IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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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 and
SHARON WIMPRESS,

Defendants.

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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. On August 24, 2011, I granted defendant's motion for summary judgment on its counterclaim that plaintiff breached the insurance contract by failing to join Sharon Wimpress, the underinsured motorist, to this action. I concluded that joinder of the underinsured motorist was a condition precedent to plaintiff's ability to sue defendant under the insurance contract. On September 6, 2011, plaintiff filed a second amended complaint,

naming Wimpress as a defendant. Plaintiff filed an affidavit of service regarding Wimpress on October 27, 2011. Wimpress has not answered or otherwise responded.

There are two motions before the court for decision. First, plaintiff has filed a motion for reconsideration of the court's conclusion that the parties' insurance contract requires joinder of Wimpress as a defendant in this action. Dkt. #47. Plaintiff contends that the joinder provision is void because it violates Washington's public policy of protecting victims of underinsured motorists as well as federal policy in favor of class actions. Additionally, plaintiff contends that the provision cannot be enforced unless defendant shows actual prejudice from plaintiff's failure to join Wimpress. Because plaintiff's motion consists solely of arguments that could have been, but were not raised earlier, or arguments that I rejected previously, I will deny the motion. Ahmed v. Ashcroft, 388 F.3d 247, 249 (7th Cir. 2004) ("'Reconsideration is not an appropriate forum for rehashing previously rejected arguments or arguing matters that could have been heard during the pendency of the previous motion.'") (citation omitted).

Second, defendant has filed a motion to dismiss plaintiff's breach of contract claim, contending that because the court lacks personal jurisdiction over Wimpress, plaintiff has not complied with the joinder provision of the insurance contract. Dkt. #43. After reviewing defendant's motion, I conclude that it raises issues related to standing and contract interpretation that would be resolved easily if this case were transferred to the Western

District of Washington, where venue is more appropriate. If the case is transferred to Washington, there will be no question that plaintiff has complied with the joinder provision and defendant will be able to pursue its subrogation claims against Wimpress in the same action. Therefore, I am staying a decision on defendant's motion to dismiss and asking the parties to show cause why this case should not be transferred under 28 U.S.C. § 1404.

## OPINION

### A. Plaintiff's Motion for Reconsideration

Plaintiff raises three main arguments in support of his motion for reconsideration. First, he contends that his failure to join the underinsured motorist in this action is an immaterial breach of the agreement from which defendant has shown no prejudice. Plaintiff contends that defendant must establish that the underinsured motorist can respond to any damages award ultimately rendered against her in a manner that makes it worth the time and expense for defendant to prosecute a subrogation action against her.

This argument is identical to the argument plaintiff made in support of its motion to dismiss and in opposition to defendant's motion for summary judgment, Plt.'s Br., dkt. #10, at 13-14; Plt.'s Opp. Br., dkt. #24, at 8-9. I remain unpersuaded by it. Plaintiff cites no cases standing for the broad proposition that an insurance company must always establish prejudice before it can rely upon express provisions of a policy. In Oregon Automobile

Insurance Co. v. Salzberg, 535 P.2d 816, 819 (Wash. 1975), the only case plaintiff cites in support of his motion for reconsideration, the insurance company was seeking to defeat coverage on the basis of an insured's breach of a "cooperation clause" in the contract. The Washington Supreme Court concluded that "sound public policy requires that an alleged breach of a cooperation clause may be considered substantial and material, and may effect a release of an insurer from its responsibilities only if the insurer was actually prejudiced by the insured's actions or conduct." Id. at 819. The court stated that "absent a showing of prejudice" the insurance company would receive a "questionable windfall." Id.

In this case, requiring plaintiff to comply with the joinder provision does not lead to defendant's receiving a windfall and does not allow defendant to defeat coverage. As I explained previously, "[t]he 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." Op. & Order, dkt. #41, at 23. Thus, the rule in Salzberg is not applicable here.

Moreover, I concluded previously that defendant had shown sufficient prejudice by plaintiff's failure to join the underinsured driver. McLean Townhomes, LLC v. American States Insurance Co., 156 P.3d 278, 280 (Wash. Ct. App. 2007) ("[T]o establish actual prejudice the insurer must show 'some concrete detriment. . . .'") (citation omitted). Defendant has stated that it intends to file a cross-claim against Wimpress. In the previous

order, I explained that "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." Id. at 23. Additionally, it would prevent the statute of limitations from running on defendant's claim against Wimpress. This is sufficient to show prejudice.

Plaintiff's second argument is that the joinder provision violates the public policy behind Washington's underinsured motorist statute. Again, this is an argument that I rejected in the previous order. In that order, I identified the applicable framework for determining whether a provision violates Washington's public policy and concluded that the joinder provision does not do so. I stated that

> [T]he joinder provision does not undermine the declared public policy of the [underinsured motorist] statute, which is "to protect innocent victims of motorists of underinsured motor vehicles." The joinder provision at issue in this case does not eliminate, limit or even condition plaintiff's coverage. . . 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.

Id. at 22-23.

In his motion for reconsideration, plaintiff suggests the joinder provision violates a different public policy behind the underinsured motorist statute. Specifically, plaintiff contends that the joinder provision violates Washington's public policy "requiring an insured to be made whole before his insurer may assert its subrogation rights." Plf.'s Br., dkt. #49,

at 2. To the extent that plaintiff is making a new public policy argument in his motion for reconsideration, it is too late. Brooks v. City of Chicago, 564 F.3d 830, 833 (7th Cir. 2009) ("[A]ny arguments . . . raised for the first time in [a] motion to reconsider are waived."); Mungo v. Taylor, 355 F.3d 969, 978 (7th Cir. 2004) (same).

In any event, plaintiff's argument is unpersuasive. Washington has a "strong public policy in favor of joining the [underinsured motorist insurer] and the tortfeasor in a single action." Petersen-Gonzales v. Garcia, 86 P.3d 210, 214 (Wash. App. 2004). Additionally, Washington courts have identified the public policy behind the underinsured motorist statute. The cases plaintiff cites do not support his argument that an additional public policy prohibits insurance companies from enforcing subrogation claims against underinsured drivers in the same case as an insured's claims against the insurance company. The first case plaintiff cites, Thringer v. American Motors Insurance Co., 588 P.2d 191 (Wash. 1978), concerns an insurer's entitlement to reimbursement out of settlement proceeds when those proceeds are insufficient to make the insured whole. Id. at 193 ("The decisive issue before us concerns the allocation of the proceeds of the settlement, as between the insured and the insurer."). The second case, Brown v. Snohomish County Physicians Corp., 845 P.2d 334 (Wash. 1993), concerns the validity of an exclusionary provision in an insurance policy when its enforcement would prevent the insured from being made whole. Id. at 340 (exclusionary provisions invalid "[t]o the extent that [they] operate to exclude

coverage for medical expenses before the insured party is fully compensated for general damages and other special damages"). The holdings of these cases are not relevant to the issue in this case.

Plaintiff's final argument is that the joinder provision conflicts with the public policy of Fed. R. Civ. P. 23 and Washington's policy of aggregating small claims into class actions. Plaintiff contends that his breach of contract claim for diminished value (approximately $7,500) is the type of small claim for which the class action remedy is highly appropriate and that because the joinder provision will undermine his attempts to raise the claim on a classwide basis, the joinder provision is void. As I pointed out in the previous opinion, "[i]t 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." Op. & Order, dkt. #41, at 24. (I am skeptical whether this case could be maintained as a class action regardless of the joinder provision. As I noted in the previous order, there are several potential problems that could prevent certification of a class in this case, including the application of various state laws to the class members' breach of contract and tort claims and the varied classification and processing experiences of the class members. Op. & Order, dkt. #41, at 27.) I noted in the previous order that "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." Id. By waiting to raise this

argument for the first time in his motion for reconsideration, plaintiff has waived it. Brooks, 564 F.3d at 833; Mungo, 355 F.3d at 978. Moreover, plaintiff's argument is not persuasive when considered in the context of this case.

It is true that contractual provisions may be invalid if they violate established public policy. However, plaintiff cites no cases standing for the proposition that any contractual provision that would make it difficult to bring a class action should be invalidated. Plaintiff cites Fed. R. Civ. P. 19(d), which states that the joinder requirements of Rule 19 are "subject to Rule 23." However, it is not Rule 19 that requires plaintiff to join Wimpress. Plaintiff must join Wimpress because his insurance contract requires him to do so.

Plaintiff also cites Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co., 130 S. Ct. 1431 (2010), in support of his argument that the joinder provision is invalid because it conflicts with Rule 23. However, Shady Grove is inapposite. That case addressed conflicts between state and federal law and, in particular, whether plaintiffs could maintain a class action in federal court that arguably met the requirements of Rule 23 but was barred under a New York statute. Id. at 1437-38. Unlike the New York statute, the joinder provision in the parties' insurance contract does not prohibit class actions or even address class actions. The question whether plaintiff will be able to maintain a class action in this case is still governed exclusively by Rule 23. Although the joinder provision will be a factor in assessing whether the requirements of Rule 23 are met, the Court did not discuss in Shady

Grove whether private party contractual provisions should be invalidated if they make maintenance of a class action inappropriate or even impossible.

The Washington Supreme Court addressed the issue of contractual provisions that might undermine class actions in Schnall v. AT&T Wireless Services, Inc., 259 P.3d 129, 133 (Wash. 2011), a case in which customers filed a nationwide class action against AT&T for an improper charge that appeared monthly on their billing statements. In its customer agreements, AT&T had a choice of law clause that required customers to litigate asserted violations of their contracts under the law of the jurisdiction in which they signed the contract, which was usually based on the customer's area code. Id. at 132. The supreme court agreed with the trial court that there was no public policy reason to invalidate the choice of law provision, even though enforcement made maintenance of a nationwide class impossible. Id. at 133, 135 (holding that trial court correctly denied certification of nationwide class in part because of choice of law issues). Similarly, in AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011), the United States Supreme Court considered whether a class action waiver provision in a party's arbitration agreement was unenforceable because it was unconscionable under California law. Id. at 1744. The Court concluded that the parties' agreement to arbitrate their disputes and to prohibit class action arbitration was enforceable under the Federal Arbitration Act, noting that "arbitration is a matter of contract, and the [Federal Arbitration Act] requires courts to honor parties' expectations."

Id. at 1752. Like the choice of law provision in Schnall and the arbitration provision in Concepcion, the joinder provision in this case is a matter of contract that defendant can enforce even if it would undermine plaintiff's attempts to bring a nationwide class action. Accordingly, I will deny plaintiff's motion for reconsideration.

B. Defendant's Motion to Dismiss for Lack of Personal Jurisdiction

Defendant has moved to dismiss plaintiff's second amended class action complaint on the basis that plaintiff has failed to join Wimpress, the underinsured motorist, as required by this court's previous order and the joinder provision of the insurance contract. Defendant contends that although plaintiff filed an amended complaint, named Wimpress as a defendant and served Wimpress with a summons and complaint, plaintiff has not complied with the joinder provision because this court lacks personal jurisdiction over Wimpress. In other words, defendant interprets the language of the joinder provision—that "the underinsured motor vehicle *must be made a defendant*," dkt. #8-1, Endorsement 55, §.1.3—as requiring plaintiff to join Wimpress as a party in a court that can exercise personal jurisdiction over her. In response, plaintiff does not deny that this court lacks personal jurisdiction over Wimpress. Instead, he contends that he was required only to name Wimpress as a defendant in his complaint and serve copies of the summons and complaint on her. Plaintiff contends that because he has taken these steps, he has complied with the

joinder provision and the court's order.

As an initial matter, it is not clear whether defendant has the right to raise a personal jurisdiction challenge on behalf of Wimpress. Unlike subject matter jurisdiction, personal jurisdiction is a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty. Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702–03 (1982). Thus, it is waivable by the affected parties and ordinarily cannot be raised on their behalf by anyone else. E.g., Seven Arts Pictures, Inc. v. Jonesfilm, 2011 WL 2461701, *4 (E.D. La. June 17, 2011); Sayles v. Pacific Engineers & Constructors, Ltd., 2009 WL 791332, at *7 (W.D.N.Y. Mar. 23, 2009) (citation omitted) (defendant cannot contest personal jurisdiction over co-defendant); Smithkline Beecham Corp. v. Geneva Pharmaceuticals, Inc., 287 F. Supp. 2d 576, 580 n.7 (E.D. Pa. 2002) (citation omitted) (same).

In some limited circumstances a defendant may assert jurisdictional defenses belonging to others. A defendant may do so, for example, when the court is unable to obtain lawful personal jurisdiction over a truly indispensable party. E.g., Hanson v. Denckla, 357 U.S. 235, 245 (1958) (defendant in trust action could assert lack of personal jurisdiction over indispensable trustee as basis for dismissal of action because "any defendant affected by the court's judgment ha[d] that 'direct and substantial personal interest in the outcome' that is necessary to challenge whether that jurisdiction was in fact acquired.") (citation

omitted); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 804 (1985) (citing Hanson to confer on defendants right to challenge court's personal jurisdiction over non-consenting class members). Additionally, a district court may raise personal jurisdiction concerns sua sponte when deciding whether to enter a default judgment because the defendant has failed to appear. Wright & Miller, Federal Practice & Procedure § 1063.

That being said, defendant has the right under the contract to challenge whether plaintiff complied with the joinder provision and this court's order by naming Wimpress as a defendant and serving her with the summons and complaint in a court that likely lacks personal jurisdiction over her. As I explained previously, the purpose of the joinder provision is to promote efficient resolution of all issues among all parties who might have an interest in the results. In particular, the joinder provision exists to allow defendant to assert its subrogation claim against Wimpress in the same lawsuit and to avoid the running of the statute of limitations on that claim. Assuming that this court lacks personal jurisdiction over Wimpress, defendant could not recover on its subrogation claim against Wimpress in this court unless Wimpress agreed to waive her personal jurisdiction defense. Thus, plaintiff's joinder of Wimpress to its breach of contract claim in this court does not achieve the goals of the joinder provision and would make the provision meaningless in the context of this case.

On the other hand, plaintiff is correct that the joinder provision does not state

specifically that a plaintiff complies with the joinder provision only if the court may exercise personal jurisdiction over the underinsured motorist. One can imagine scenarios in which there is no court that could exercise personal jurisdiction over both the underinsured motorist and defendant and thus, there would be no court in which the plaintiff could bring a suit to recover against defendant and still comply with the joinder provision. At the very least, under defendant's interpretation of the joinder provision, a plaintiff's choice of forum will be limited.

It seems clear that transferring this case to the Western District of Washington would moot the parties' difficult jurisdictional disputes. The factors of 28 U.S.C. § 1404 favor transfer. Plaintiff is a citizen and resident of Washington; Wimpress is a resident of Washington; the insurance policy was issued in Washington; the accident that gave rise to plaintiff's claims took place in Washington; and Washington law applies to plaintiff's claims. The only apparent tie to Wisconsin is that defendant is headquartered here, however, even defendant has conceded that Washington would be a more appropriate forum. Dkt. #12 at 7, 20 ("[Plaintiff] is able to bring this suit in Washington, where Wimpress can be joined as a party.").

I am reluctant to make a final decision on defendant's motion to dismiss if it would be more appropriate to transfer of this case, but I am equally reluctant to transfer the case without allowing the parties to be heard on the question. Therefore, I will give the parties

an opportunity to show cause why this case should not be transferred to the Western District of Washington.

ORDER

IT IS ORDERED that

1. Plaintiff Mikhail Maryanouskiy's motion for reconsideration, dkt. #47, is DENIED.

2. A decision on defendant American Family Mutual Insurance Co.'s motion to dismiss, dkt. #43, is STAYED.

3. The parties may have until December 23, 2011 to show cause why this case should not be transferred to the Western District of Washington under 28 U.S.C. § 1404.

Entered this 9th day of December, 2011.

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