IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

MIKHAIL MARYANOUSKIY, individually
and on behalf of all others similarly situated,

OPINION and ORDER

Plaintiff,

11-cv-106-bbc

v.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

Defendant.

- -

In this proposed class action, plaintiff Mikhail Maryanouskiy contends that defendant American Family Mutual Insurance Company breached its contract and violated Washington statutory and common law in a number of ways after plaintiff's vehicle was damaged by an underinsured motorist: (1) failing to notify him that he could recover for the diminished value of the car; (2) failing to inspect his car for diminished value; and (3) misclassifying plaintiff's claim under his collision insurance rather than under his underinsured motorist coverage. Defendant has filed a counterclaim for breach of contract for plaintiff's alleged failure to cooperate in the processing of his claim and for his failure to join the underinsured motorist as a defendant in this lawsuit. Jurisdiction is present under the Class Action

Fairness Act, 28 U.S.C. § 1332(d), because the cumulative amount in controversy exceeds $5,000,000 and the parties are citizens of different states.

Now before the court is plaintiff's motion to dismiss defendant's counterclaim for failure to state a claim upon which relief may be granted. Dkt. #9. Also before the court are defendant's motion for

- summary judgment on its breach of contract counterclaim for plaintiff's failure to name the underinsured motorist as a defendant;
- dismissal of plaintiff's complaint for failure to join necessary parties;
- summary judgment on plaintiff's claim for breach of contract on the merits;
- dismissal or summary judgment on plaintiff's class allegations and claims for declaratory and injunctive relief; and
- an order striking certain portions of plaintiff's amended complaint.

Dkt. #11.

After considering the parties' arguments, I conclude first that plaintiff's motion to dismiss defendant's counterclaim must be denied because defendant has pleaded sufficient facts to state a breach of contract claim against plaintiff based on its claims that plaintiff failed to join the underinsured motorist as a defendant in this suit and failed to cooperate in the investigation of his claims. With respect to defendant's own motion for dismissal or summary judgment for plaintiff's failure to state a claim by failing to join a necessary party,

I conclude that it must be granted in part and denied in part. Plaintiff has a contractual obligation to include in this lawsuit the underinsured motorist who damaged his vehicle. Thus, I will grant judgment to defendant on its breach of contract counterclaim as it relates to the joinder provision and will dismiss plaintiff's breach of contract claim for his failure to comply with this provision. The dismissal is without prejudice and plaintiff may amend his complaint accordingly.

I will deny defendant's motions in all other respects. With respect to plaintiff's statutory or common law claims, it is not clear whether defendant is seeking judgment on those claims because it did not cite any statutory or common law in support of its motion for summary judgment and appeared to abandon any arguments related to those claims in its reply brief. Additionally, I will not dismiss plaintiff's claims for declaratory and injunctive relief. Plaintiff is seeking relief in these claims that is distinct from the relief he is seeking in his remaining statutory and common law claims. Finally, I will deny defendant's motion to strike because it is unnecessary and untimely and I will deny its motion to dismiss the class claims as premature. Defendant's arguments related to plaintiff's ability to represent the class should be raised at the class certification stage.

From the parties' proposed findings of fact, I find the following to be material and undisputed.

UNDISPUTED FACTS

Plaintiff Mikhail Maryanovsky sustained personal injuries and vehicle damage on May 22, 2010 in Renton, Washington, when a vehicle owned and driven by Sharon Wimpress drove through a red light and struck plaintiff's 2010 Toyota Corolla, rendering it undrivable. Wimpress remained at the scene until the police arrived. She told plaintiff and the investigating officer that she was insured by GEICO Insurance Company. At the time, plaintiff and his wife, Tatiana Kopylova, were insured under a policy issued by defendant American Family Mutual Insurance Company. Defendant arranged for plaintiff's vehicle to be repaired at an approved shop under his collision insurance coverage. Plaintiff's vehicle was taken to Thoroughbred Collision Center, a repair shop that was part of defendant's Customer Repair Program.

Plaintiff's policy includes both collision coverage and an endorsement for underinsured motorist coverage. The underinsured motorist endorsement defines underinsured motor vehicle as including vehicles with no liability insurance (uninsured vehicles) and vehicles with insufficient insurance (underinsured vehicles). (I will use the term "underinsured" throughout this opinion because that is the term used in the contract.) The deductible on a collision claim for plaintiff was $500. The deductible on an underinsured motorist claim was no more than $300. Plaintiff's collision coverage does not cover claims for "diminished value," which are claims that a car has a lower market value

than it did before an accident, even after it has been repaired fully.

On May 25, 2010, Washington lawyer Brandon Feldman notified defendant that he represented plaintiff and that there should be no further contact between defendant and plaintiff. Thereafter, defendant dealt solely with Feldman and others at his office on matters related to plaintiff's claim. By June 1, the Feldman firm had discovered that Wimpress was not actually insured by GEICO. Ken Polonsky, a paralegal from Feldman's office, asked Thoroughbred Collision Center whether it could provide a diminished value report for plaintiff's vehicle. Thoroughbred told Polonsky that he should make any inquiries regarding diminished value to defendant directly.

On June 10, 2010, defendant wrote Wimpress that it intended to claim subrogation rights against her and her insurance company and asked her to send it her insurance information. In a letter dated June 22, 2010, Feldman notified defendant that GEICO denied any insurance coverage for Wimpress or her vehicle.

On July 7, 2010, defendant changed the payment for plaintiff's property damage and personal injury claims so that they would be paid under his underinsured motorist coverage. On July 27, 2010, Feldman's paralegal, Polonsky, told defendant that plaintiff would be seeking diminished value and had arranged for Stroud's Auto Rebuild to prepare an assessment on that aspect of plaintiff's damages claim. On July 30, 2010, defendant told Polonsky that Lisa McNally had been assigned to plaintiff's diminished value claim. That

day, McNally emailed Polonsky to request eight pieces of information that defendant required to assess plaintiff's diminished value claim, including information such as whether plaintiff's car had received regular maintenance and whether it was insured by any other insurer.

On August 2, 2010, McNally spoke with Polonsky, who confirmed that he had received the letter and would work on providing the eight matters about which defendant had inquired. On October 5, 2010, defendant received a letter dated September 29, 2010, from Feldman with a demand for $7,510 as the diminished value of plaintiff's repaired vehicle. Along with this letter, Feldman enclosed a diminished value appraisal prepared by Stroud's. Other than this letter, neither Feldman nor anyone from his law offices responded to McNally's letter requesting the eight items of inquiry related to plaintiff's diminished value claim, even after she wrote again to Feldman on October 26, 2010, to request the information.

OPINION

A. Plaintiff's Motion to Dismiss Defendant's Counterclaims

In its counterclaims, defendant contends that plaintiff breached the insurance agreement between the parties by (1) failing to join the underinsured driver as a defendant in this case and (2) failing to cooperate with and assist defendant in processing plaintiff's

claims. Plaintiff has moved to dismiss the claims under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted.

A claim should be dismissed under Rule 12(b)(6) when the allegations in the complaint do not raise a plausible claim of entitlement to relief. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 558 (2007). In ruling on a motion to dismiss, courts must construe all of the claimant's factual allegations as true and draw all reasonable inferences in the claimant's favor. Savory v. Lyons, 469 F.3d 667, 670 (7th Cir. 2006). In considering plaintiff's motion to dismiss, I have considered only the allegations in defendant's answer and counterclaim.

Plaintiff argues in his motion to dismiss that defendant cannot enforce the joinder provision of the insurance policy because it is inapplicable, ambiguous and violates public policy. However, as explained below in the discussion of defendant's motion for summary judgment, these arguments are unpersuasive. I conclude that plaintiff breached the insurance agreement by failing to name the underinsured driver as a defendant in this case. Thus, I will not dismiss defendant's counterclaim relating to plaintiff's breach of the joinder provision of the contract.

With respect to defendant's counterclaim that plaintiff breached the "cooperation" provision of the insurance agreement, plaintiff contends that defendant has failed to plead any facts to support this claim or any facts to suggest that defendant suffered harm from the

alleged breach. I disagree. Defendant alleges that it requested information from plaintiff related to his diminished value claim and that plaintiff failed to provide the information, thereby preventing defendant from processing plaintiff's diminished value claim and leading to this lawsuit. These allegations are sufficient at the pleading stage to state a claim for breach of contract against plaintiff.

B. Defendant's Motion for Summary Judgment, Motion to Dismiss and Motion to Strike

In his amended complaint, plaintiff makes the following allegations against defendant in support of his claims for breach of contract and violation of the Washington Consumer Protection Act, administrative regulations and common law:

- Defendant failed to disclose plaintiff's and class members' rights to recover diminished value under the underinsured motorist provisions;
- Defendant failed to assess plaintiff's and the class members' diminished value losses during the appraisal and repair process on underinsured motorist claims;
- Defendant failed to compensate plaintiff and class members for their diminished value losses;
- Defendant mischaracterized plaintiff's and class members' underinsured motorist or hit-and-run claims as falling under the collision coverage provisions

of their policies rather than under the underinsured motorist provisions;

- Defendant failed to investigate and settle claims promptly and failed to provide explanations of the manner in which claims are settled;
- Defendant misrepresented the terms of its insurance policies; and
- Defendant attempted to conceal its contractual obligations to avoid paying plaintiff's and the class members' diminished value loss.

Am. Cpt., dkt. #8, ¶¶ 62-73.

Defendant has moved for partial summary judgment on plaintiff's claims and for summary judgment on its own counterclaim that plaintiff breached his contract by filing this suit without naming the underinsured motorist as a defendant. Unfortunately, it is difficult to determine from defendant's brief the specific claims of plaintiff's on which defendant seeks summary judgment. In its opening brief, defendant states that it is seeking summary judgment on all of plaintiff's individual and class claims with the exception of plaintiff's claim that he should be compensated for the amount of his diminished value loss. Dft.'s Br., dkt. #12, at 7, 15 (arguing for summary judgment on plaintiff's "claims for breach of contract and violation of Washington's Consumer Protection Act and similar statutes"). However, in its reply brief, defendant states that it "did not move for summary judgment on [plaintiff's] individual and bad faith and statutory claims," that it did move for summary judgment on plaintiff's "statutory claims" only "to the extent that they rest on class

allegations in his complaint for which there is no factual basis" and that "there may be a material dispute of fact regarding whether [defendant] breached certain provisions of the [Washington Administrative Code] or acted in bad faith in regard to [plaintiff]" or "somehow 'mishandled' [plaintiff's] claim." Dft.'s Reply Br., dkt. #30, at 4, 12. Defendant does not explain which of plaintiff's claims qualify as "mishandling," "bad faith" or "statutory" claims. It appears from plaintiff's complaint that several of the claims overlap. For example, plaintiff contends that defendant's failure to pay his diminished value claim violated the insurance contract, the common law duty of good faith and fair dealing, Washington's Consumer Protection Act and the administrative regulations enacted to enforce the Act.

I will address defendant's motion only with respect to those claims that defendant has made clear are the subjects of its motion for summary judgment. I understand defendant to be seeking summary judgment on plaintiff's claims that defendant breached the insurance contract by (1) mischaracterizing plaintiff's claim as one under his collision coverage rather than underinsured motorist coverage; (2) failing to notify plaintiff that he could recover for the diminished value of his vehicle; and (3) refusing to assess plaintiff's vehicle for diminished value. Defendant contends that these claims have no factual basis. In addition, defendant contends that because plaintiff has no factual basis to assert these claims, his "class claims" arising from these allegations should also be dismissed. To the extent that

defendant was intending to seek summary judgment on any of plaintiff's other individual claims, including his claims under Washington's Consumer Protection Act and related regulations, defendant waived those arguments by failing to develop them clearly, failing to cite any standard for evaluating such claims and abandoning them in its briefs. MMG Financial Corp. v. Midwest Amusements Park, LLC, 630 F.3d 651, 659 (7th Cir. 2011) (arguments presented with no analysis are waived).

Both parties agree that Washington law applies to the insurance contract at issue.

1. Breach of contract claims

a. Failure to join indispensable parties

Before considering the merits of plaintiff's breach of contract claims, I must resolve two threshold questions. First, defendant contends that plaintiff's breach of contract claims should be dismissed for failure to join indispensable parties under Fed. R. Civ. P. 19. Specifically, defendant contends that Tatiana Kopylova, plaintiff's co-insured and the co-owner of the damaged vehicle, and Sharon Wimpress, the underinsured motorist involved in the accident, are necessary parties under Rule 19. Second, defendant contends that plaintiff is required under the insurance contract to name Wimpress as a defendant in any suit for underinsured motorist coverage. Defendant contends that because plaintiff failed to satisfy this condition precedent for bringing the present suit, defendant is entitled to

summary judgment on its breach of contract counterclaim and plaintiff's breach of contract claim must be dismissed.

1) Fed. R. Civ. P. 19

Rule 19 is intended to permit joinder of all materially interested parties in a single lawsuit to protect interested parties and avoid waste of judicial resources. Askew v. Sheriff of Cook County, 568 F.3d 632, 634 (7th Cir. 2009). The first step in determining whether a suit should be dismissed for failure to join an indispensable party is to identify the required parties under Rule 19(a). Id. at 635. Rule 19(a) reads in relevant part:

> (1) Required Party. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
>
> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a). If the non-joined parties fall under Rule 19(a)(1)(A) or either alternative of Rule 19(a)(1)(B), they must be joined unless it is not feasible to do so. Only

after making this determination may the court decide whether the required parties are indispensable, warranting dismissal under Rule 19(b). Under 19(b), the court must conduct a multifactor analysis to "determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed."

2) indispensability of Kopylova

Defendant contends that both Kopylova and Wimpress fit the criteria of Rule 19(a)(1)(A) and (B) because failing to join them would make defendant "subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations." With respect to Kopylova, she is co-insured with plaintiff on the policy insuring the 2010 Toyota Corolla that is the subject of this lawsuit and thus, she is entitled to make claims under that policy. Additionally, because Kopylova is plaintiff's wife and Washington is a community property state, she has a partial ownership interest in the vehicle involved in the accident. Defendant contends that unless Kopylova is made a party to this action, she will not be bound by any judgment issued as a result and could bring a separate action against defendant to determine defendant's liability to her under the policy.

Defendant has not cited any statute or case law in support of its arguments that Kopylova would not be bound by a judgment issued in the present action or that both spouses are necessary parties in cases involving community property. The law cited by

plaintiff suggests otherwise. Wash. Rev. Code § 4.08.030 provides that "[e]ither spouse . . . may sue on behalf of the community." As the Washington court of appeals explained in Landry v. Luscher, 976 P.2d 1274 (Wash. Ct. App. 1999), one spouse alone "could file suit on behalf of [the other spouse] and [their] community for damage to their community property." Id. at 1278. In Landry, the court of appeals considered whether an action was barred by an earlier suit in small claims court in which the husband and wife had obtained judgment against the same defendants for damage to the marital community's automobile. The court found that although the husband was the only person to sign the small claims notice, he had listed his wife as a plaintiff in the small claims action and thus, they were both bound by the judgment. Id. Moreover, the court added, even if the wife had not been listed as a plaintiff in small claims court, the judgment would bar the subsequent case. Id.

Although defendant argues that the discussion in Landry was dicta and that "case law does not appear to resolve" the issue whether Kopylova must be named to recover for injury to community property, Dft.'s Reply Br., dkt. #30, at 17, defendant has not cited anything that undermines the court's statement in Landry that one spouse can bind another in a suit for recovery of damage to community property. As the moving party, defendant has the burden of showing that Kopylova is a necessary party under Rule 19. 5C Wright, Miller & Kane, Federal Practice & Procedure § 1359. It has not met that burden.

3) indispensability of Wimpress

With respect to Wimpress, the underinsured motorist who damaged plaintiff's vehicle, defendant contends that she must be joined because it intends to pursue its subrogation rights against her. It argues that if Wimpress is not made a party to this action, it will be required to initiate a separate action to recover from her the amount it may have to pay on plaintiff's diminished value claim. Further, if Wimpress disputes the amount of damages for the diminished value of plaintiff's vehicle, defendant may be subject to inconsistent rulings.

I am not persuaded that Wimpress's absence in this litigation will subject defendant to a "substantial risk" of incurring inconsistent obligations. Defendant has adduced no evidence suggesting that Wimpress has an interest in joining this litigation or that she will dispute the amount of damages plaintiff will recover in this case. Additionally, defendant has cited no cases holding that the underinsured driver is a necessary party under Rule 19 in a suit against the insurer for coverage. In contrast, plaintiff has cited several cases in which courts have allowed plaintiffs to bring lawsuits for underinsured motorist coverage directly against an insurer, without including the underinsured motorist. These cases suggest that the underinsured driver is not a necessary party under Rule 19 for breach of contract suits against the insurer, as opposed to tort suits against an insurer and its insured. E.g., Bradley v. State Farm Mutual Automobile Ins. Co., 2010 WL 3766883, *2 (Mich. App.

Sept. 28, 2010); Patterson v. State Farm Mutual Automobile Ins. Co., 2006 WL 1877002, *5 (S.D. Ind. Jul. 6, 2006); Allstate Ins. Co. v. Ramos, 782 A.2d 280, 282-83, 287, n.7 (D.C. 2001); Sullivan v. American Casualty Co. of Reading, Pa., 605 N.E.2d 134 (Ind. 1992); Reese v. State Farm Mutual Automobile Ins. Co., 285 Md. 548, 555, 403 A.2d 1229, 1234 (Md. 1979).

b. Insurance contract

Although I conclude that neither Kopylova nor Wimpress is a necessary party under Rule 19, the question remains whether Wimpress must be joined as a defendant as a condition to plaintiff's ability to sue defendant under the contract. Patterson, 2006 WL 1877002, *5 (holding that underinsured motorist must be joined under contract provision even though motorist was not necessary party under Rule 19). Plaintiff's policy states that "[defendant] may not be sued unless all the terms of this policy are complied with." Dkt. #8-1, § IV.D.9. It also states that

> If any suit is brought by [plaintiff] to determine liability or damages, the owner or operator of the underinsured motor vehicle must be made a defendant and you must notify us of the suit.

Id., Endorsement 55, §.1.3 (the "joinder provision").

Defendant contends that the contract provision is clear on its face and requires plaintiff to join Wimpress as a party in any suit regarding liability or damages brought in

connection with plaintiff's underinsured motorist coverage. Plaintiff raises three primary arguments in opposition.

First, plaintiff contends that the provision is inapplicable in this particular case because defendant has already determined that the underinsured motorist was at fault in the accident and that plaintiff should be reimbursed under his underinsured motorist endorsement. In this case, plaintiff is claiming that defendant breached its contract and the duty of good faith and fair dealing by mischaracterizing plaintiff's claim, failing to notify plaintiff of his right to recover diminished value and failing to assess his vehicle for diminished value. Thus, plaintiff contends, his claims relate solely to defendant's actions, making it unnecessary for Wimpress to be involved in this case.

The problem with this argument is that although plaintiff is seeking damages for defendant's breach of contract, he is also seeking damages for the diminished value of his vehicle on the ground that defendant must compensate plaintiff for all damages he would be "legally entitled to recover" from the underinsured driver Washington law. Under Washington law, plaintiff argues, insured drivers may recover diminished value from an underinsured driver. In other words, part of the recovery plaintiff is seeking in this case is to recover damages that Wimpress would be liable to pay directly to plaintiff. Because Wimpress would be liable for the diminished value, defendant has a right of subrogation against Wimpress and could seek repayment from Wimpress for any damages it pays to

plaintiff for diminished value as a result of this case. Thus, this case is about "liability or damages," as contemplated by the joinder provision of the policy, giving defendant a legitimate reason to insist on Wimpress's presence in the suit.

Plaintiff's second argument against enforcement of the joinder provision is that it is ambiguous and thus, should be construed against defendant. Plaintiff contends that the provision is unclear about whether it applies only in cases in which the insured is bringing a tort claim against an underinsured motorist or whether it applies only in cases in which the insured is suing its insurer for breach of contract. Plaintiff argues that the requirement that the underinsured driver must be "made a defendant" makes no sense in a tort suit against the underinsured driver (because, by definition, the underinsured driver will necessarily be a defendant), while the requirement that the insured must "notify [defendant American Family] of the suit" makes no sense in a suit against American Family (because American Family will necessarily know about the suit). Plaintiff contends that because of this "ambiguity," the provision should be construed against defendant and interpreted to mean that "any time an insured decides to bring a suit against a third-party tortfeasor, the individual tortfeasor must be named and [defendant] must be notified of the suit." Plf.'s Opp. Br., dkt. #24, at 19.

A clause in an insurance policy is ambiguous only "when, on its face, it is fairly susceptible to two different interpretations, both of which are reasonable." American

National Fire Ins. Co. v. B & L Trucking & Construction Co., 951 P.2d 250, 256 (Wash. 1998). When determining whether a provision is ambiguous, a court must consider the insurance policy as a whole and give it a "fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance." Quadrant Corp. v. American States Ins. Co., 110 P.3d 733, 737 (Wash. 2005). When this is done, it becomes clear that plaintiff's proposed construction is not reasonable because it makes the joinder requirement superfluous. Defendant would have no reason to include a provision requiring joinder of the underinsured motorist as a defendant in tort cases *against the underinsured motorist*. The provision has only one sensible construction: if an insured brings *"any* suit," whether against defendant or the underinsured driver, to determine liability or damages under his underinsured motorist endorsement, he must (1) make the owner or operator of the underinsured vehicle a defendant and (2) notify defendant of the suit. Although the provision may be overinclusive, in that both the "joinder" and "notice" requirements may not be necessary in every case, this construction gives the provision its plain meaning. Moeller v. Farmers Ins. Co., 229 P.3d 857, 861-62 (Wash. Ct. App. 2010) (when interpreting insurance policy's terms, courts read policy in manner in which average insured would understand it, giving terms their "plain, ordinary, and popular meaning ") see also Quadrant, 110 P.3d at 737 (court may not modify policy terms or create ambiguity where none exists).

Plaintiff's final argument is that the joinder provision should not be enforced because it violates the public policy behind Washington's underinsured motorist statute, citing cases in which courts have refused to enforce provisions in insurance contracts that require joinder of the underinsured driver as violative of public policy. In response, defendant cites cases in which courts have found that such provisions do not violate public policy. Compare Diaz-Hernandez v. State Farm Fire & Casualty Co., 19 So.3d 996, 999-1000 (Fla. Dist. Ct. App. 2009) (provision requiring insured to join underinsured motorist in suit against insurer is void as against public policy because it imposes an "additional burden upon the insured," and "[t]here is nothing in the [underinsured motorist] statute that imposes such a burden upon the insured"); Reese, 403 A.2d at 1232 (insured can bring contract action against insurer without joining underinsured motorist); Ramos, 782 A.2d at 287 n.7 (same), with Bodden v. State Farm Mutual Auto. Insurance Co., 195 Fed. Appx. 858 (11th Cir. 2006) (unpublished) (policy provision requiring insured to join tortfeasor in action against insurer as condition precedent to recovering underinsured motorist benefits not unenforceable as against public policy; nothing in Florida's underinsured motorist statute prohibits such requirement), and Patterson, 2006 WL 1877002, *4 (policy provision requiring joinder of underinsured motorist did not violate public policy of Indiana's underinsured motorist statute). None of these decisions are binding and none address the statute or policy provision at issue in this case.

Washington's underinsured motorist statute requires every motor vehicle liability insurer doing business in Washington to offer underinsured motorist coverage to its Washington policyholders. Wash. Rev. Code § 48.22.030(2). The purpose of the statute is to protect the innocent victims of automobile accidents by providing a source of indemnification when the tortfeasor does not provide adequate protection. Fisher v. Allstate Ins. Co., 961 P.2d 350, 353 (Wash. 1998); MidCentury Ins. Co. v. Henault, 905 P.2d 379, 382 (Wash. 1995) ("Washington has a strong public policy, both legislative and judicial, to protect innocent victims from uninsured or underinsured motorists.").

"[I]nsurers cannot diminish the statutorily mandated [underinsured motorist] coverage through language in the insurance policy." Liberty Mutual Ins. Co. v. Tripp, 25 P.3d 997, 1002 (Wash. 2001) (citation omitted). Thus, "where the underinsured motorist endorsement does not provide protection to the extent mandated by the underinsured motorist statute, the offending portion of the policy is void and unenforceable." Britton v. Safeco Ins. Co. of America, 707 P.2d 125, 133 (Wash. 1985). However, despite the public policy of broad protection for injured persons, "Washington courts have avoided undue interference with the right to contract." Allstate Ins. Co. v. Hammonds, 865 P.2d 560, 563 (Wash. App. 1994). Thus, "public policy arguments are generally successful only if supported by specific legislation or judicial decisions." Id.; see also State Farm v. Emerson, 687 P.2d 1139, 1142 (Wash. 1984) ("We shall not invoke public policy to override an

otherwise proper contract even though its terms may be harsh and its necessity doubtful.").

The Washington Supreme Court has explained that when a court is determining whether a duty imposed by a provision in an underinsured motorist policy violates public policy, the court should consider whether the imposition of the duty (1) violates the express language of the undersinsured motorist statute, §§ 48.22.030-.040, or (2) undermines the statute's declared public policy. Tripp, 25 P.3d at 1002; Greengo v. Public Employees Mutual Ins. Co., 959 P.2d 657, 660 (Wash. 1998).

Plaintiff does not point to any express language of the underinsured motorist statute that might be violated by the joinder provision at issue, and I see nothing in the statute that would prohibit a policy provision requiring the inclusion of the underinsured driver in a lawsuit related to liability or damages. Although plaintiff argues that the statute does not "require" the joinder provision, that is not the test for validity. Tripp, 25 P.3d at 1002 (question is whether provision "conflicts with the statute, not whether statute expressly allows the provision") (internal quotation and citation omitted); see also Greengo, 959 P.2d at 661 & n.2 ("lack of express statutory authorization for the precise exclusion is not the focus of our inquiry. . . [i]ndeed, we have repeatedly upheld [underinsured motorist] exclusions that are not expressly authorized by the [underinsured motorist] statute").

Additionally, the joinder provision does not undermine the declared public policy of the statute, which is "to protect innocent victims of motorists of underinsured motor

vehicles." Wash. Rev. Code § 48.22.030(12); see also Tripp, 25 P.3d at 1003 ("[T]he public policy underlying [the underinsured motorist statute] is creation of a second layer of floating protection for the insured.") The joinder provision at issue in this case does not eliminate, limit or even condition plaintiff's coverage. It merely sets forth a condition to suit that does not appear overly burdensome or unreasonable. The policy provision promotes the efficient resolution in one lawsuit of all issues among all parties who might have an interest in the results, including the underinsured motorist. In particular, bringing the underinsured motorist into the lawsuit saves defendant the extra expense of having to assert its subrogation claim for plaintiff's diminished value loss against Wimpress in a separate lawsuit.

Finally, I am not persuaded by plaintiff's argument that the joinder provision is void because there could be situations in which it would be impossible to join the underinsured driver, such as where the underinsured is a hit-and-run driver and thus unidentifiable. Plaintiff's claim does not involve a hit-and-run accident. He knows who the underinsured driver is, so it would not have been impossible for him to name her as a defendant in this lawsuit. I will not consider hypothetical scenarios to invalidate the joinder provision. Barth v. Allstate Ins. Co., 977 P.2d 6, 12 (Wash. Ct. App. 1999) (upholding policy provision that is "generally too broad" where it was not overly broad under facts at issue); see also American Home Assurance Co. v. Stone, 61 F.3d 1321, 1329 (7th Cir. 1995) (refusing to consider

hypothetical "scenarios not confronting" court as basis to invalidate provision in insurance policy).

It makes sense that plaintiff does not wish to include Wimpress as a defendant in this case. First, it is doubtful whether Wimpress can be sued in Wisconsin, as she is apparently a citizen of Washington. In addition, plaintiff seeks to represent a plaintiff class. It will be difficult to show that a class should be certified if all of the underinsured drivers who are blamed for the damage to the class plaintiffs' vehicles must be added to the case. However, neither of these complications contravenes the declared public policy of Washington's underinsured motorist statute. Moreover, plaintiff has not argued that the joinder provision should not be enforced because it violates some other public policy in favor of allowing class action suits to resolve these types of claims.

In sum, the contract plaintiff seeks to enforce requires him to name the underinsured driver as a defendant. The requirement is not void as ambiguous, contrary to statute or public policy. Thus, plaintiff breached his contract by failing to name Wimpress as a defendant in this lawsuit and may not proceed with his own breach of contract claim against defendant unless he names Wimpress as a defendant. Plaintiff's claims will be dismissed without prejudice, but he will be given until September 6, 2011 to amend his complaint to join Wimpress as a defendant if he so chooses. With the dismissal of these claims, I need not consider defendant's additional arguments in support of summary judgment on plaintiff's

individual breach of contract claim.

2. Class claims

Defendant contends that the "class claims" in the amended complaint should be dismissed because plaintiff lacks "standing" to assert them on behalf of the class. In particular, defendant contends that because plaintiff's breach of contract claim lacks merit, he cannot assert that claim on behalf of a class. Additionally, defendant contends that plaintiff has not suffered the same injuries as the potential class members, because plaintiff was not the victim of a hit-and-run accident, defendant did not misclassify plaintiff's claim for coverage and plaintiff was represented by counsel who knew that plaintiff could make a claim for diminished value. Therefore, defendant argues, plaintiff did not suffer any injuries from defendant's alleged failure to notify him of his possible claim for diminished value.

It is true that to maintain a claim before a class is certified, the named plaintiff must have standing. Kohen v. Pacific Investment Management, 571 F.3d 672, 676 (7th Cir. 2009) (before class certification, only named plaintiff "has a legally protected interest in maintaining the suit"). This means that the plaintiff must have suffered an "injury in fact" that is fairly traceable to the challenged action of the defendant and "likely," as opposed to merely "speculative," to be "redressed by a favorable decision." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

Plaintiff's pleadings meet these requirements. He has alleged that he suffered a monetary injury by not being compensated for the diminished value of his vehicle; the injury is traceable to defendant's failure to pay plaintiff's diminished value claim; and his injury can be redressed by judgment in his favor. Although plaintiff's breach of contract claim will be dismissed, his claims that defendant acted in bad faith and violated certain statutory and regulatory provisions will go forward. Thus, plaintiff has standing to maintain this suit.

To be fair, defendant is not exactly arguing that plaintiff lacks standing to bring his own claims. Rather, defendant is arguing that plaintiff cannot bring a class action. However, this argument conflates the standing inquiry with the Rule 23 inquiry with plaintiff's suitability to serve as a class representative. The proper remedy for this shortcoming is not dismissal of the class allegations, but rather an order denying class certification and permitting the case to continue as an individual suit. Payton v. County of Kane, 308 F.3d 673, 677 (7th Cir. 2002) (if plaintiffs lack "'standing' to bring a class action . . . proper remedy is . . . an order denying class certification"); see also 7B Wright, Miller & Kane, Federal Practice & Procedure, Civil 3d § 1798 ("Compliance with the Rule 23 prerequisites theoretically should not be tested by a motion to dismiss for failure to state a claim or by a summary judgment motion. The proper vehicle is Rule 23(c)(1) (A), which provides that, at an early practicable time, the court must 'determine by order whether to certify the action as a class action.'"); Walker v. County of Cook, 2006 WL 2161829, at *2 (N.D. Ill. July 28,

2006) (issues regarding commonality and typicality as required under Rule 23 were raised prematurely in Rule 12(b)(6) motion); Oxman v. WLS-TV, 595 F. Supp. 557, 561-62 (N.D. Ill. 1984) (motion to dismiss was premature because issues would be better raised in motion opposing class certification).

The Court of Appeals for the Seventh Circuit has cautioned district courts to not "put the cart before the horse" by "[f]irst ruling on the merits of the federal claims, and then denying class certification on the basis of that ruling." Thomas v. City of Peoria, 580 F.3d 633, 635 (7th Cir. 2009) (citing Wiesmueller v. Kosobucki, 513 F.3d 784, 786-87 (7th Cir. 2008)); see also Bieneman v. City of Chicago, 838 F.2d 962, 964 (7th Cir. 1988) (per curiam) (in most cases, class certification issue should be decided before decision on merits). This is precisely what defendant is asking the court to do. However, without considering both parties' arguments regarding class certification, I cannot conclude at this stage whether certification is appropriate or whether plaintiff would be an adequate class representative. (I note, however, that defendant has flagged several potential problems that may prevent certification of a class in this case, including plaintiff's inability to represent class members who have breach of contract claims, the varied classification and processing experiences of the potential class members and the variations in state law that would apply to the class members' claims.) After considering this ruling, plaintiff may decide to redefine the class or may determine that there is an adequate class representative that could replace him. At this

stage in the case, I do not think it appropriate to deny plaintiff the opportunity do so.

In sum, I conclude that defendant's arguments regarding plaintiff's ability to represent the class are best left for the class certification stage. Therefore, I will not strike or dismiss any of the class allegations in the amended complaint at this time.

3. Claim for injunctive and declaratory relief

In addition to his claims for breach of contract and violations of state law, plaintiff brings claims for declaratory and injunctive relief. Am. Cpt., dkt. #8, ¶¶ 42-57. Defendant contends that these claim should be dismissed because they duplicate his claims for breach of contract and because plaintiff is not entitled to injunctive relief for a breach of contract. Kartman v. State Farm Mutual Auto. Ins. Co., 634 F.3d 883, 886 (7th Cir. 2011) (remedy for breach of contract and bad-faith denial of insurance benefits is damages, not injunctive relief).

I will not dismiss these claims at this time. First, I disagree that the claims are duplicative. Plaintiff does not seek through his other claims a declaration of his rights or an injunction requiring defendant to notify its customers regarding diminished value claims and to evaluate those claims. In addition, plaintiff's request for injunctive relief is not actually an independent claim; rather, it is a request for a specific remedy. Even if plaintiff is not entitled to injunctive relief for his breach of contract claim, particularly now that the contract

claim will be dismissed, he may be entitled to an injunction in connection with his remaining claims. Because neither party has explained whether plaintiff's request for injunctive relief was related solely to plaintiff's breach of contract claim, I will not dismiss the claim at this time.

4. Motion to strike

Defendant's final request is that the court strike several portions of plaintiff's amended complaint under Fed. R. Civ. P. 12(f), which allows a court "to strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." I will deny this motion. As an initial matter, motions to strike are disfavored because they waste time by requiring judges to engage in busywork and judicial editing without addressing the merits of a party's claim. Custom Vehicles, Inc. v. Forest River, Inc., 464 F.3d 725, 727 (7th Cir. 2006). Defendant has asked the court to strike more than five pages worth of allegations from plaintiff's amended complaint but does not explain why the material is "redundant, immaterial, impertinent, or scandalous." Most of the targeted allegations concern plaintiff's class allegations, which are properly objected to at the class certification stage.

Moreover, defendant's motion to strike is untimely. Under Rule 12(f), a party may file a motion to strike "either before responding to the pleading or, if a response is not

allowed, within 21 days after being served with the pleading." Defendant filed its motion to strike after filing a responsive pleading, which was too late. At this stage, the parties should focus on the propriety of class certification.

ORDER

IT IS ORDERED that

1. Plaintiff Mikhail Maryanouskiy's motion to dismiss, dkt. #9, is DENIED.

2. Defendant American Family Mutual Insurance Co.'s motion for summary judgment, motion for partial summary judgment, motion to dismiss and motion to strike, dkt. #11, is GRANTED IN PART and DENIED IN PART:

a. Defendant's motion for summary judgment on its counterclaim that plaintiff breached the insurance contract by failing to join the underinsured motorist to this action is GRANTED.

b. Defendant's motion to dismiss plaintiff's claims for declaratory and injunctive relief is DENIED.

c. Defendant's motion to dismiss the class allegations in the amended complaint is DENIED.

d. Defendant's motion to strike is DENIED.

e. Defendant's motions are DENIED in all other respects.

3. Plaintiff's breach of contract claim is DISMISSED without prejudice. He may have until September 6, 2011 to file an amended complaint in which he names the underinsured motorist as a defendant in this action.

Entered this 24th day of August, 2011.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge