Auto. Ins. Co.*, 256 A.3d 1145 (Pa. 2021).
[2] *Gallagher v. GEICO Indemnity Co.*, 201 A.3d 131, 135 (Pa. 2019).
[3] *Craley v. State Farm Fire and Casualty Co.*, 895 A.2d 530 (Pa. 2006).
[4] *Rush v. Erie Insurance Exchange*, --- A.3d ---, 2021 WL 4929434 (Pa. Super. Oct. 22, 2021).

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