**UNITED STATES DISTRICT COURT**
**DISTRICT OF CONNECTICUT**

ENVIRO EXPRESS, INC.,
Plaintiff,

v.

AIU INSURANCE COMPANY,
Defendant.

CIVIL ACTION NO.
3:04cv1093 (SRU)

# ORDER CERTIFYING QUESTION TO THE CONNECTICUT SUPREME COURT

With a potential tort liability in excess of two million dollars and its primary insurance carrier insolvent, Enviro Express, Inc. ("Enviro") seeks a declaratory judgment setting out the amount it must pay in tort damages before it is entitled to excess coverage under an umbrella policy issued to it by AIU Insurance Company ("AIU"). Enviro argues it is only obligated to pay the first $400,000 of any judgment entered against it in the underlying tort case; AIU argues that Enviro is responsible for the first $1,000,000. Enviro has moved for summary judgment; AIU has moved for judgment on the pleadings. Resolution of this dispute requires an answer to the question whether, under Connecticut law, payments by an uninsured motorist carrier are considered payments on an obligation of the uninsured tortfeasor for the purpose of determining the coverage of the tortfeasor's excess insurance carrier. My review of Connecticut cases and statutes leaves me unable to determine with any certainty how the courts of Connecticut would decide this public policy issue. Accordingly, I believe the question is appropriate for certification to the Connecticut Supreme Court.

## I. Facts

The following facts are undisputed by the parties for the purposes of the motions presently before the court. They are also the relevant facts for the purpose of certification. *See*

Conn. Gen. Stat. § 51-199b(f)(2).

A. Background

Enviro is a municipal waste hauler and transfer station operator in the State of Connecticut. In June 1998, an Enviro truck struck a car driven by Louis Mennillo, causing him serious injury. Mennillo sued Enviro in Connecticut Superior Court, seeking in excess of $2,000,000.

Enviro's primary automobile insurance coverage was provided by Reliance National Indemnity Company ("Reliance"), which insured Enviro for up to $1,000,000 per accident or loss. In addition, AIU provided Enviro with excess insurance coverage for amounts in excess of $1,000,000.

On October 3, 2003, before Reliance made any payments to Enviro, it was liquidated. Because of Reliance's liquidation and consequent inability to pay insurance coverage, Mennillo applied for, and received, uninsured[1] motorist benefits of $600,000 from his insurance carrier, Safeco Insurance Company ("Safeco").

Mennillo's lawsuit against Enviro has not yet gone to trial.

B. Relevant Terms of the AIU Policy

Enviro's policy from AIU ("the Policy") contains the following terms relevant to the present dispute.

**I. Coverage**

We will pay on behalf of the **Insured** those sums in excess of the Retained

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[1] It is unclear from the record whether the benefits were uninsured or underinsured motorist benefits. I use the term "uninsured" to refer to both because the distinction between the two is immaterial in this case.

> Limit that the **Insured** becomes legally obligated to pay by reason of liability imposed by law or assumed by the **Insured** under an **Insured Contract** because of **Bodily Injury, Property Damage, Personal Injury** or **Advertising Injury** that takes place during the policy Period and is caused by an **Occurrence** happening anywhere in the world . . . .
>
> ***
>
> **III. Limits of Insurance**
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> ***
>
> E. Retained Limit
>
> We will be liable only for that portion of damages in excess of the **Insured**'s Retained Limit which is defined as . . . [t]he total of the applicable limits of the underlying policies listed in the Schedule of Underlying Insurance and applicable limits of any other underlying insurance providing coverage to the **Insured** . . . .
>
> ***
>
> **VI. Conditions**
>
> ***
>
> P. When Loss is Payable
>
> Coverage under this policy will not apply unless and until the **Insured** or the **Insured's** underlying insurer is obligated to pay the Retained Limit.

The only automobile insurance listed on the "Schedule of Underlying Insurance" is the Reliance policy, which had a limit of $1,000,000. Thus, the Retained Limit for the purpose of the Mennillo accident is $1,000,000.

## II. Discussion

### A. Choice of Law

The Policy does not specify which state's law should apply. Because this case is brought

under this court's diversity jurisdiction, I must apply Connecticut's choice-of-law rules. Enviro and Mennillo are both located in Connecticut, and Connecticut is where the accident in question occurred. AIU, however, is located in New York, as is Suburban Carting Corporation ("Suburban"), Enviro's parent corporation, which purchased the insurance for Enviro.

Under these circumstances, the choice-of-law question is an easy one. The place of the insured risk is Connecticut, and, absent a "compelling showing" that another state has an overriding interest, Connecticut law applies. *Reichhold Chemicals, Inc. v. Hartford Accident and Indemnity Co.*, 252 Conn. 774, 782 (2000). AIU and Safeco's presence in New York is insufficient to overcome the presumption that Connecticut law applies.

B. The Dispute

The parties dispute how much of Mennillo's judgment, assuming he receives one, will be Enviro's responsibility and how much will be AIU's. The critical issue is what effect, if any, does Safeco's payment to Mennillo of $600,000 in uninsured motorist benefits have on Enviro's and AIU's payment obligations.

Under the terms of the Policy, AIU is only required to cover "sums in excess of the Retained Limit that [Enviro] becomes legally obligated to pay." Neither party seriously disputes that any verdict a jury returns in Mennillo's favor will, when judgment enters, be reduced by the $600,000 he has received from Safeco. *See Fahey v. Safeco Insurance Company of America*, 49 Conn. App. 306, 314 (1998) (noting that court will reduce jury verdict to account for uninsured motorist policy). Consequently, any judgment Mennillo receives will not obligate Enviro to repay the $600,000 already paid by Safeco.

According to AIU, this last statement settles everything. Enviro will not be legally

obligated to pay the $600,000; the Policy only obligates AIU to provide coverage for amounts Enviro is legally obligated to pay in excess of the Retained Limit; and, therefore, the $600,000 does not count towards the Retained Limit. Accordingly, AIU concludes, Enviro will be liable for the first $1,000,000 of any judgment Mennillo obtains.

Enviro disagrees. It argues that, although Mennillo's judgment will not legally obligate it to pay the $600,000, that is only because that $600,000 was effectively paid on its behalf by Safeco. In other words, Enviro will not be legally obligated to pay the $600,000 because it has, in essence, already paid it. Accordingly, argues Enviro, the $600,000 should go towards the Retained Limit just as if Enviro itself had written the check, and Enviro should only be responsible for the first $400,000 of any judgment Mennillo obtains.

To this argument, AIU counters that the Safeco payment was not made on behalf of Enviro, but was merely the result of Safeco's insurance contract with Mennillo.

In sum, the parties' dispute reduces to the question whether, under the circumstances, an uninsured motorist payment should be treated as a payment made in satisfaction of the tortfeasor's obligation or as a payment made in satisfaction of the insurer's contractual obligation to its insured. This question is difficult because, under Connecticut law, uninsured motorist payments are deemed "hybrid" obligations; sometimes they are treated as tort payments, and sometimes they are treated as contract payments. Which circumstance warrants which treatment is determined by reference to Connecticut's public policy, and I am unable to determine which treatment that policy indicates under the present circumstances.

C. Connecticut Law

There are several Connecticut Supreme Court cases that treat uninsured motorist payments as contractual payments between the carrier and the insured, not payments made on behalf of the tortfeasor. In *Pecker v. Aetna Casualty and Surety Co.*, 171 Conn. 443 (1976), the Court faced the question whether an "other insurance" clause in an uninsured motorist policy violated the prohibition on reducing uninsured motorist coverage below a statutory minimum.[2] The Court concluded that the "other insurance" payments made by other uninsured motorist carriers did not fall within the statutory exception that allowed reduction of the uninsured insurance minimum for payments made on behalf of the uninsured motorist responsible for the injury, because such payments were "'on behalf of' the insured, not the uninsured motorist." *Id.* at 452.

Other cases have followed the *Pecker* rationale. In *Mazziotti v. Allstate Insurance Co.*, 240 Conn. 799 (1997), the Court concluded that an uninsured motorist carrier was not collaterally estopped by its insured's judgment against the tortfeasor because the "insurer is not the alter ego of the tortfeasor." *Id.* at 817. Similarly, in *Dodd v. Middlesex Mutual Assurance Co.*, 242 Conn. 375 (1997), the Court concluded that, although an employer who paid workers' compensation benefits to a tort victim was entitled to recover those amounts from the tortfeasor, that did not permit the employer to invade the victim's uninsured motorist benefits. This was so, the Court reasoned, because "[p]ayments made pursuant to an uninsured motorist policy are paid on behalf of the insured, and not on behalf of the financially irresponsible motorist who has

[2] The "other insurance" clause in *Pecker* limited Aetna's liability according to the ratio of its coverage to any other uninsured motorist coverage, effectively bringing Aetna's coverage below the statutory minimum. *Pecker*, 171 Conn. at 445-46.

caused the insured's injuries." *Id.* at 384.

On the other hand, there are several cases where the Connecticut Supreme Court found it more suitable to view the uninsured motorist carrier as paying a tort obligation, not a contractual obligation. In *Haynes v. Yale-New Haven Hospital*, 243 Conn. 17 (1997), the Court was asked whether a tort victim who had been fully compensated by his uninsured motorist carrier was permitted to pursue a tort claim against an insured co-tortfeasor. The Court distinguished uninsured motorist payments from other insurance payments, which under the "collateral source" rule do not count against further recovery, because uninsured motorist benefits "operate in part as a liability insurance surrogate for the underinsured motorist third party tortfeasor." *Id.* at 25. Therefore, the Court concluded, under the doctrine of "double recovery" the plaintiff was barred from recovering from a co-tortfeasor amounts already paid by his uninsured motorist carrier. *Id.*

In *Collins v. Colonial Penn Insurance Co.*, 257 Conn. 718 (2001), a victim of a tort committed by co-tortfeasors, one of whom was unidentified, sued the identified tortfeasor and the victim's uninsured motorist carrier standing in place of the unidentified motorist. The victim settled with his uninsured motorist carrier, and the court held that the other tortfeasor was entitled to have an apportionment of any judgment ultimately obtained against him. This was so, the court concluded, even though Connecticut's tort reform statute explicitly barred apportionment between "parties liable for negligence and parties liable on any basis other than negligence," because the uninsured carrier was acting as "the unidentified driver's surrogate." *Id.* at 773.

The two lines of cases just cited are not inconsistent. On the contrary, they are the result of the Connecticut Supreme Court's recognition that

> . . . underinsured motorist benefits are sui generis. They are contractual but

> they depend on principles of tort liability and damages. Whether in any particular case underinsured motorist benefits should be treated as are other types of insurance must depend on a case-by-case analysis of the underlying purpose and the principles that apply to such benefits.

*Haynes*, 243 Conn. at 24. Thus, in determining the proper treatment of uninsured payments the Connecticut courts look to public policy. *See, e.g.*, *Dodd*, 242 Conn. at 380-81 ("outcome of this case is determined not by definitions but by an examination of the purpose of workers' compensation, the policy reasons for allowing an employer, in certain circumstances, to recoup compensation, and the nature of an insurance policy"); *Haynes*, 243 Conn. at 27 ("We must, therefore, examine the purpose that underinsured motorist coverage is meant to serve, and decide how, as a matter of policy, including consistency with related legal principles, that specific type of insurance should be treated."). No court in Connecticut, however, has examined how uninsured motorist payments should be treated when the question is whether they count towards a retained limit necessary to trigger the tortfeasor's excess insurance coverage.

I do not mean to suggest that Connecticut case law offers no indication of how this dispute could be resolved. Connecticut courts have repeatedly emphasized that the purpose behind Connecticut's uninsured motor vehicle laws is to ensure that tort victims are fully compensated. *Haynes*, 243 Conn. at 27 ("The public policy established by the underinsured motorist statute is that every insured is entitled to recover for the damages he or she would have been able to recover if the underinsured motorist had maintained an adequate policy of liability insurance.") (quoting *Rydingsword v. Liberty Mutual Ins. Co.*, 224 Conn. 8, 18 (1992)). That policy would appear to indicate that, in a case such as this, a tort victim's receipt of some uninsured motorist benefits should not serve to reduce the amount he would receive from the

tortfeasor's excess carrier to an amount below what he would have received if the tortfeasor had sufficient insurance. Nevertheless, the question is a close one, and, rather than attempting to guess at what policy Connecticut would prefer, I think it wiser to allow the Connecticut Supreme Court the opportunity to address the question in the first instance.

## III. Question For Certification

Because "the answer may be determinative of an issue in pending litigation" in this court and because "there is no controlling appellate decision, constitutional provision or statute" of Connecticut, *see* Conn. Gen. Stat. § 51-199b(d), the following question is certified to the Supreme Court of Connecticut:

> Is an uninsured or underinsured motorist payment considered a payment that the tortfeasor was legally obligated to pay for the purpose of determining whether the retained limit of the tortfeasor's excess insurance policy has been met?

The Connecticut Supreme Court may, of course, reformulate the question as it sees fit. Additionally, this court will make available to the Connecticut Supreme Court any part of the record in this case that will assist that Court in its review of the issue.

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It is so ordered.

Dated at Bridgeport, Connecticut, this 2nd day of May 2005.

/s/ Stefan R. Underhill
Stefan R. Underhill
United States District Judge