STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC **SUPERIOR COURT**

(FILE: January 5, 2013)

RICHARD A. FOOTE, as Administrator of the Estate of Colin B. Foote, on behalf of the Estate and on behalf of a class of similarly situated persons	:	
V.	:	**C.A. No. WC-2011-0040**
GEICO INDEMNITY COMPANY	:	

DECISION

SAVAGE, J. Before this Court is Defendant GEICO Indemnity Company's motion to dismiss the Second Amended Complaint filed by Plaintiff Richard A. Foote, as administrator of the estate of his late son, Colin B. Foote, for failure to state a claim pursuant to Rule 12(b)(6) of the Rhode Island Rules of Civil Procedure. Plaintiff filed suit against GEICO alleging breach of contract and bad faith, and seeking class certification and declaratory and injunctive relief, in connection with a claim made by Plaintiff under a motorcycle insurance policy issued by GEICO to the decedent. For the reasons set forth in this Decision, this Court denies Defendant's motion to dismiss Plaintiff's Second Amended Complaint.

I

Facts and Travel

In May 2010, Colin Foote died as a result of injuries sustained when a car struck his motorcycle. (Second Am. Compl. ¶ 4.) The tortfeasor, Laura Reale, subsequently pled guilty to a felony charge of driving to endanger with death resulting. (Second Am. Compl. ¶ 5.) Ms.

Reale held an insurance policy with Progressive Automobile Insurance that permitted coverage up to $100,000 per accident. (Second Am. Compl. ¶ 7.) Plaintiff asserts that this policy is insufficient to compensate the Estate of Colin B. Foote for his wrongful death such that Ms. Reale is an underinsured motorist pursuant to R.I. Gen. Laws § 27-7-2.1(g).[1] (Second Am. Compl. ¶ 7.)

Colin B. Foote was insured under a motorcycle liability policy issued by GEICO. (Second Am. Compl. ¶ 4.) The Policy – No. 4174-69-95-55 – provides bodily injury liability coverage of $25,000 per person and $50,000 per occurrence. (Second Am. Compl. ¶ 6, Ex. 1, GEICO Policy, at 2.) The Policy also provides uninsured/underinsured motorist ("UM") coverage of $25,000 limit per person and $50,000 per occurrence. (Second Am. Compl., Ex. 1, Policy, at 2.) The limit for medical payments ("Med Pay") under the Policy is $2,500, the statutory minimum amount of medical payments coverage that insurers are required to provide in any insurance policy delivered or issued in Rhode Island, pursuant to R.I. Gen. Laws § 27-7-2.5. (Second Am. Compl., Ex. 1, Policy, at 2.)

The Policy provides, in pertinent part, that "[t]he amount payable under [UM] Coverage will be reduced by all amounts [. . .] payable under the Bodily Injury Coverage or Medical Payments Coverage of this [P]olicy." (Second Am. Compl., Ex. 1, Policy, Part IV, Coverage J.) The UM coverage part of the Policy further contains a "Trust Agreement" which provides that if GEICO pays any covered person for a loss under that provision:

[1] This statute provides, in pertinent part, as follows:

> (g) For the purposes of this section "uninsured motorist" shall include an underinsured motorist. An "underinsured motorist" is the owner or operator of a motor vehicle who carries automobile liability insurance with coverage in an amount less than the limits or damages that persons insured pursuant to this section are legally entitled to recover because of bodily injury, sickness, or disease, including death, resulting from that injury, sickness or disease.

R.I. Gen. Laws § 27-7-2.1(g).

> 1. We [GEICO] are entitled to recover from the covered person an amount equal to such payment from the proceeds of any settlement or judgment made on his [or her] behalf against the person or organization legally responsible for the bodily injury.
>
> 2. The person to or for whom we make payment must hold in trust for us all rights to recover money which he [or she] may have against the person or organization legally responsible for the damages which are the subject of the claim made under this amendment.
>
> 3. The covered person must do everything proper to secure our rights and to do nothing to prejudice these rights.
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> 4. If we ask in writing, the covered person will take necessary or appropriate action, through a representative designated by us, to recover payment as damages from the responsible person or organization; if there is a recovery, then we shall be reimbursed, on a pro-rata basis, out of the recovery for expenses, costs and attorney's fees incurred in connection with this.
>
> 5. The covered person must execute and deliver to us any legal instruments or papers necessary to secure his [or her] and our rights and obligations.

(Second Am. Compl., Ex. 1, Policy, Part IV, Coverage J.) (emphasis omitted).

Plaintiff submitted a claim to GEICO under the UM provision of the Policy. (Second Am. Compl. ¶ 8.) In a letter dated August 2, 2010, GEICO offered the $25,000 policy limit to settle the claim. (Second Am. Compl. ¶ 9, Ex. 2, Offer Letter.) GEICO conditioned its offer, however, on Plaintiff executing a "Release and Trust Agreement" and "Hold Harmless Agreement" which, in accordance with the Policy, provided for the amount payable under the Med Pay coverage of the Policy to be deducted from the UM Policy limit and contained terms detailing the manner of subrogation. (Sec Am. Compl. ¶¶ 9-11, Ex. 3, Settlement Documents.) Plaintiff objected to these conditions; to date, the parties have not reached a settlement agreement. (Second Am. Compl. ¶ 12.)

On January 27, 2011, Plaintiff filed a Complaint against GEICO in this Court. (Compl.) On April 22, 2011, GEICO moved to dismiss Plaintiff's Complaint pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. (GEICO Mot.) GEICO also filed a memorandum in support of its motion to dismiss and attached, as exhibits to its memorandum, the settlement letter, the Release and Trust Agreement and Hold Harmless Agreement, and the Policy; Plaintiff did not attach these documents to the Complaint. (GEICO Mem., Exs. 1-2; Compl.) Plaintiff filed an objection to GEICO's motion to dismiss his Complaint on June 10, 2011. (Pl. Obj.)

This Court heard oral argument on GEICO's motion to dismiss on June 20, 2011. At oral argument, the parties agreed that the Court could convert the motion to dismiss to a motion for summary judgment to consider the documents submitted outside of the pleadings. The parties further agreed that there were no genuine issues of material fact in dispute such that this Court could construe the Policy as a matter of law. The Court stayed discovery pending its decision on the summary judgment motion. (Order, dated August 22, 2011.)

On March 16, 2012, after conferring with the Court regarding the procedural posture of the case, Plaintiff filed his First Amended Complaint, to which he inadvertently attached the incorrect insurance policy. (First Am. Compl.) On April 2, 2012, Plaintiff filed his Second Amended Complaint, to which he attached the correct Policy as well as the pertinent settlement documents. The parties stipulated that the Second Amended Complaint is the operative pleading in this matter.

GEICO then filed a motion to dismiss the Second Amended Complaint, to which Plaintiff objected. It is this motion that is the subject of this Decision. The parties agree that this Court may consider their memoranda and arguments made with respect to GEICO's first motion to

dismiss in deciding its pending motion to dismiss the Second Amended Complaint. As the Policy at issue is now attached to the Second Amended Complaint, the parties agree further that the Court need not convert that motion to a motion for summary judgment, but may proceed to decide the pending motion to dismiss under Rule 12(b)(6).

In the Second Amended Complaint, Plaintiff alleges bad faith (Count I) and breach of contract (Count II). (Second Am. Compl. at 3-4.) Plaintiff articulates three reasons why the GEICO UM Policy violates Rhode Island law and hence constitutes a breach of contract and bad faith:

> a) [The Policy requires] Plaintiff to agree to reduce uninsured motorist limits by amounts that the insured received for Med Pay;
>
> b) [The Policy requires] Plaintiff to hold all third-party claims in trust for the uninsured motorist insurer, rather than merely the insured's claims against the uninsured motorist;
>
> c) [The Policy requires] Plaintiff to agree that GEICO may reimburse itself from the proceeds of any recovery on the third-party claims without regard to whether Plaintiff or Plaintiff's decedent had been made whole.

(Second Am. Compl. ¶ 14.) With respect to both his bad faith claim in Count I, and his breach of contract claim in Count II, "Plaintiff demands judgment against Defendant GEICO for compensatory damages, interest, costs, and such other and further relief as may be just." (Second Am. Compl. at 4.) Plaintiff also seeks punitive damages and attorneys' fees in connection with his bad faith claim. (Second Am. Compl. at 4.)

After pleading his causes of action for bad faith and breach of contract in Counts I and II, respectively, Plaintiff includes an additional section in his Second Amended Complaint that is entitled "Class Action Allegations". In this section, he requests class certification and

declaratory and injunctive relief.[2] (Second Am. Compl. at 5-8.) Plaintiff sets forth issues in this section that are similar to the arguments underlying his bad faith and break of contract claims in Counts I and II:

> a) Whether Defendant GEICO violated the laws of the State of Rhode Island by unlawfully insisting upon its alleged right to deduct Med Pay payments from uninsured and underinsured motorist coverage;
>
> b) Whether Defendant GEICO violated the laws of the State of Rhode Island by requiring that its insureds hold all third-party claims and recoveries in trust for GEICO as a condition of GEICO paying underinsured and uninsured motorist coverage to said insureds;
>
> c) Whether Defendant GEICO violated the laws of the State of Rhode Island by requiring its insureds to sign releases that entitled GEICO to reimburse itself from the proceeds of any recovery from third-parties, and whether or not GEICO's insureds first have been made whole;
>
> d) Whether Defendant GEICO's policy of insurance violates the laws of the State of Rhode Island.

(Second Am Compl. ¶ 26.) Plaintiff seeks a declaration that GEICO's conduct and Policy provisions violate Rhode Island law as well as an order "preliminarily and permanently enjoining GEICO from engaging in such unlawful conduct and issuing such policies." (Second Am. Compl. at 7-8.) Plaintiff also seeks compensatory, punitive, and exemplary damages and pre-judgment interest and attorneys' fees and costs in connection with his Class Action Allegations. (Second Am. Compl. at 8).

In moving to dismiss Plaintiff's Second Amended Complaint under Rule 12(b)(6), GEICO argues that an insurer's compliance with the express terms of a policy cannot constitute

[2] In support of his request for class certification, Plaintiff alleges that: his claims are typical of the claims of class members; he will fairly and accurately protect the interests of the class; questions of law and fact that are common to the members of the class predominate over questions that affect only individual members; class action treatment is superior to the alternatives for the fair and efficient adjudication of the controversy; and separate adjudications would create a risk of inconsistent or varying adjudications. (Second Am. Compl. ¶¶ 24-29.)

breach of contract or bad faith. (GEICO Mem. at 2.) GEICO further contends that Med Pay offsets are permissible under Rhode Island law, that its reservation of subrogation rights is likewise permissible under state law, and that the "made whole" doctrine is not violated by the Policy or its settlement offer. (GEICO Mem. at 6-16.) GEICO makes no arguments about Plaintiff's Class Action Allegations or his request for declaratory and injunctive relief contained within that section of his Second Amended Complaint.

In response, Plaintiff further explicates the three bases for his breach of contract and bad faith claims: 1) the Policy's Med Pay setoff provision violates Rhode Island law because it is inconsistent with the statutorily mandated minimum amount of medical payments coverage that a policy must provide under § 27-7-2.5; 2) the Policy violates § 27-7-2.1(h) by extending GEICO's subrogation rights beyond Ms. Reale and her insurer; and 3) the Policy violates the made whole doctrine because it entitles GEICO to receive the first $25,000 of any recovery, assigns all rights to GEICO, requires all monies recovered to be paid directly to GEICO, and further deducts GEICO litigation expenses. (Pl. Mem. at 1-10.) Plaintiff also asserts that it is irrelevant whether GEICO's conditional settlement offer comports with the Policy. (Pl. Mem. at 10-11.) Plaintiff, too, makes no argument with respect to his Class Action Allegations or his request for declaratory and injunctive relief contained within that section of his Second Amended Complaint.

II
Standard of Review

Motions to dismiss, filed pursuant to Rule 12(b)(6) of the Rhode Island Superior Court Rules of Civil Procedure for failure to state a claim upon which relief can be granted, "test the legal sufficiency of a claim for relief in any pleading." R.I. Super. R. Civ. P., Comm. § 12:9.

"Rule 12(b)(6) does not deal with the likelihood of success on the merits, but rather with the viability of a plaintiff's bare-bones allegations and claims as they are set forth in the complaint." Hyatt v. Village House Convalescent Home, Inc., 880 A.2d 821, 823 (R.I. 2005). Because "the sole function of a motion to dismiss is to test the sufficiency of the complaint," review is confined to the four corners of the pleading. Palazzo v. Alves, 944 A.2d 144, 149 (R.I. 2008) (quoting Rhode Island Affiliate, ACLU, Inc. v. Bernasconi, 557 A.2d 1232, 1232 (R.I. 1989)).

In ruling on a Rule 12(b)(6) motion to dismiss, the Court must look to the allegations in the complaint in a light most favorable to the plaintiff and assume them to be true. Palazzo, 944 A.2d at 149 (citing Ellis v. Rhode Island Public Transit Authority, 586 A.2d 1055, 1057 (R.I. 1991)). In doing so, the Court must "resolve any doubts in the plaintiff's favor." Rhode Island Affiliate, ACLU, Inc., 557 A.2d at 1232. The Court may only grant the Rule 12(b)6) motion to dismiss "'when it is clear beyond a reasonable doubt that the plaintiff would not be entitled to relief from the defendant under any set of facts that could be proven in support of the plaintiff's claim.'" Palazzo, 944 A.2d at 149 (quoting Ellis, 586 A.2d at 1057).

III

Analysis

As this Court has noted, the three bases for Plaintiff's claims of breach of contract and bad faith are: the Med Pay setoff provision of the Policy unlawfully reduces his recovery below the statutory minimums; the subrogation provision of the Policy expands GEICO's rights beyond those authorized by statute; and GEICO's reservation of rights violates the "made whole" principle. In addition, as part of his Class Action Allegations, Plaintiff seeks a declaratory judgment that these provisions of the Policy —and GEICO'S conduct in offering to settle on those terms—violate Rhode Island law. Although Plaintiff's request for declaratory relief as part

of his Class Action Allegations is not yet ripe, as he has not asked that a class be certified or sought a declaratory judgment, the parties have briefed the issues of the legality of the Policy provisions as part of the motion to dismiss. As Plaintiff's arguments that the Policy provisions violate Rhode Island law thus serve as the underpinning of all of the allegations in his Second Amended Complaint, including his claims for breach of contract and bad faith, as well as his request for declaratory and injunctive relief in his Class Action Allegations, this Court will first address those contentions.

A

Med Pay Setoff Provision of Policy

This Court will begin by addressing Plaintiff's argument that the Med Pay provision of the GEICO Policy violates Rhode Island law. The Policy at issue contains "Uninsured/Underinsured Motorist [UM] Coverage" under which "[GEICO] will pay damages which a covered person is legally entitled to recover from the owner or operator of an underinsured motor vehicle because of bodily injury sustained by a covered person, and caused by accident." (Second Am. Compl., Ex. 1, Policy, Part IV, Coverage J.) There is no dispute that the tortfeasor qualifies as an underinsured motorist within the Policy and pursuant to § 27-7-2.1. There is likewise no dispute that UM Coverage applies to the accident that gave rise to this action.

The Policy further sets forth a "Limit of Liability" that "[t]he amount payable under [UM] Coverage will be reduced by all amounts [. . .] payable under the Bodily Injury Coverage or [Med Pay] Coverage of this policy." (Second Am. Compl., Ex. 1, Policy, Part IV, Coverage J.) GEICO's settlement correspondence to Plaintiff reiterated these terms of the Policy. In a

letter dated August 2, 2010, GEICO's claims examiner apprised Plaintiff of the Med Pay setoff as follows:

> Confirming our discussion, we are offering the policy limits of $25,000 as settlement of Colin Foote's underinsured motorist bodily injury claim.
>
> As discussed, any amounts issued on behalf of Colin B[.] Foote under the Medical Payments Coverage of the policy would then offset the amount of Underinsured Motorist Bodily Injury coverage under the Policy available to Colin B[.] Foote.
>
> Please be advised that once received, I will forward a certified copy of the Policy Declaration Page [as] well as the Policy Contract which describes the offset taken for the payments made under the medical payments coverage under the policy of $2,500 which can be located on page 7 of the policy contract, Part IV, Coverage J: Uninsured Motorist Coverage.

(Second Am. Compl., Ex. 2, Offer Letter.) Plaintiff declined to settle his claim or execute the settlement documents because he objected to their terms.[3] (Compl. ¶ 12.)

The Med Pay statute in Rhode Island provides, in pertinent part, as follows:

> [n]o policy insuring against loss resulting from liability imposed by law, or for injuries caused by a motor vehicle collision or for injuries arising out of the ownership, maintenance, or use of a motor vehicle, shall be delivered or issued in this state unless coverage is provided in the policy for medical payments in an amount of not less than twenty-five hundred dollars ($2,500) for each individual[.]

§ 27-7-2.5 (emphasis added). By its terms, therefore, it requires insurance policies covering injuries resulting from either motor vehicle collisions or the ownership, maintenance, or use of a motor vehicle that are issued or delivered in Rhode Island to provide a minimum of $2,500 in Med Pay coverage per individual. Id.

The UM statute in Rhode Island provides, in pertinent part, as follows:

[3] GEICO asserts that Plaintiff has made no claim for Med Pay coverage under the Policy.

> [t]he insurer shall provide uninsured motorist coverage in an amount equal to the insured's bodily injury liability limits [. . . and] in no event less than the limits [$25,000] set forth in [the bodily injury statute,] § 31-31-7.[4]

§ 27-7-2.1(a) (emphasis added). By its terms, therefore, it requires insurers to provide a minimum of $25,000 in UM coverage. Id. All provisions and policies inconsistent with statutes governing liability insurance "shall be void." § 27-7-3; see also Allstate Ins. Co. v. Fusco, 101 R.I. 350, 356, 223 A.2d 447, 450 (1966) (insurance contracts "must conform to constitutionally valid conditions imposed by the legislature").

The GEICO Policy at issue here provides for Med Pay coverage of $2,500 and UM coverage of $25,000 per person or $50,000 per occurrence. (Second Am. Compl. Ex. 1, Policy, at 2.) There is no question, therefore, that the limits for Med Pay and UM coverage in the Policy meet the statutory minimums mandated by Rhode Island law. See §§ 27-7-2.5 and 27-7-2.1(a). The question raised by the motion to dismiss, however, is whether the Med Pay setoff provision of the Policy—that requires that "[t]he amount payable under [UM] Coverage will be reduced by all amounts [. . .] payable under the [. . .] [Med Pay] Coverage—violates Rhode Island law because it effectively reduces the amount of UM coverage provided in the Policy below the statutory minimum mandated in § 27-7-2.1(a) or, viewed another way, provides the minimum

[4] This statute provides, in pertinent part, as follows:

> (a) No policy or bond shall be effective under § 31-31-6 unless issued by an insurance company or surety company authorized to do business in this state, except as provided in subsection (b) of this section, nor unless the policy or bond is subject, if the accident has resulted in bodily injury or death, to a limit, exclusive of interest and costs, of not less than twenty-five thousand dollars ($25,000) because of bodily injury to or death of one person, in any one accident and subject to the limit for one person, to a limit of not less than fifty thousand dollars ($50,000) because of bodily injury to or death of two (2) or more persons in any one accident, and if the accident has resulted in injury to, or destruction of, property to a limit of not less than twenty-five thousand dollars ($25,000) because of injury to or destruction of property of others in any one accident.

§ 31-31-7(a).

amount of UM coverage but fails to provide the minimum amount of Med Pay coverage mandated by statute.

Plaintiff contends that the statutes set forth inviolable minimum coverage amounts—i.e., it is "clear that insurance policy provisions derogating from statutorily mandated coverages and coverage limits are void." (Pl. Mem. at 2.) GEICO counters that Rhode Island law "expressly authorizes" the Med Pay setoff provision of its Policy so as long as the Med Pay and UM coverage limits of the Policy satisfy the statutory minimums prior to any setoff. (GEICO Mem. at 6, 9.)

In this Court's view, GEICO has failed to demonstrate beyond a reasonable doubt that Plaintiff's contention that the Med Pay setoff violates Rhode Island law fails as a matter of law. Indeed, the case law is at best unclear, and when considering a motion to dismiss, this Court must resolve all doubts in Plaintiff's favor.

In Aldcroft v. Fidelity & Casualty Co. of New York, our Supreme Court considered "whether an insurer may, by the terms of the contract of insurance offered pursuant to the uninsured motorist coverage statute, § 27-7-2.1, abrogate the limits of liability established by that statute." 106 R.I. 311, 317, 259 A.2d 408, 413 (1969). The defendant insurer argued that the insurance contract at issue validly provided that the amount of damages paid to an insured were to be reduced by any amounts paid to the plaintiff under a workmen's compensation act, disability benefits law, or other similar law. Id., 106 R.I. at 316-17, 259 A.2d at 412-13. It thus maintained that the wages and medical expenses paid to the injured plaintiff by his employer, subsequent to the motor vehicle accident and during the pendency of the action, should be deducted from the damages awarded to the insured under the policy. Id.

The Supreme Court rejected this argument, stating: "[n]othing in the statute warrants the issuance of a policy providing for such protection of the insured motorist" in any amount less than the statutory minimum (which was then $10,000). Aldcroft, 106 R.I. at 318-19, 259 A.2d at 413-14; see also Poulos v. Aetna Casualty & Surety Co., 119 R.I. 409, 414, 379 A.2d 362, 365, n.5 (1977) (holding that insurer's offset of workmen's compensation benefits against UM coverage permissible only to the extent of insured's double recovery and citing Aldcroft for the proposition that an "insurer may not utilize this deduction to reduce its payment to less than the minimum amount mandated by statute"). The Court held that nothing in the statute conferred upon an insurer "authority to require an insured to accept a policy proffered for delivery which contains such a limitation upon the mandated statutory coverage." Id. The Court thus declared the offending policy provisions to be void and construed the policy "as having included within its terms coverage against damage by uninsured motorists up to the extent of the statutory limit[.]" Id., 106 R.I. at 319-20, 259 A.2d at 414.

In a subsequent decision, our Supreme Court considered a case in which an insured collected the $10,000 statutory minimum and policy limit under each of two policies issued by different insurers. Lombardi v. Merchants Mut. Ins. Co., 429 A.2d 1290, 1290-93 (R.I. 1981). The insured then won a $32,000 judgment against the uninsured tortfeasor, who had secured a $10,000 bond prior to the judgment. Id. The insured and both insurers sought the proceeds of the bond, with one insurer arguing that it was entitled to the bond pursuant to the terms of the insurance policy and settlement agreement under which it paid the insured. Id. The Court likened the situation to that considered in Aldcroft—i.e., an attempt to reduce coverage below the statutory minimum—and reiterated the principle that "[n]othing in the [UM] statute warrants the issuance of a policy providing for such protection of the insured motorist in any lesser

amount or in any alternative amount." Id. (quoting Aldcroft, 106 R.I. at 311, 319, 259 A.2d at 408, 414). The Court stated that the coverage requirements of the UM statute, § 27-7-2.1, and the bodily injury statute, § 31-31-7, do "not provide for diminution of said coverage by virtue of a partial satisfaction from the uninsured motorist or from a bond that might be filed on his behalf." Lombardi, 429 A.2d at 1292-93. The Court reasoned that, "[i]f an insurance carrier cannot issue a policy that has the effect of diminishing its effective coverage under" the UM coverage requirement, then "a fortiori [the insurer] may not" condition payments due under the policy on the insured agreeing to "a release or assignment that would have the same effect of diluting its proper liability." Id. at 1293.

Finally, the Supreme Court had occasion to consider whether an insurer, in conformance with the setoff provisions of its insurance policy, may decline to pay Med Pay coverage ($3,000 policy limit) where it already paid the plaintiff the full amount of UM coverage under the policy ($50,000 policy limit). DiTata v. Aetna Casualty and Surety Co., 542 A.2d 245, 246-47 (R.I. 1988). At the time the Court decided DiTata, there was no statutorily mandated minimum Med Pay coverage; the statutorily mandated minimum for UM coverage was $50,000. Id. Although the Court noted that it "has disallowed contractual limitations that curtail an insured's recovery in instances in which the insured has not recovered the amount of his of her actual loss[,]" the Court upheld the setoff. Id. at 248 (citing Lombardi, 429 A.2d at 1292; Poulos, 119 R.I. at 414-15, 379 A.2d at 365). Specifically, the Court held "that the insurer was entitled to limit its payment to the plaintiffs to the uninsured-motorist coverage because it provided the statutory minimum recovery of $50,000." DiTata, 542 A.2d at 248; see also Pickering v. Am. Employers Ins. Co., 109 R.I. 143, 153, 282 A.2d 584, 590 (1971) ("We said in Aldcroft that there is nothing

in § 27-7-2.1 which authorizes the issuance of a policy providing for protection in any lesser amount than that mandated by the statute.").

GEICO relies exclusively on DiTata to argue that the provision of its Policy at issue here that allows it to deduct Med Pay payments from the payment of UM coverage is permissible under Rhode Island law because the Policy expressly provides for such an offset. (GEICO Mem. at 6-9.) Indeed, GEICO alleges that the facts of the instant matter "parallel the facts of DiTata." (GEICO Mem. at 7.) Plaintiff, on the other hand, contends that "Rhode Island law is clear that insurance policy provisions derogating from statutorily mandated coverages and coverage limits are void." (Pl. Mem. at 2.)

Without deciding the legality of the challenged provision of the Policy as a matter of law—a task arguably more appropriate for resolution by way of a declaratory judgment than decision on a Rule 12(b)(6) motion to dismiss—this Court concludes that GEICO has failed to prove beyond a reasonable doubt that Plaintiff's Med Pay argument regarding the legality of the Med Pay setoff provision of the Policy fails as a matter of law. GEICO's reading of DiTata is strained: although the Court in DiTata upheld the offset, there was no statutory minimum for Med Pay coverage in effect at that time. 542 A.2d at 246-47. The statutory scheme which governed DiTata simply is not present here. Moreover, the Court in DiTata, in reliance on Aldcroft and Lombardi, specifically noted that the defendant insurer had provided the statutorily required minimum amount of UM coverage. Id. Here, in contrast, application of the setoff provision in the GEICO Policy would reduce the UM coverage below the minimum amount set by statute or, viewed another way, would provide the statutorily required minimum amount of UM coverage but would deprive Plaintiff of the statutorily required Med Pay coverage altogether.

Accordingly, Plaintiff's challenge to the Med Pay setoff provision of the Policy must survive GEICO's motion to dismiss because Plaintiff has raised the possibility that if GEICO were entitled to offset its Med Pay or UM payments to insureds against the other form of payment made, then GEICO would not be providing the statutory minimum amount of insurance that it is obligated to provide under the other form of coverage. The case law, at the very least, lends itself to a colorable claim that the minimum amount of insurance coverage that Rhode Island law mandates that insurers provide insureds may not be abrogated by the terms of an insurance policy. See Aldcroft, 106 R.I. at 311, 319, 259 A.2d at 408, 414; Lombardi, 429 A.2d at 1292-93; Pickering, 109 R.I. at 153, 282 A.2d at 590. In short, there is no precedent of such dispositive clarity and force to resolve this dispute in favor of GEICO at this stage of the litigation.

B

Subrogation Provision of the Policy and the "Made Whole" Doctrine

This Court next must consider Plaintiff's claim that the GEICO Policy and settlement offer violate Rhode Island law by extending the insurer's subrogation rights beyond the tortfeasor and her insurer. This inquiry also must address the sufficiency of Plaintiff's claim that the Policy and settlement offer violate the "made whole" doctrine by allowing GEICO the right to recover payments it makes to Plaintiff before Plaintiff has been made whole.

Subrogation is an insurer's right, if it pays a loss incurred by its insured, to assert the insured's rights against the "third party who was responsible for the injury." Lombardi, 429 A.2d at 1291 (citing Silva v. Home Indemnity Co. R.I., 416 A.2d 664 (R.I. 1980)). According to the "made whole" principle, an insurer may not subrogate to its insured's right against the tortfeasor until the insured's total judgment is satisfied. Id., at 1291-93 (summarizing

authorities). These issues concern the scope and timing of subrogation, i.e., 1) against whom GEICO may assert Plaintiff's rights, and 2) when GEICO may do so in relation to Plaintiff's quest for full compensation. Because the issues are related, they are considered in tandem.

The Policy's "Trust Agreement" provides that if GEICO pays any covered person UM coverage:

> 1. We [GEICO] are entitled to recover from the covered person an amount equal to such payment from the proceeds of any settlement or judgment made on his [or her] behalf against the person or organization legally responsible for the bodily injury.
>
> 2. The person to or for whom we make payment must hold in trust for us all rights to recover money which he [or she] may have against the person or organization legally responsible for the damages which are the subject of the claim made under this amendment.

(Second Am. Compl., Ex. 1, Policy, Part IV, Coverage J.) (emphasis omitted). As with the claims examiner's letter describing the Med Pay setoff, the "Release and Trust Agreement" in GEICO's settlement correspondence comports with the Policy:

> As a further consideration of this payment Richard Foote, as Administrator of The Estate of Colin B[.] Foote, agree to hold in trust for the benefit of the Company [GEICO] all rights, claims, and causes of action which I have or may have against the person or persons or organization legally responsible in whole or in part for the injuries and damages sustained by the insured arising from this accident. I[,] Richard Foote, as Administrator of The Estate of Colin B[.] Foote, will take, through the representative designated by the Company, such action in my own name as is requested by the Company to recover damages from the person or person or organization legally responsible for me therefore, and the Company shall have the right at its election to employ an attorney of its choice to represent me in any such action to be taken in my name. Any monies recovered as a result of judgment, settlement, or otherwise, whether obtained as a result of action requested by the Company or not, will be paid to the Company provided, however, any sum recovered in excess of Twenty Five Thousand dollars ($25,000.00), shall be retained by me, and I hereby covenant and agree that from said monies to be paid to me that I

> will pay proportionate share therefrom of the cost, expenses, and attorney fees incurred in the action taken for recovery of said monies.

(Second Am. Compl., Ex. 2, Settlement Documents.) (emphasis added).

The UM statute, § 27-7-2.1(h), provides that where, as here, an insured recovers from its own insurer under a UM policy, the insurer is entitled to subrogation against the tortfeasor and her insurer:

> In the event that the person entitled to recover against an underinsured motorist recovers from the insurer providing coverage pursuant to this section, that insurer shall be entitled to subrogation rights against the underinsured motorist and his or her insurance carrier.

(emphasis added).

The parties here disagree as to the permissible scope of GEICO's right to subrogation and further disagree as to whether the "made whole" doctrine is even implicated in this case. Plaintiff contends that the Policy and GEICO's settlement offer impermissibly conflict with the subrogation statute, § 27-7-2.1(h). (Pl. Mem. at 4-6.) Specifically, Plaintiff argues that, in accordance with the plain language of the statute, GEICO is entitled only to subrogation rights against the tortfeasor and her insurer. (Pl. Mem. at 4-6.) Insofar as the Policy and settlement offer authorize subrogation against any responsible party, Plaintiff contends that they violate the UM statute under the precept of statutory construction of expressio unius est exclusio alterius. (Pl.'s Mem. at 5.) (citing Ret. Bd. of Employees' Ret. Sys. of State & City of Cranston v. Azar, 721 A.2d 872, 877-78 (R.I. 1998)). Moreover, Plaintiff avers that the Policy, as embodied in the offer of settlement, violates the "made whole" doctrine because GEICO would be paid the first $25,000 of any recovery regardless of whether Plaintiff were made whole, and because all rights,

claims, and causes of action arising out of the underlying accident would be assigned to GEICO. (Pl. Mem. at 6-10.)

GEICO responds that, in accordance with the Policy, it is entitled to subrogation not only against the tortfeasor or her insurer but from any "person or organization legally responsible for the bodily injury." (Second Am. Compl., Ex. 1, Policy, Part IV, Coverage J; GEICO Mem. at 9-11.) It argues that this provision does not run afoul of § 27-7-2.1(h) of the UM statute and that to construe the law otherwise would be to permit a double recovery by Plaintiff. Id. Regarding the "made whole" doctrine, GEICO denies that the Policy requires subrogation where the Plaintiff has not been made whole. (GEICO Mem. at 11-14.) GEICO emphasizes that "whether or not Plaintiff will be made whole, will recover anything from any third party, or will have anything setoff against any possible future recovery is all wholly hypothetical." Id.

Section 27-7-2.1(h) of the UM statute and the Policy arguably are not in harmony: the former authorizes subrogation "against the underinsured motorist and his or her insurance carrier" whereas the latter more broadly entitles GEICO to subrogation against "the person or organization legally responsible for the bodily injury." GEICO fails to articulate how, notwithstanding this apparent discord, Plaintiff's argument fails as a matter of law. Although our Legislature grants a UM insurer subrogation rights against the tortfeasor and its insurer, the statute is silent regarding broader subrogation rights as set forth in the Policy. From GEICO's perspective, the statutory silence may not be read as forbidding subrogation rights against parties other than the tortfeasor and its insurer where an insurer pays its insured under a UM provision and where the underlying accident involved multiple tortfeasors, one of whom was underinsured. Conversely, as Plaintiff argues, this silence may be read to warrant the application of the "maxim expressio unius est exclusio alterius, which provides 'the expression of one thing is the exclusion

of another.'" Ret. Bd. of Employees' Ret. Sys. of State v. DiPrete, 845 A.2d 270, 287 (R.I. 2004) (citing In re Advisory Opinion to the House of Representatives, 485 A.2d 550, 555 (R.I. 1984)). GEICO concedes that this issue has yet to be addressed by our Supreme Court and relies on inapposite cases from foreign jurisdictions for the proposition that an insurer's subrogation rights may extend beyond the bounds of a subrogation statute. See Bauter v. Hanover Ins. Co., 247 N.J. Super. 94, 95-97, 588 A.2d 870, 871-72 (1991) (addressing whether UM statute encompassed non-automobile insurance for the purposes of offset by insurer); Bonte v. Am. Global Ins. Co., 136 N.H. 528, 530, 618 A.2d 825, 826 (1992) (allowing subrogation where statute preserved insurer's "rights of recovery of such person against any person or organization legally responsible") (emphasis added); AIG Hawaii Ins. Co., Inc. v. Rutledge, 87 Hawai'i 337, 338-43, 955 P.2d 1069, 1071-75, n.12 (1998) (allowing subrogation beyond the uninsured motorist where no statute addressed UM subrogation).

It is true, as GEICO argues, that § 27-7-2.1(h) does not expressly forbid an insurer from pursuing UM reimbursement via subrogation where there is a responsible party in addition to the uninsured motorist and her insurer. Yet, it is significant to this Court that the statute, as written, speaks only to subrogation rights against the uninsured motorist and her insurer. See Construing Policy Consistent with Statute, Couch on Insurance, § 19:2 (3d ed. 2010) ("policy must be interpreted and construed in a manner consistent with the statute"); Statutory Law as Part of Contract, Couch on Insurance, § 19:1 ("[e]xisting and valid statutory provisions enter into and form a part of all contracts of insurance to which they are applicable and [. . .] become a part of the contract as much as if they were actually incorporated therein"). In light of this authority, GEICO's scant authority, and the early posture of this litigation, this Court finds that GEICO has

failed to show that Plaintiff's contention that the GEICO Policy and settlement offer violate the subrogation provision of the UM statute, § 27-7-2.1, is barred as a matter of law.

This Court reaches a similar conclusion as to Plaintiff's claim that that GEICO's Policy and settlement offer violate the "made whole" doctrine. GEICO cites numerous cases from foreign jurisdictions for the proposition that an insurer is entitled to subrogation only once an insured has been made whole. Plaintiff concurs with this precept and, indeed, our Supreme Court has enunciated this principle through a discussion of Fourth Circuit case law. See Lombardi, 429 A.2d at 1291-93. (citing Martin v. State Farm Mutual Automobile Ins. Co., 375 F.2d 720 (4th Cir. 1967) (uninsured motorist carrier would not become subrogated to its insured's right against the tortfeasor until the total judgment was satisfied)). GEICO fails, however, to demonstrate how the Policy and settlement offer comport with this precept, as they provide that Plaintiff must "agree to hold in trust for the benefit of [GEICO] all rights, claims, and causes of action which [he has] or may have against the person or persons or organization legally responsible." (Second Am. Compl., Ex. 1, Policy, Part IV, Coverage J; Ex. 2, Settlement Documents.) Specifically, GEICO fails to explain how this language does not impede Plaintiff's right to full compensation for his loss; GEICO instead baldly asserts that its Policy provision is ubiquitous and that it does not intend to trample on Plaintiff's rights. Moreover, unlike the extant case law, in the instant matter there is no judgment upon which this Court may consider whether Plaintiff has been made whole. As such, given the early posture of the case and its failure to cite persuasive authority in support of its argument, GEICO has not met its burden to prove that Plaintiff's "made whole" allegation fails as matter of law.

C

Breach of Contract and Bad Faith

Even assuming, arguendo, that there is merit to Plaintiff's arguments that the GEICO Policy and settlement offer violate state law, GEICO nonetheless contends that Rule 12(b)(6) requires dismissal of Plaintiff's claims for bad faith and breach of contract in Counts I and II of his Second Amended Complaint. (GEICO Mem. at 14-16.) GEICO argues that "as a matter of law, an insurer's adherence to agreed terms of an insurance policy, even if those terms are later found to be invalid, cannot constitute breach of contract or bad faith." (GEICO Mem. at 14-16.)

Plaintiff responds that GEICO violated state law and that such violations constitute breach of Colin Foote's insurance contract as well as bad faith. (Second Am. Compl. ¶¶ 13-19.) Specifically, Plaintiff argues that it is immaterial whether GEICO abided by the terms of its Policy and that GEICO must demonstrate that it reasonably believed that the terms in question were legal. (Pl. Mem. at 10-11.)

To prevail on a claim for breach of an insurance contract, a plaintiff must prove the existence of the contract, breach of that contract, and damages flowing from the breach. Petrarca v. Fidelity and Cas. Ins. Co., 884 A.2d 406, 410 (R.I. 2005); Gorman v. St. Raphael Academy, 853 A.2d 28, 33 (R.I. 2004) (the Court must "make the predicate findings of offer, acceptance, consideration and breach requisite to determining a breach of contract claim"). A breach of contract is defined as a "violation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance." Breach of Contract, Black's Law Dictionary (9th ed. 2009); see also Women's Dev. Corp. v. City of Cent. Falls, 764 A.2d 151, 158 (R.I. 2001). "Generally, whether a party materially breached his or her contractual duties is a question of fact." Parker v. Byrne, 996 A.2d 627, 632 (R.I. 2010).

Section 9-1-33 of the Rhode Island General Laws establishes a cause of action for bad faith. It provides, in pertinent part, as follows:

> (a) Notwithstanding any law to the contrary, an insured under any insurance policy as set out in the general laws or otherwise may bring an action against the insurer issuing the policy when it is alleged the insurer wrongfully and in bad faith refused to pay or settle a claim made pursuant to the provisions of the policy, or otherwise wrongfully and in bad faith refused to timely perform its obligations under the contract of insurance. In any action brought pursuant to this section, an insured may also make claim for compensatory damages, punitive damages, and reasonable attorney fees.

§ 9-1-33(a). To prevail on a claim of bad faith, a plaintiff must prove: 1) the existence of an insurance contract and the insurer's breach thereof; 2) the insurer's intentional refusal to pay; 3) absence of a reasonably legitimate or arguable reason for the refusal; 4) the insurer's actual knowledge of the absence of any legitimate or arguable reason; and 5) "if the intentional failure to determine the existence of a lawful basis is relied upon, the plaintiff must prove the insurer's intentional failure to determine whether there is a legitimate or arguable reason to refuse to pay the claim." Skaling v. Aetna Ins. Co., 799 A.2d 997, 1007 (R.I. 2002) (quoting Bartlett, 538 A.2d at 1000).

Bad faith is established when the proof demonstrates that the insurer denied coverage or refused payment without a reasonable basis in fact or law for the denial. Imperial Cas. & Indem. Co. v. Bellini, 947 A.2d 886, 893 (R.I. 2008) (citing Skaling, 799 A.2d at 1010). An insurer also acts in bad faith when it "either intentionally or recklessly failed to properly investigate the claim or to subject the results of the investigation to a cognitive evaluation and review." Skaling, 799 A.2d at 1011. The "fairly debatable" standard applied to bad faith claims turns on "whether there is sufficient evidence from which reasonable [minds] could conclude that in the investigation, evaluation, and processing of the claim, the insurer acted unreasonably and either

knew or was conscious of the fact that its conduct was unreasonable." Id. As such, both a claim for breach of contract and a claim for bad faith require a plaintiff to prove that the insurer breached the insurance contract.

The parties here do not dispute that there was an insurance contract in force between decedent and GEICO. The primary issue with respect to Plaintiff's claims of breach of contract and bad faith, therefore, is whether GEICO breached the contract by incorporating in the Policy and the settlement offer terms that violated state law.

GEICO has provided this Court with scant authority to support its argument that Plaintiff's claims of breach of contract and bad faith must fail as a matter of law because GEICO followed the terms of the Policy in offering to settle Plaintiff's claim. GEICO, for example, cites only to an Alabama Supreme Court case in which an insurer appealed from the trial court's grant of class action certification; the insurer successfully argued that such certification was inappropriate as to claims for breach of contract and bad faith. GEICO Mem. at 14-16; Ex parte Gov't Employees Ins. Co., 729 So. 2d 299 (Ala. 1999). Yet, unlike here, in that case the plaintiff apparently conceded that the insurer did not breach the insurance contract; the Alabama Supreme Court further found that the insurer could not have acted in bad faith because it acted in conformance with the policy. Id. at 305-06; see also Murray v. Bensen Aircraft Corp., 259 N.C. 638, 642, 131 S.E.2d 367, 370 (1963) (holding that the violation of a statute designed to protect persons or property is a negligent act that cannot give rise to a breach of contract claim).

In contrast, Plaintiff's position in this case is supported, at least implicitly, by a decision from the Maryland Court of Appeals that distinctly parallels this action. See Lewis v. Allstate Ins. Co., 368 Md. 44 (2002). In Lewis, the plaintiff prevailed via a jury verdict on its claim of breach of contract premised on a policy provision that allowed Med Pay payments to be setoff

against UM coverage such that the UM coverage was brought below the statutory minimum. Id. at 46. The specific issue before the Court of Appeals was whether the applicable Maryland statute authorized "a policy provision which reduces the amount of [UM] benefits, to which the insured is otherwise entitled, by the amount" the insurer previously paid to the insured under the Med Pay provision of the policy. Id. at 45. Although the Court did not directly address the breach of contract claim, it reversed the intermediate appellate court's decision that allowed the setoff and held that the insurance policy's setoff language was void because it resulted in coverage below the statutory minimum. Id. at 52-53.

The tension between the parties' positions in the instant matter is evident. From the insurer's perspective, it is intuitive that there simply can be no breach of contract—and, by extension, bad faith—where the insurer, in settling an insured's claim, follows the express terms of the insurance contract. GEICO thus argues that the question of whether a policy term violates a statute is of no significance for purposes of finding a breach, although such a provision may be void under state law.

On the other hand, "[e]xisting and valid statutory provisions enter into and form a part of all contracts of insurance to which they are applicable and [. . .] become a part of the contract as much as if they were actually incorporated therein." Statutory Law as Part of Contract, Couch on Insurance, § 19:1. In addition, "[i]f the terms of an insurance policy do not comport with the statutory requirements, the statutory requirements supersede the conflicting policy provisions and become part of the insurance policy itself." Conflict between Statute and Policy Provision, Couch on Insurance, § 19:3. Repugnant terms, therefore, are superseded by state law, and the insurance contract may indeed be breached. In addition, an insurer's knowledge concerning

whether the terms of a policy violate state law could be material to the question of breach and bad faith.

At this stage in the litigation—where this Court has not been asked to certify a class or declare the rights and obligations of the parties, where all that is before the Court is GEICO's Rule 12(b)(6) motion to dismiss and Plaintiff's objection thereto, where the parties have engaged in no discovery, and where the authority that has been cited favors Plaintiff—this Court reiterates that it will not venture into these grey areas. Indeed, it is precisely when faced with a motion to dismiss that involves an undeveloped factual record and novel questions of law that a court should be most vigilant in exercising judicial restraint. See Motions to Dismiss—Practice under Rule 12(b)(6), Wright, Miller, Kane, and Marcus, 5B Fed. Prac. & Proc. Civ. § 1357 (3d ed. 2012) ("The district court should be especially reluctant to dismiss on the basis of pleadings when the asserted theory of liability is novel or even 'extreme,' since it is important that new legal theories be explored and assayed in the light of actual facts rather than a pleader's suppositions."); see also Crowhorn v. Nationwide Mutual Ins. Co., 2001 WL 695542, *3 (Del. Super.) (denying motion to dismiss claim for breach of insurance contract and asserting both that state law does not recognize conflicting statutory provisions and that the law "has not gone so far as to state that the statute becomes integrated or incorporated into the contract, thereby allowing contractual claims for statutory violations").

D

Class Action Allegations and Request for Declaratory Relief

Moreover, even assuming, arguendo, that Plaintiff's claims of breach of contract and bad faith fail because, as GEICO contends, its compliance with the terms of the Policy cannot constitute breach of contract as a matter of law, GEICO's motion to dismiss the Second

Amended Complaint still would fail. In the Second Amended Complaint, it appears that Plaintiff's Class Action Allegations are distinct from his claims for breach of contract and bad faith. Plaintiff's requests for class certification and declaratory and injunctive relief, therefore, do not depend on proof of a breach of contract. Compare Second Am. Compl. at 3-4, with Second Am. Compl. at 5-8. The declaratory judgment Plaintiff seeks in this section of his Second Amended Complaint simply asks this Court to determine whether GEICO's Policy terms and settlement offer (and similar policies in effect with respect to other putative class members) violate Rhode Island law. As this Court has found that GEICO has failed to prove that Plaintiff's statutory arguments fail as a matter of law, it necessarily follows that Plaintiff's Second Amended Complaint survives GEIGO'S Rule 12(b)(6) motion to dismiss, regardless of the disposition of Plaintiff's claims for bad faith and breach of contract.

IV

Conclusion

For all of these reasons, Defendant GEICO's Motion to Dismiss Plaintiff's Second Amended Complaint is denied. Counsel shall confer and submit forthwith for entry an agreed upon form of Order that is consistent with this Decision.