

IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA  
CIVIL ACTION—LAW

KEITH RUTT, individually and on behalf of a :  
class of similarly situated persons, :  
Plaintiff, :  
v. : No. CI-19-02544  
DONEGAL MUTUAL INSURANCE :  
COMPANY, :  
Defendant. :

**OPINION**

This case is before the court on preliminary objection and brief filed by Defendant Donegal Mutual Insurance Company (“Donegal”) on April 15, 2018, the responsive brief filed by Plaintiff Keith Rutt on May 1, 2019, and the reply brief filed by Donegal on May 7, 2019. The briefing schedule having been completed, this matter is now ripe for review.

**I. Factual and Procedural Background**

Mr. Rutt’s complaint alleges the following facts. Donegal is an insurance provider who issued an insurance policy to Mr. Rutt on two cars (“Donegal Policy”). On August 20, 2016, while Mr. Rutt was riding his motorcycle which was insured under an insurance policy issued by the Agency Insurance Company of Maryland (“Agency Policy”), he was injured in a motor vehicle accident due to the negligence of the driver of the other vehicle involved, which was insured under an insurance policy issued by the State Farm Mutual Automobile Insurance Company (“State Farm Policy”). Mr. Rutt’s claims for his injuries exceed the combined limits of both the liability coverage under the State Farm Policy and the underinsured motorist coverage under the Agency Policy. Mr. Rutt received the policy limits of \$50,000 under the State Farm Policy, and his underinsured motorist claim under the Agency Policy is currently being litigated.

Mr. Rutt made a claim on Donegal seeking recovery of underinsured motorist (“UIM”) benefits under the Donegal Policy. Donegal denied Mr. Rutt’s claim on the basis of the household exclusion in the Donegal Policy, which states:

**EXCLUSIONS**

A. We do not provide Underinsured Motorist Coverage for ‘bodily injury’ sustained:

1. By you while “occupying,” or when struck by, any motor vehicle you own or lease which is not insured for this coverage under this policy. This includes a “trailer” of any type used with that vehicle.

On January 19, 2019, the Pennsylvania Supreme Court issued a decision in Gallagher v. Geico Indem. Co. holding that household exclusions cannot be enforced as they “act[] as a *de facto* waiver of stacked UIM coverage provided for in the [Pennsylvania Motor Vehicle Financial Responsibility Law].” 201 A.3d 131, 138 (Pa. 2019). Mr. Rutt filed his class action complaint in this action on March 19, 2019, seeking declaratory judgment and asserting a breach-of-contract claim against Donegal. Donegal filed a preliminary objection in the nature of a demurrer on April 15, 2019, arguing that Gallagher should not be applied retroactively here.

**II. Discussion**

A. Legal standard for preliminary objections

Preliminary objections may be filed for “legal insufficiency of a pleading (demurrer).”

Pa.R.C.P. 1028(a)(4).

A demurrer can only be sustained where the complaint is clearly insufficient to establish the pleader's right to relief. For the purpose of testing the legal sufficiency of the challenged pleading a preliminary objection in the nature of a demurrer admits as true all well-pleaded, material, relevant facts, and every inference fairly deducible from those facts. The pleader's conclusions or averments of law are not considered to be admitted as true by a demurrer.

Since the sustaining of a demurrer results in a denial of the pleader's claim or a dismissal of his suit, a preliminary objection in the nature of a demurrer should be sustained only in cases that clearly and without a doubt fail to state a claim for which relief may be granted. If the facts as pleaded state a

claim for which relief may be granted under any theory of law then there is sufficient doubt to require the preliminary objection in the nature of a demurrer to be rejected.

Allegheny Cty. v. Commonwealth, 490 A.2d 402, 408 (Pa. 1985).

Section 1738 of the Pennsylvania Motor Vehicle Financial Responsibility Law, 75 Pa.C.S.A. § 1738 (“MVFRL”) governs the stacking of UIM benefits in automobile insurance policies. Under Section 1738, UIM benefits are “stacked” unless the named insured waives the stacked limits. Section 138 provides the language to be included in forms waiving stacked UIM benefits. 75 Pa.C.S.A. § 1738(d).

Donegal’s preliminary objection in the nature of a demurrer argues that Gallagher should not be applied retroactively to the determination of this case, and that under prior law, household vehicle exclusions were consistently upheld by Pennsylvania courts. The facts in Gallagher are similar to the case at hand. In Gallagher, the plaintiff was injured in an accident caused by an underinsured motorist while the plaintiff was riding on a motorcycle insured under a Geico motorcycle insurance policy. The plaintiff sought stacked UIM benefits under a separate Geico automobile insurance policy, for which he was also a named insured. Geico denied his claim under the household vehicle exclusion in the automobile insurance policy. The Pennsylvania Supreme Court held “that the household vehicle exclusion violates the MVFRL; therefore, these exclusions are unenforceable as a matter of law.” 201 A.3d at 138.

Here, Donegal argues that Gallagher is distinguishable from this case, as the two policies at issue in Gallagher were both issued by the same insurance provider; whereas here, Mr. Rutt’s motorcycle was insured under the Agency Policy, and the cars were insured under the Donegal Policy. However, the court in Gallagher specified that all household vehicle exclusions are in

violation of the MVFRL, rather than limiting its holding to cases wherein both policies were issued by the same insurance provider.

Donegal further argues that even if the Gallagher holding applies to these facts, it should not be applied retroactively. Donegal contends that Gallagher introduced a new rule of law by breaking from precedent. The United States District Court for the Eastern District of Pennsylvania recently addressed this very issue, and concluded that Pennsylvania law requires that Gallagher should be applied retroactively as it did not introduce a new rule of law or overrule prior binding precedent. Butta v. Geico Cas. Co., 383 F.Supp.3d 426, 436–41 (E.D. Pa. 2019) (noting that there had been no prior Pennsylvania Supreme Court majority holding addressing whether household vehicle exclusions violated section 1738 of the MVFRL). This court is persuaded by the reasoning of the district court in Butta.

Even more controlling on the applicability of Gallagher in the instant case is the disposition of the appeal in a recent Franklin County case. On March 13, 2018—pre-Gallagher—the Honorable Shawn D. Meyers granted summary judgment to the defendant insurance company in a case with a very similar facts to the case at hand. Petra v. Pa. Nat’l Mut. Cas. Ins. Co., No. 2016-2932 (Franklin Co. Com. Pl., Mar. 13, 2018). In Petra, as here, the plaintiff sought UIM benefits under an automobile insurance policy for injuries resulting from an accident on his motorcycle which was insured under a policy issued by a different insurance provider, and his claims were denied under the household vehicle exclusion. Id. at \*1–2. The plaintiff appealed the order granting summary judgment to the insurance company, and the Superior Court affirmed the trial court’s order in an unpublished memorandum and order. Petra v. Pa. Nat’l Mut. Cas. Ins. Co., No. 505 MDA 2018 (Pa. Super. Jan. 16, 2019). Gallagher was decided one week later. On September 4, 2019, the Pennsylvania Supreme Court vacated the Superior Court’s order, and

remanded the case for reconsideration in light of Gallagher. Petra v. Pa. Nat'l Mut. Cas. Ins. Co., No. 194 MAL 2019, 2019 WL 4183617 (Pa. Sept. 4, 2019). Therefore, as the Supreme Court directed the trial court to consider Gallagher on remand of Petra, this court finds that Gallagher must also be applied retroactively to control the determination of the action at hand.

An appropriate order follows.

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**ORDER**

AND NOW, this 16<sup>th</sup> day of September 2019, upon review of defendant’s preliminary objection to plaintiff’s complaint, and plaintiff’s response thereto, defendant’s preliminary objection is OVERRULED for the reasons in the opinion accompanying this order.

BY THE COURT:



LEONARD G. BROWN, III, JUDGE

ATTEST:

Copies: James C. Haggerty, Esq.  
Joseph B. Mayers, Esq.