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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

ERICA KLEIN,

Plaintiff/Respondent,

vs.

FARMERS INSURANCE COMPANY OF IDAHO,

Defendant/Appellant.

Docket No. 46314-2018

Bannock County District Court
CV-2017-4584-OC

APPELLANT'S REPLY BRIEF

Appealed from the District Court of the Sixth Judicial District of the State of Idaho,

In the for the County of Bannock

Honorable Rick Carnaroli, District Judge, presiding

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I. An "overwhelming number of jurisdictions" have not adopted the "breach of contract" rule. A significant number of jurisdictions that have addressed this issue have held that either the "date of the accident" rule or the "settlement/judgment" rule is more appropriate.

As is often the case with a generalization, it can go too far. Klein takes issue with the claim by Farmers in the Appellant's Brief that the "breach of contract" rule has "fallen out of favor."[1] Klein's criticism of this generalization is fair because the breach of contract rule did not fall out of favor. The two most recent courts that addressed this issue adopted the breach of contract accrual rule for UIM claims, while one jurisdiction signaled that it may be moving from the "breach of contract" rule to the "date of the accident" rule.[2] However, Klein also went too far when suggesting that an "overwhelming number of jurisdictions" have adopted the "breach of contract rule." Only about two thirds of the states have even addressed this issue. While the cases which have attempted to identify the number of jurisdictions that have adopted one of the three

[1] Respondent's Brief, page 11.

[2] *Erie Ins. Exch. v. Bristol*, 174 A.3d 578, 587 (Pa. 2017); and *Am. States Ins. Co. v. LaFlam*, 69 A.3d 831, 837 (R.I. 2013). *Hensley v. State Farm Mut. Auto Ins. Co*., 2014 WL 3973115, Ky.App., Aug. 15, 2014, Review Granted, Decision Vacated (Apr. 5, 2016) is cited because the reported decision adopted the "breach of contract" accrual rule, but the decision was vacated. A new decision was issued as *Hensley v. State Farm Mut. Auto. Ins. Co.*, No. 2013-CA-000006-MR, 2017 WL 837698, at *2 (Ky. Ct. App. Mar. 3, 2017). The Court rejected its prior decision and Hensley's argument that the two-year limitation period in her policy that began on the date of the accident was unreasonable. In footnote 4, the Kentucky Court of Appeals stated:

> While the arguments in this case centered more directly on accrual, which we addressed at length in our original opinion, the Supreme Court's majority opinion in *Riggs* suggested by implication that **the cause of action begins to accrue at the time of the accident, a different conclusion than the majority reached when we first considered this case**. We believe any further consideration of that issue is best addressed by the Supreme Court, especially since the policy language at issue in this case is the same language the Supreme Court considered in *Riggs*.

Id. (emphasis added). *State Farm Mut. Auto. Ins. Co. v. Riggs*, 484 S.W.3d 724, 727 (Ky. 2016). Thus, Kentucky is leaning towards the "date of the accident" rule and away from the breach of contract rule, although it has not been definitively decided.

rules for accrual of UIM claims vary somewhat in their count,[3] the number of states adopting the "breach of contract" rule is probably no more than twenty-one with ten to thirteen jurisdictions opting for one of the other accrual rules. Therefore, it is an exaggeration to claim that the "breach of contract" rule is the rule in an "overwhelming number of jurisdictions."[4] Moreover, most of the twenty-one jurisdictions that have adopted the "breach of contract" rule did so more than fifteen years ago. Eighteen of the decisions cited in the string cite at page nine of Respondent's Brief were decided more than eighteen years ago. Only two of the decisions cited in the string cite were decided within the last five years, *McDonnell v. State Farm Mut. Auto. Ins. Co.*, 299 P.3d 715 (Alaska 2013) (UM only) and *Am. Ins. Co. v. LaFlam*, 69 A.3d 831 (R.I. 2013).

Most of the cases which developed the case law identifying the three UIM accrual rules arose in the 1980's and 1990's. The Supreme Court of Minnesota was one of the most active to address the policies and reasons for and against the three accrual rules and for that reason provides a good back drop for understanding the debate[5] and the reasons given for rejecting the "breach of contract" rule when the courts were most actively evaluating the accrual options.

First, the Supreme Court of Minnesota considered and rejected the "breach of contract" accrual rule in 1986 because under such a rule "the statute of limitations might not begin to run

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[3] In *Hensley*, 2014 WL 3973115, 7, at fn. 10, 11 and 12, the Court of Appeals in Kentucky identified sixteen jurisdictions which had adopted the "breach of contract" accrual rule; seven jurisdictions which had adopted the "settlement/judgment" accrual rule; and three jurisdictions which had adopted the "date of accident" accrual rule. In *Am. States Ins. Co. v. LaFlam*, 69 A.3d 831, 842 (R.I. 2013), at fn. 9, the Supreme Court of Rhode Island identified twenty-one jurisdictions which had adopted the "breach of contract" accrual rule; eight jurisdictions which had adopted the "settlement/judgment" accrual rule; and five jurisdictions which had adopted the "date of accident" accrual rule.

[4] Respondent's Brief, page 10.

[5] See also Jeffrey A. Kelso and Matthew R. Drevlow, *When Does the Clock Start Ticking? A Primer on Statutory and Contractual Time Limitation Issues Involved in Uninsured and Underinsured Motorist Claims*, 47 Drake L. Rev. 689 (1999).

indefinitely" and decided that a claim for "implied in law" UIM benefits should accrue on the date of the accident. *O'Neill v. Illinois Farmers Ins. Co.*, 381 N.W.2d 439, 440 (Minn. 1986). Then in 1994 in *Beaudry v. State Farm Mut. Auto. Ins. Co.*, 518 N.W.2d 11, 13 (Minn. 1994), and again in 1996 in *Hermeling v. Minnesota Fire & Cas. Co*., 548 N.W.2d 270, 276 (Minn. 1996), the Supreme Court of Minnesota clarified any uncertainty that might have existed as to whether the "date of accident" accrual rule applied to all UIM benefit claims and held in each case that the statute of limitations on a UIM claim begins to run when the accident occurs. However, in 2000 the Supreme Court of Minnesota overruled its prior precedent. In *Oanes v. Allstate Ins. Co*., 617 N.W.2d 401 (Minn. 2000) the Supreme Court of Minnesota held that the better reasoned approach was to adopt the "date of settlement with or judgment against the tortfeasor" accrual rule. The reason the Supreme Court of Minnesota reconsidered its prior precedents was that in another line of cases it held that a claimant is required to pursue his or her claim against the tortfeasor to settlement or judgment before seeking UIM benefits from the underinsurer and that could place the insured in the untenable position of having the statute of limitations run on the UIM claim while trying to close the claim against the tortfeasor by a settlement or judgment.[6] While reconsidering its prior precedents on this issue, the Supreme Court of Minnesota, fourteen years after having first rejected it, again rejected the "breach of contract rule" because "if the accrual date was the date of the breach of the insurance contract, that is, the date the claim was denied, the insured would be able to postpone the operation of the statute of limitations indefinitely." *Oanes*, 617 N.W.2d at 406.

[6] As explained in Appellant's Brief, because of the decision in *Hill v. Am. Family Mut. Ins. Co*., 150 Idaho 619, 249 P.3d 812 (2011) the concern that caused the Supreme Court of Minnesota to reject the "date of the accident" rule and adopt the "date of settlement/judgment" rule does not exist in Idaho. Appellant's Brief, pp. 9, 10, 12.

II. The specific facts of this case and the law in Idaho demonstrate why the "breach of contract" rule is unworkable in Idaho. The "date of the accident" rule and the settlement/judgment" rule provide an objectively identifiable accrual date that is fair to all parties.

Klein takes issue with the argument by Farmers that the "breach of contract" rule has proven to be "unworkable." This is not an over generalization. The validity of this argument is illustrated by this case. If filing a lawsuit for UIM benefits requires a breach of contract by the insurer[7], as Klein argues, Klein's lawsuit should be dismissed. Klein does not claim Farmers breached the contract of insurance in this case. (Tr, p. 11, 22:25 – 23:2). Klein's Complaint does not allege that Farmers breached the insurance contract. (R, pp. 7 – 12). Farmers has not refused arbitration, denied coverage, denied the claim or refused payment of the claim. It was not necessary for Klein to file this action to compel arbitration. By letter dated October 26, 2017, Klein's lawyer advised Farmers that because of its "reliance on a statute of limitations defense which is not supported by the policy of insurance or Idaho law, as well as its unwillingness to participate in meaning (sic) settlement negotiations,[8] it appears Ms. Klein is now compelled to reach a resolution of her claim through arbitration per the terms of her policy." (R, p. 128). Although the policy required a "certified letter" when arbitration was demanded by letter[9] Farmers did not stand on formality, accepted the October 26, 2017 letter as a demand for arbitration, proposed an arbitrator, and advised that it would likely file a declaratory judgment action to resolve the statute of limitations issue. (R, p. 130). Klein's lawyer responded and

[7] *Erie Ins. Exch. v. Bristol*, 174 A.3d 578, 590 (Pa. 2017) (Because it is undisputed that Erie has not refused arbitration or denied coverage in this case, it follows that Bristol had no accrued cause of action to initiate through the court either by complaint or motion to compel arbitration); *McDonnell v. State Farm Mut. Auto. Ins. Co*., 299 P.3d 715, 733 (Alaska 2013) (UM claim accrues when the insurer has allegedly breached the insurance contract, such as by refusing the insured's request for payment or denying the insured's claim).

[8] Klein acknowledges that Farmers suggested and participated in mediation on September 22, 2017. (Respondent's Brief, pp. 6 – 7)

[9] "Demand may also be made by sending a certified letter to the party against whom arbitration is sought, with a return receipt as evidence." R, p. 177

advised that "my letter to Mr. Surmelis was not meant as a formal demand for arbitration" and further advised that he would be filing "a complaint demanding arbitration pursuant to the terms of the policy." Klein's complaint seeks an order "compelling [Farmers] to arbitration." However, that was not necessary because Farmers had already agreed to arbitrate based on the written demand which was an acceptable alternative method for commencing arbitration under the insurance policy.

In Respondent's Brief, Klein argues that "[a] cause of action accrues and the statute of limitations begins to run when a cause of action exists"[10] and "it would be inconsistent to allow for a cause of action to accrue before the insurer has been asked to perform under the contract of insurance."[11] Applying Klein's own arguments to the facts of this case reveals why the "breach of contract" accrual rule is unworkable. Based on Klein's arguments the complaint filed by her should be dismissed because Farmers has not breached its contract with Klein. This Court's decision in *Walden v. Nationwide Ins. Co.*, 131 Idaho 18, 21, 951 P.2d 949, 952 (1998) compels such a result: "Walden could not make a breach of contract claim or a claim for bad faith, since Nationwide was pursuing resolution of the case through arbitration pursuant to the terms of the contract. Walden did not establish that it was necessary to bring suit to recover for her loss. The amount of her loss was to be determined in arbitration." Klein will likely argue that her complaint, unlike Walden's, should not be dismissed because the policy provides that "Formal demand for arbitration shall be filed in a court of competent jurisdiction" and that justifies her filing the complaint. However, that argument places form over substance because the policy also provides that "Demand may also be made by sending a certified letter" which is the method of

[10] Respondent's Brief, p. 11.
[11] Respondent's Brief, p. 14.

demanding arbitration that was accepted by Farmers before Klein filed her complaint. Farmers did not breach the contract of insurance and therefore Klein's complaint should be dismissed.[12]

The point is not whether Klein's complaint should be dismissed. Focusing on whether Klein's complaint should be dismissed for failure to arbitrate misses the point in this case because the complaint served its purpose to raise the statute of limitations accrual issue for decision by the trial court, and this appeal which followed. The focus, for purposes of resolving the issue before this Court, is whether it makes sense to adopt an accrual rule that is so difficult to apply. In *Johnson v. Highway 101 Investments, LLC*, 156 Idaho 1, 4, 319 P.3d 485, 488 (2014), this Court found adoption of a "bright line rule" persuasive because it avoided expensive and time consuming litigation. Adoption of either the "date of the accident" or the "settlement/judgment" rule is such a "bright line rule" because both are objectively ascertainable, provide reasonable dates for accrual of claims to enforce UIM claims and provide certainty for both the insured and the insurer. On the other hand, the "breach of contract" accrual rule requires insurers to breach their contract with their insureds before they can close their files on UIM claims and, in many cases, leads to uncertainty as to when exactly an action to enforce a UIM claim accrues.

The courts that have adopted the "breach of contract" accrual rule recently seem more interested in following the "majority rule" than in adopting a rule that is easy to understand and apply. The Supreme Court of Alaska for all practical purposes ignored the difficulties with the

[12] Farmers did not initially move to dismiss the complaint for failure to arbitrate as Nationwide did in *Walden*, but instead moved for summary judgment to resolve the statute of limitations issue because resolution of the statute of limitations defense is not a matter subject to arbitration. This is why Farmers advised Klein when it accepted the October 26, 2017 letter as a demand for arbitration that it was also considering filing a declaratory judgment action to resolve the statute of limitations issue. *See* issues that can be determined by arbitration in the Arbitration provision of the policy (R, p. 177) and the Third Affirmative Defense in the Answer filed by Farmers. (R, p. 18).

application of the rule when it adopted the "breach of contract" accrual rule for uninsured motorist disputes: "If the parties disagree over when the contract was allegedly breached and the statute of limitations began to run, the superior court will resolve this factual issue." *McDonnell*, 299 P.3d at 728 (Alaska 2013). The Supreme Court of Rhode Island rejected any concern about stale claims as an unlikely "doomsday scenario" and suggested that an insurance company "possesses the means to prevent the belated assertion of overly stale claims" by bringing "declaratory judgment actions to determine coverage at their own convenience." *LaFlam*, 69 A.3d at 842 (R.I. 2013). What exactly the Supreme Court of Rhode Island meant is unclear from the language in its opinion. Requiring insurance companies to file declaratory judgment actions to eliminate stale claims does not seem practical or expedient. In this case, Klein waited nearly three years after the accident to make a UIM claim. Farmers evaluated the claim and paid the undisputed amount within sixty days. Klein then waited another four years before making a supplemental demand. By the time Klein made a demand for arbitration over seven and one half years had elapsed since the accident which gave rise to the UIM claim. It is not clear what Farmers could have done earlier to avoid the stale claim brought by Klein. If Idaho follows the "breach of contract" accrual rule, Farmers would be required to breach its insurance contract with Klein to bring the matter to a head and start the five year contract statute of limitations running. That hardly makes good sense or complies with any good public policy rationale. If Idaho follows the "breach of contract" accrual rule, filing a declaratory judgment action would not resolve any issue or require the insured to bring or complete a UIM claim.[13] It would only involve a pointless lawsuit and possibly be considered frivolous litigation.

[13] In *Westover v. Idaho Ctys. Risk Mgmt. Program*, 164 Idaho 385, 430 P.3d 1284, 1289 (2018) this Court observed that "declaratory judgment actions run a particular risk of crossing the 'fine line between purely hypothetical or

The issue in *LaFlam* was not as straight forward as the issue in this case, which makes it an unreliable precedent to follow. The American States policy had a contractual limitation provision which required UM/UIM claims to be brought within three years of the accident. Rhode Island has a three year statute of limitations for injuries to the person.[14] Thus, the concern was that the insurance policy contractual "three-year limitations period may even require some insureds to file suit before it becomes clear that the tortfeasor is underinsured at all." *LaFlam,* 69 A.3d 831, 834 (R.I. 2013) (a short contractual limitations period that begins to run on the date of the accident may operate to bar an insured from recovery before the insured even knows she has a UM/UIM claim). That is not the case in Idaho. The statute of limitations in Idaho for personal injuries is two years (I. C. Section 5-219) and the statute of limitations in Idaho for actions on a written contract is five years (I. C. Section 5-216). If the insured's two year tort action against the responsible driver and the insured's five year UIM claim against the insurer accrue on the same date, the date of the accident, the insured will know well in advance of the expiration of the statute of limitation for bringing an action to enforce a UIM claim whether the responsible driver is underinsured.

The Supreme Court in Pennsylvania seemed more swayed by its erroneous conclusion that "[t]he majority of jurisdictions have adopted the [breach of contract accrual rule]. *Bristol*, 174 A.3d at 587. *See* authorities collected in footnote 3 showing that less than half the jurisdictions in the United States have adopted the "breach of contract" accrual rule. Adopting a so-called "majority rule" that creates uncertainty, confusion and requires an insurer to breach the insurance contract is not a good policy choice.

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academic questions and actually justiciable cases'" and "courts will not rule on declaratory judgment actions which present questions that are moot or abstract." When and under what circumstances would it be appropriate for an insurer to file a declaratory judgment action to eliminate a stale UIM claim?

[14] Title 9, Ch. 1, Sec. 9-1-14 of the Rhode Island statutes.

The facts of this case demonstrate the difficulty the insured faces to determine when a lawsuit has to be filed to avoid losing a UIM claim and also demonstrate the difficulty the insurer faces in determining when it can close its file and eliminate its exposure for a UIM claim. If it requires a breach of the policy by the insurer, Klein's claim has not yet accrued, even though the accident which gives rise to the claim for UIM benefits occurred nine years ago. That does not make good sense, especially where (as here) Farmers paid the amount justly due Klein on her UIM claim nearly five years before she demanded arbitration.

Klein dismisses such difficulties by claiming that such concerns "ignore the well-recognized legal principle that an insurance policy will be interpreted similar to any other contract." (Respondent's Brief, p. 12) However, the principle cited by Klein relates to interpretation of insurance policy provisions, not when a UIM claim accrues. The issue of when the statute of limitations begins to run on an insured's ability to initiate a court action to enforce a UIM claim does not involve interpretation of insurance policy provisions.[15]

III. The "date of the accident" rule is consistent with Idaho law. The "breach of contract" rule is not.

Klein argues that "Farmers' logic is flawed and confuses the claim process with a legal cause of action"[16] when it suggested that the "breach of contract" accrual rule is inconsistent with the decision in *Hill v. Am. Family Mut. Ins. Co*., 150 Idaho 619, 249 P.3d 812 (2011). Klein appears to suggest that an exhaustion clause, or the lack thereof, has no bearing on when a cause

[15] In *Sunshine Min. Co. v. Allendale Mut. Ins. Co*., 107 Idaho 25, 28, 684 P.2d 1002, 1005 (1984) this Court held that "provisions within these insurance policies attempting to limit to one year the time for filing actions on the insurance policies are void under I.C. § 29–110." I.C. § 29–110 provides that: "Every stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract in Idaho tribunals, or which limits the time within which he may thus enforce his rights is void as it is against the public policy of Idaho." Thus, it is clear under Idaho precedent that an insurance company could not contractually require an insured to bring an action to enforce UIM benefits within less than five years after it accrues. However, that does not prevent this Court from identifying the date on which such an action accrues.

[16] Respondent's Brief, page 13.

of action to enforce a UIM provision accrues. In *Snyder v. Case*, 259 Neb. 621, 611 N.W.2d 409 (2000), which is one of the cases contained in the string cite at footnote 1, page 9 of the Respondent's Brief, the Supreme Court of Nebraska identified one of the reasons for delaying the accrual of a UIM claim until the contract was breached was the fact that "EMC had no contractual obligation to pay underinsured motorist benefits to Snyder until she exhausted the limits of Case's liability insurance by the settlement made with the knowledge and consent of EMC in September 1998." *Id.* at 416. It is clear from reading the cases which have adopted one of the three accrual rules, that the existence of exhaustion clauses either in policies or in statutes did have a bearing on the rationale for adopting one accrual rule over the others.

Since 2008, when the Idaho Legislature required insurers to offer UIM coverage, insureds have not been required to exhaust the remedies they have against the tortfeasors who caused the accident and can pursue their claims for UIM benefits at the same time they pursue their claims against the tortfeasor responsible for the accident. The decision in *Hill* confirmed that such exhaustion clauses violated Idaho public policy. Klein did not wait in this case. Her lawyer sent the same demand package he sent to the insurer of the at-fault driver to Farmers on December 14, 2010, to put Farmers on notice of her UIM claim. (R, p. 58). Her lawyer followed that notice letter nearly two years later on November 7, 2012, with a formal proof of claim. (R, p. 67). This was all accomplished within three years of the accident. Under Idaho's two year statute of limitations for personal injury claims and five year statute of limitations for claims for obligations under a written contract, it is not "fundamentally unfair" to require both the tort claim and the contract claim to accrue on the date of the accident.

The decisions in *Brooks v. State Farm Ins. Co*., 141 N.M. 322, 327, 154 P.3d 697, 702 (2007) and *Grayson v. State Farm Mut. Auto. Ins.*, 114 Nev. 1379, 1382, 971 P.2d 798, 799 (1998), as modified on denial of reh'g (Mar. 19, 1999) both claim "it would be fundamentally unfair to time-bar an insured from compensation that she bargained for because an insured may not be aware until long after the accident that she will need to pursue a claim against her UIM insurer." In *Grayson*, the insured's lawyer failed to file a lawsuit against the at-fault driver within two years of the accident and although Grayson sued her lawyer she did not make a claim for UIM benefits until six years and two months after the accident. The statute of limitations in Nevada for claims based on written contracts is six years. In *Brooks*, the insured was a minor, but through his mother did settle with the insurer for the at-fault driver and then pursued a UIM claim. The negotiations to resolve the UIM claim consumed nearly three years and after six years the insurer denied the claim because the six year statute of limitations for claims on written contracts had expired. In both cases the courts adopted an accrual rule, the "breach of contract" rule, which would not bar the claims. Hard cases make bad law. This court has recognized in other situations that application of the recognized accrual rules and the applicable statutes of limitations result in harsh outcomes, e.g. *Stuard v. Jorgenson*, 150 Idaho 701, 707, 249 P.3d 1156, 1162 (2011). However, because an insured injured in an auto accident has two years to pursue the at-fault driver and five years to pursue the UIM claim if the "date of accident" accrual rule is adopted, it is unlikely that many UIM claims will be lost because the insured is "unaware" of the need to pursue a UIM claim as the courts in *Brooks* and *Grayson* fear. Klein's UIM claim was not lost and her claim for additional benefits would not have been lost in this case because she was "unaware." Klein was aware. She pursued and resolved her claim against the at-fault driver and obtained the "amount justly due" under her UIM policy within three years of the date

of the accident. That gave her an additional three years to pursue additional compensation under her UIM benefit. Based on the fact that she demanded $250,000 in UIM benefits[17] and received $75,000 as the "amount justly due" from Farmers[18], Klein knew by December of 2012 that she had a claim for additional UIM benefits. It is puzzling why she and her lawyers waited for another three and a half years until July 7, 2016[19] to move forward with the claim. It is equally puzzling why Klein and her lawyers waited more than seven years after the accident until October 26, 2017 to demand arbitration[20] and until November 22, 2017 to file the Complaint.[21] Time barring Klein's claim for additional benefits is not "fundamentally unfair" and adoption of a "date of accident" or "date of settlement/judgment" accrual date for pursuing UIM claims in Idaho should not create "fundamentally unfair" losses of UIM claims in Idaho.

Although the relationship between the insured and the insurer is contractual in nature, the duties owed by an insurer are not confined to contractual duties. *White v. Unigard Mut. Ins. Co.*, 112 Idaho 94, 100, 730 P.2d 1014, 1020 (1986) (because of the unique relationship between the insured and the insurer there exists a common law tort action, distinct from an action on the contract, for an insurer's bad faith in settling the first party claims of its insured); *Harmon v. State Farm Mut. Auto. Ins. Co*., 162 Idaho 94, 102, 394 P.3d 796, 804 (2017) (this Court has extended liability for insurance bad-faith to negligent delays or denials of insurance). Klein would have this Court restrict its search for the accrual date that best works in Idaho to the contractual relationship and argues that "it would be illogical to begin the statute of limitations

[17] R, p. 36.
[18] R, pp. 37 – 39.
[19] R, p. 45.
[20] R, p. 128.
[21] R, p. 7.

before the insured even has a justiciable claim for breach of contract." (Respondent's Brief, page 16).

The purpose of UIM coverage and the public policy supporting the Idaho Legislature's decision to require insurers to offer UIM coverage is to protect "Idahoans suffering catastrophic injuries from drivers carrying insufficient coverage." *Hill*, 150 Idaho at 624, 249 P.3d at 817. It is, therefore, the auto accident that is central to requiring UIM coverage and to the purpose for having the coverage. After *Hill*, a UIM insured may immediately proceed against the UIM insurer, who must then investigate and attempt to resolve the claim in good faith. *Hill*, 150 Idaho at 627–28, 249 P.3d at 820–21. It is not illogical to begin the statute of limitations for making a claim against the UIM coverage on the date of the accident. When considered together, Idaho Code Sections 5-201 and 5-216 provide that a civil action must be commenced within five years "after the cause of action shall have accrued" on "any . . . obligation . . . founded upon an instrument in writing." Farmers' obligation to pay Klein UIM benefits is expressed as follows in the policy: "We will pay all sums which an insured person is legally entitled to recover as damages from the owner or operator of an UNDERInsured motor vehicle because of bodily injury sustained by the Insured person." R, p. 40. That obligation begins immediately with the occurrence of an injury caused by an automobile accident. *Swafford v. Huntsman Springs, Inc*., 163 Idaho 209, 212, 409 P.3d 789, 792 (2017) held that "A cause of action accrues and the statute of limitations begins to run when a cause of action exists" citing *Lido Van and Storage, Inc. v. Kuck*, 110 Idaho 939, 942, 719 P.2d 1199, 1202 (1986). *Lido* cited *Galbraith v. Vangas, Inc.*, 103 Idaho 912, 915, 655 P.2d 119, 122 (Ct. App. 1982) as authority where the Idaho Court of Appeals observed that "[o]rdinarily, negligence is actionable—and a cause of action thus accrues—only when an injury has been sustained." Klein's cause of action against the

underinsured motorist accrued on the date of the accident. Farmers' obligation to pay UIM benefits[22] and Klein's right to enforce that obligation also accrued on the date of the accident because that is when she was "legally entitled to recover damages from the owner or operator" of the underinsured motor vehicle. When the Supreme Court of New Jersey held that the cause of action to enforce a UIM claim accrued on the date of the accident in *Green v. Selective Ins. Co. of Am.*, 144 N.J. 344, 352, 676 A.2d 1074, 1079 (1996) it observed that "[a] cause of action accrues [on the date of the accident] because 'there exists a claim capable of present enforcement.'" That observation is equally applicable in Idaho where UIM claims can be enforced immediately following an accident. It is therefore logical in Idaho to begin the statute of limitations for enforcing the obligation to pay UIM benefits on the date of the accident. The "date of the accident" accrual date for UIM claims is entirely consistent with Idaho law and public policy as announced by this Court.

IV. The "settlement/judgment" rule is preferable to the "breach of contract" rules because it provides an objectively identifiable accrual date and by which date the insured will know whether the liable party is underinsured.

Klein also criticizes the alternative date which is objectively ascertainable for accrual of claims to enforce UIM obligations, namely the "settlement/judgment" rule, because it is inconsistent with Idaho law after *Hill* determined exhaustion clauses to be void as against public policy in Idaho. Respondent's Brief, page 18. Farmers made this same observation in Appellant's Brief at page 12. However, that it is not to suggest that the "settlement/judgment" rule is unworthy of consideration against the "breach of contract" accrual rule. The advantage of the "settlement/judgment" rule is two-fold: (1) it is a date which is objectively ascertainable; and

[22] Klein may argue that *Hill* was decided on January 5, 2011 after her accident on February 1, 2010 so she did not know she did not have to exhaust before pursuing her UIM claim. That argument should not change the result here. The amendment to I.C. § 41–2502(1) which requires insurers to offer UIM coverage went into effect on March 5, 2008. The exhaustion clause violated public policy on that date and the decision in *Hill* affirmed that.

(2) the insured should know by that date whether the at-fault driver is underinsured. Of course, after *Hill*, it is no longer necessary for the insured with UIM coverage to exhaust the coverage available to the at-fault driver before pursuing a UIM claim so the more logical objectively ascertainable accrual date is the date of the accident.

V. The "date of accident" rule does not invalidate or compromise the arbitration provisions in Klein's insurance policy. It merely provides that arbitration must be demanded within the five-year statute of limitations.

Klein claims that the "breach of contract" accrual rule is most consistent with the arbitration provision found in the policy issued by Farmers. There is no dispute that arbitration is required under the policy to determine entitlement to recover damages and the amount of damages and there is no dispute that either party can demand arbitration. (R, p. 177). Klein suggests that if this Court adopts the "date of accident" accrual rule, it would be unfair because the rule is "detached from the arbitration provision," "would arbitrarily divest Klein of the benefits she contracted for," and "would excuse Farmers from its joint obligation to resolve the claim either by agreement, or through arbitration." Respondent's Brief, page 23. A closer examination of the reasons given by Klein for not adopting the "date of accident" accrual rule will show that such fears are unfounded. If the insurer refuses to arbitrate the insured can file a lawsuit to compel arbitration as Klein did in this case. By requiring it to be filed within five years of the accident does not detach the accrual rule from the arbitration provision. By requiring the insured to file an action to enforce the right to UIM benefits within five years of the accident when Idaho requires the insured to file suit against the at-fault driver to recover his available insurance[23] within two years of the accident does not amount to an "arbitrary" divestment[24] of

[23] After *Hill* "[t]The UIM carrier will receive credit for the full amount of the tortfeasor's policy, regardless of the insured's actual recovery." *Hill*, 150 Idaho at 628, 249 P.3d at 821.

the insured's benefits. Requiring the insured to file an action to enforce the right to UIM benefits within five years of the accident does not excuse the insurer of the obligation to resolve the claim by agreement or through arbitration. If the insurer refuses to negotiate or arbitrate, the insured can file a lawsuit to compel arbitration just like Klein did in this case, except the insured will be required to do so within five years of the accident. In this case, Klein waited for more than seven years to even ask that her claim be arbitrated. There is no good reason that demand could not have been made within five years of the accident.

VI. Klein did not request arbitration until more than seven years after the date of the accident and nearly five years after the amount justly due was paid by Farmers. There was no justification for this delay. Thus, arbitration was not requested within a reasonable time.

Klein has included a new issue on appeal raising whether the trial court was correct in determining that a genuine issue of material fact exists concerning whether Klein's lawsuit to compel arbitration was made within a reasonable time. Respondent's Brief, page 8). Klein's identification of this as an additional issue on appeal is unusual. It was not the issue that precipitated the Order Granting Motion for Permission to Appeal. R, pp. 286 – 87. It was not identified by Farmers as an issue on appeal, so it does not present an issue which is in dispute between the parties. The argument cited in support of this new issue on appeal appears to be included only for the purpose of identifying actions by Farmers which would support Klein's argument that she demanded arbitration within a reasonable time.[25] However, examination of the

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[24] When rejecting an equal protection challenge to one of Idaho's statutes of limitation this Court held in *Davis v. Moran*, 112 Idaho 703, 708, 735 P.2d 1014, 1019 (1987) that: "The legislature's program in ameliorating the problem of stale claims under its various statutes of limitations may not be ideal. However, as we have already noted, a classification having some reasonable basis does not offend against the equal protection clause merely because it is made without mathematical exactitude or because in practice it results in some inequality. If any state of facts reasonably can be conceived that would sustain the classification, the existence of that state of facts at the time the law was enacted must be assumed."

[25] Before the trial court, Farmers anticipated that Klein might argue that by responding and communicating with Klein's lawyer about the late demand for supplemental UIM benefits Farmers waived its statute of limitations

facts cited by Klein demonstrates that they do not support her claim that she acted within a reasonable time. First, Klein cites an email from a Farmers adjuster dated December 13, 2012, approximately three years after the accident and five years before Klein demanded arbitration, in which the Farmers adjuster stated: "Farmers is paying $75,000 for the amount justly due. I recognize this does not resolve the UIM claim. I did make this offer to resolve the claim but there has not been any signed release from your client and I will be keeping this claim open." R, p. 106. It would be a stretch to suggest that this email communicated an intention to keep Klein's UIM claim open indefinitely into the future. Every other action which Farmers took and which Klein identifies in Respondent's Brief[26] as supporting her claim that she pursued arbitration within a reasonable time occurred after her present lawyer assumed her representation in July of 2016,[27] more than six years five months after the accident which gave rise to the claim occurred. The fact that Farmers continued to communicate with Klein's lawyers over the next year and four months is not proof that Klein pursued her claim promptly and within a reasonable time. It is proof only that Farmers continued to consider her claim, recognizing that Idaho law was not settled as to when a civil action to enforce UIM benefits accrued. Klein has consistently attempted to use Farmers willingness to negotiate and participate in mediation more than seven years after the accident as proof that Klein timely pursued her UIM claim.[28] These are the kind of

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defense. R, pp. 92 – 93. Klein, however, did not argue that Farmers waived the statute of limitations defense (R, pp. 191 – 214) and the trial court did not address the waiver issue. R, pp. 232 – 39; 256 – 264. Instead Klein argued that she pursued arbitration within a reasonable time. Farmers did not disagree that this presented a question of fact for decision by a fact finder, but pressed the trial court by motion for reconsideration to decide when the statute of limitations accrued. R, p. 237, 256.

[26] Respondent's Brief, pages 24 – 25.

[27] R, p. 45.

[28] It should not be assumed that such evidence is even admissible under IRE 408. *Soria v. Sierra Pac. Airlines, Inc*., 111 Idaho 594, 606, 726 P.2d 706, 718 (1986) (the decision whether to admit settlement negotiations for "another purpose" under IRE 408 is committed to the discretion of the trial court).

issues that can be eliminated by adopting a clear and objectively ascertainable accrual date for UIM claims.

CONCLUSION

When a cause of action to enforce a UIM claim accrues is an issue of first impression in the State of Idaho. This Court exercises free review of matters of law such as this where the issue is when a statute of limitations accrues. Idaho is unique in that it has no statutory scheme for how UIM claims are resolved[29] and insureds are not required to exhaust their claims against the at-fault driver before pursuing a UIM claim. A UIM claim is connected with the insured's bodily injury claim against an at-fault driver because UIM coverage is also designed to supplement and protect an insured from the bodily injury damages proximately caused by the negligent ownership/operation of a motor vehicle. It is logical to require claims to enforce UIM coverage to accrue from the same date that negligence claims against the at-fault driver accrue, i.e. from the date of the accident. That is particularly true in Idaho where the statute of limitations for negligence claims against the at-fault driver is two years and the statute of limitations for enforcing obligations under insurance contracts is five years. There is little risk that an insured will fail to discover that the at-fault driver is underinsured within five years after an accident. Adoption of an accrual date based on the "date of accident" will establish an objectively ascertainable bright line rule for enforcement of UIM claims which will benefit both insureds and insurers.

[29] See e.g. Utah Code § 31A-22-305.3. Underinsured motorist coverage.

Farmers requests this Court to reverse the district court's decision adopting the "breach of contract" accrual date and remand this matter for entry of a judgment dismissing Klein's Complaint with prejudice.

DATED this 25th day of February, 2019.

/s/ Gary L. Cooper
GARY L. COOPER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of February, 2019, I electronically filed the foregoing with the Clerk of the Court using the Idaho I-Court E-File system and requested that a Notice of Filing be sent to the following persons:

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