‘Regular Use Exclusions’ Stand: Pa. Supreme Court’s Latest Ruling Post-’*Gallagher*’

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After the Pennsylvania Superior Court determined in 2021 that “regular use exclusions” in UM/UIM policies violate the Pennsylvania Motor Vehicle Financial Responsibility Law (MVFRL), and in a post-*Gallagher* legal landscape, some were ready to put the regular use exclusion to rest for good. Now, however, in *Rush v. Erie Insurance Exchange*, 308 A.3d 780 (Pa. Jan. 29, 2024), the Pennsylvania Supreme Court, in a lengthy majority opinion, has confirmed that the regular use exclusion remains very much alive.

The Supreme Court first considered whether its prior decisions in *Burstein* and *Williams*—two cases which found regular use exclusions valid—were controlling precedent. The court recognized that, if it were to hold for the Rushes and find regular use exclusions invalid, it would necessarily have to overrule those prior decisions.

The court noted that, in *Burstein*, it had determined that voiding regular use exclusions would frustrate the public policy considerations that led to the enactment of the MVFRL, specifically cost containment. Further, in *Burstein*, the court rejected the insureds’ argument that UM/UIM coverage was “universally portable” and found, after a textual analysis of the MVFRL, that coverage does not “follow the person” as first party benefits do.

The court was again presented with the validity of regular use exclusions in the *Williams* case, nine years after the *Burstein* decision. In *Williams*, the insured’s argument was two-fold: first, the insured argued that the Pennsylvania legislature had evidenced a public policy that placed first responders in a more favored class that demanded higher protections and thus the regular use exclusion violated that public policy. Second, the insured argued that regular use exclusions violate Section 1731 of the MVFRL, since Williams had not expressly rejected UIM coverage and the exclusion was acting as an implicit waiver of that coverage. The Pennsylvania Supreme Court rejected both arguments, finding that first responders are not more favored than other insureds under the MVFRL and that regular use exclusions do not violate Section 1731 of the MVFRL, but instead further the cost containment considerations underlying the statute. Turning to the case before it, the Supreme Court noted that the Superior Court’s decision implicitly holds that UIM coverage is mandatory in “virtually” all instances, absent a voluntary waiver and thus, the Superior Court had revived the “universal portability” argument that the Supreme Court had previously rejected in *Burstein*. The court also rejected the Superior Court’s assertion that *Williams*’ holding that regular use exclusions do not violate the express terms of MVFRL was mere

dicta. Instead, the court recognized that the question before it was identical to the question decided in *Williams*.

The court also rejected the argument that the *Gallagher* case—where the court determined that "household vehicle exclusions" are invalid when they operate as de facto waivers of stacked coverage—was analogous and applicable to regular use exclusions. Rather, the court emphasized that *Gallagher* was a limited holding and pointed to its subsequent decision in *Mione*, where it upheld a "household vehicle exclusion" where the insured had rejected UM/UIM coverage on the policy that insured the vehicle they were operating at the time of the accident.

Ultimately, the Supreme Court determined that *Burstein* and *Williams* remain valid and controlling precedent by which it is bound. As such, the regular use exclusion was upheld and the Superior Court was reversed. As the Supreme Court stated: "If the MVFRL does not require that UIM coverage follow the insured in all circumstances, then the MVFRL cannot be read to prohibit exclusions from UIM coverage."

Justice David Wecht filed a concurring opinion agreeing with the majority's opinion as to whether regular use exclusions violate Section 1731 of the MVFRL. He would, however, have remanded the case back to the Superior Court to consider whether such exclusions violate Section 1738 of the MVFRL—as the trial court had held.

Pennsylvania's federal courts have picked up the thread from Justice Wecht's opinion and considered whether regular use exclusions violate Section 1738 of the MVFRL—that is, whether they act as de facto waivers of stacked coverage in violation of Section 1738, in light of the Supreme Court's determination that household vehicle exclusions may do just that in *Gallagher*.

In *Dayton v. The Automobile Insurance Co. of Hartford, Connecticut*, 3:20-cv-1833 (M.D. Pa. April 23, 2024), Judge Malachy Mannion of the U.S. District Court for the Middle District of Pennsylvania, when faced with that argument by an insured, also looked to the Supreme Court's decision in *Mione*. He then predicted that the Supreme Court would hold that, since the insured was not a named insured on the policy insuring the vehicle he was operating at the time of the accident (which was owned by his employer), Section 1738 does not entitle him to stack his personal auto UIM insurance on the policy covering that vehicle. As the insured was not permitted to stack these UIM policies, the regular use exclusion did not act as a de facto waiver of stacked coverage. No appeal was taken from this decision.

More recently, the U.S. Court of Appeals for the Third Circuit, in a nonprecedential opinion, determined that regular use exclusions do not violate Section 1738 but it employed different reasoning than that relied upon by *Mannion*. *See Eberly v. LM General Insurance*, No. 21-2995 (3d Cir. Aug. 1, 2024) (nonprecedential). In *Eberly,* the Third Circuit rejected the insured's argument that *Gallagher* controls whether regular use exclusions violate Section 1738 by acting as de facto stacking waivers. The court noted that the Supreme Court, in *Rush*, expressly rejected the argument that *Gallagher* stands for the proposition that "insurance policy provisions that conflict with the specific requirements of the MVFRL will be declared invalid and unenforceable." The Third Circuit ultimately confirmed that the regular

use exclusion does not act as a de facto waiver of stacked coverage because "the Eberlys can access stacked coverage on their cars and on any cars they drive provided they do not fit within any applicable exclusions to such coverage," and the exclusion only applies in "the limited circumstance presented here: where the claimant was operating a vehicle which he did not own but that was provided to him for his regular use." The Third Circuit therefore determined that the regular use exclusion does not violate Section 1738 of the MVFRL.

The Supreme Court opinion in *Rush* put to rest— yet again—the challenge to regular use exclusions. Other courts, including the Third Circuit, have picked up where the Supreme Court left off and quashed attempts to challenge regular use exclusions under the *Gallagher* framework. The scope of *Gallagher* continues to be clarified and narrowed by Pennsylvania's courts, despite attempts to overstate the breadth of its impact. Only time will tell whether challenges to the regular use exclusion have finally run their course. What does seem clear, however, is that the regular use exclusion is here to stay, preserving the cost containment concerns of the MVFRL.

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