[Brief to the Maine Superior Court on motion for summary judgment to compel full payment of underinsured motorist coverage in auto insurance policy. Case settled favorably after brief filed. Names changed for privacy.]

INTRODUCTION

This is a contract action to collect underinsured motorist benefits provided for in an insurance policy issued to the plaintiffs by York Insurance Company ("York"). The complaint originally sought $84,788.02, which was the difference between the amount of the underinsured coverage ($100,000) and the amount received by the plaintiffs from the underinsured driver who caused the injuries to Jack Monroe($15,211.98).

Subsequent to the filing of this suit, York paid the plaintiffs $50,000, which it argues is the maximum of its liability. That payment was made and accepted without prejudice to the plaintiffs' right to continue to seek a judgment for the balance the plaintiffs believe to be due, which is $34,788.02.

It appears that the parties agree that there are no material questions of fact to be determined and that only issues of law need to be resolved. Therefore a motion for summary judgment is the appropriate way to resolve this matter.

The defendant believes that *Mullen v. Liberty Mutual Insurance Company*, 589 A.2d 1275 (Me. 1991), limits the plaintiffs' recovery under their $100,000 underinsured motorist policy to $50,000 because the tortfeasor who caused the insureds' damages had a liability insurance policy with limits of $50,000

per person and $100,000 per accident. The defendant takes this position even though the available liability coverage had to be shared by five injured parties, and the plaintiffs in this matter accordingly received substantially less than $50,000 from the tortfeasor.

The plaintiffs disagree and maintain that (1) *Mullen* was wrongly decided in the first place, and (2) it should be distinguished from the facts of this case. In order to apply to this case, the holding of *Mullen* would actually have to be extended. Additionally, applying *Mullen* to the facts of this case would require ignoring the plain language of the insurance policy issued by York.

FACTS

As described in more detail in the Plaintiffs' Statement of Material Facts, the key facts of this case are as follows:

Joe Monroe and Tonya Monroe purchased from York in 1996 a personal automobile liability insurance policy, which became effective on November 1, 1996. This contract obligated York to pay to any insured, as defined in the policy, underinsured motorist benefits up to $100,000. The policy's broad definition of who was an insured included Joe Monroe's son, Jack, who was then 15 years old and living at home with his parents.

On February 20, 1997, while the insurance policy was in effect, Jack was injured in an automobile accident while a passenger in a car operated by Mrs. Finney. There were three

other passengers besides Jack. Mrs. Finney had negligently lost control of her vehicle and swerved across the road, running head on into another car, which was driven by Mrs. Cook. No portion of the fault for the accident could be attributed to Mrs. Cook.

All four of the passengers in Mrs. Finney's car and Mrs. Cook were seriously injured in the collision. All received hospital treatment, and just the medical bills alone for the five victims was in excess of $150,000.

Mrs. Finney had at the time of the accident an automobile liability policy with Allstate with limits of $50,000 per person and $100,000 per accident. According to an affidavit requested by counsel for York, and accepted by York as true, Mrs. Finney did not have sufficient personal assets with which to pay any judgment in excess of that liability insurance coverage.

Mrs. Finney's insurance company offered the entire $100,000 policy limit to settle the case, provided that the injured parties could resolve how to divide it. The five attorneys representing the victims, faced with aggregate claims far exceeding the insurance available, arrived at a compromise which pro-rated the $100,000 in proportion to their clients' individual medical bills.[1]

Plaintiffs' participation in this compromise and the resulting settlement were specifically approved by York, but only after seeing the proof referred to above that Mrs. Finney could

[1] See the spreadsheet attached to the Foster Affidavit which shows how the settlement amounts were calculated.

not have paid more out of her own pocket to satisfy the victims' losses. In accordance with the formula agreed upon, Jack's parents (with Superior Court approval) accepted $15,211.98 from Allstate and provided Mrs. Finney with a full release.

York has admitted in this case that Jack's total damages are equal to at least $100,000, which is the amount of the underinsured motorist coverage which York's policy provided. (Jack's own medical bills, as used in the settlement formula, were $22,896. He had two operations to repair a broken leg, as well as various other injuries.) York has additionally specifically admitted that Mrs. Finney was underinsured with respect to the policy it issued.

From the plaintiffs' perspective, the issue is simple: They purchased $100,000 in underinsured motorist coverage to insure that amount of compensation if any member of their family received injuries (equal to or greater than that amount) in an accident caused by any negligent motor vehicle operator whose insurer could not pay them their full damages. After this accident the plaintiffs could only receive $15,211.98 from Mrs. Finney's insurance company. Therefore, pursuant to their contract with York, they conclude that they should be entitled to receive a total of $84,788.02 from that insurer.

ARGUMENT

York has taken the position that it owed only $50,000 to the plaintiffs for Jack's injuries because the tortfeasor's insurance

provided a theoretical $50,000 in liability coverage to any injured individual.

A superficial reading of *Mullen v. Liberty Mutual Insurance Company*, 589 A.2d 1275 (Me. 1991) would support the defendant's conclusion. In that case, Ms. Mullen had been injured in an auto accident at a time when she had underinsured motorist coverage of $45,000 available to her. The tortfeasor had $100,000 in liability coverage. The problem for Ms. Mullen was that there was a total of four parties injured in the accident, and the other three received $95,000 from the tortfeasor's insurance carrier, leaving only $5,000 for Ms. Mullen. She accordingly sued her underinsured motorist carriers for $40,000, the difference between her coverage and what she had received from the tortfeasor.

The Law Court rejected Ms. Mullen's argument that the amount she actually recovered should determine whether the tortfeasor was underinsured. It held instead that:

> [T]he determination of whether [the tortfeasor's] vehicle was underinsured is based entirely on whether the total liability insurance on that vehicle is exceeded by the total of the insurance provided by the Liberty Mutual and Hanover policies.
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> * * *
>
> That the present statutory language may cause hardship to Mullen in this case does not render the results absurd, nor does it present justification to disregard the wording of the statute. While section 2902 reflects a policy of compensating injured parties and encouraging settlements, *Wescott v. Allstate Ins.*, 397 A.2d 156, 167, 169 (Me.1979), the use of the face amount of a tortfeasor's liability insurance to determine underinsured status also reflects a policy

> decision. The early determination whether underinsured motor vehicle coverage applies, before other injured parties have established their damages and their entitlements to a tortfeasor's assets, is a legitimate legislative objective.

589 A.2d, at 1277. The Law Court went on to comment that the record before it did not establish whether or not the tortfeasor in that case had any ability to satisfy Ms. Mullen's damages out of his own funds. This factual deficiency does not exist in the present case.

After thus deciding that the tortfeasor was not actually underinsured, it was unnecessary for the Law Court to decide how much Ms. Mullen was entitled to recover from her own insurance carrier.

As indicated above, the plaintiffs believe that *Mullen* was wrongly decided and therefore should be revisited and overturned. The plaintiffs additionally believe, however, that *Mullen* can and should be distinguished from the facts of this case, that the *Mullen* holding should not be extended to apply here, and that Mullen is simply not applicable because of the insurance policy actually issued by York.

I. The decision in *Mullen* was incorrect and should be overturned.

The Law Court's decision in *Mullen* was criticized when issued in a dissenting opinion by Justice Collins, who said he found no statutory support for the Court's conclusion that the amount of "paper" coverage was controlling. He further stated:

> We have already recognized that section 2902(1) is

> ambiguous with regard to the meaning of the terms "limits" and "coverage." *Connolly v. Royal Globe Ins. Co.*, 455 A.2d 932, 934 (Me.1983). The definition of "underinsured motor vehicle" compares "coverage ... *provided*" with "*limits* of ... coverage." 24-A M.R.S.A. 2902(1) (1990) (emphasis added). Contrary to the Court's opinion, the plain meaning rule does not definitively settle this issue. [Footnote omitted.] "Coverage" is an undefined term in the statute, and the Court's resort to an asserted "plain meaning" fails, in my view, to meet our responsibility to construe it consistently with the purpose of the Legislature.

589 A.2d, at 1278.

After then discussing some of the Law Court's decisions[2] regarding the remedial purpose of the Uninsured Motorist Statute, Justice Collins went on to say:

> Thus, we have assumed that section 2902(1) has a broad remedial purpose, and have declined to construe it in ways that would lead to anomalies in conflict with that broad purpose.
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> The result of the Court's decision is such an anomaly. Under the Court's construction of the statute, Mullen would have been nine times better off if Boody [the tortfeasor] had been completely uninsured, because she then could have recovered the full $45,000 in uninsured-motorist coverage. [Footnote, which cited cases in other jurisdictions noting this anomaly, omitted.] Because I see no reason to presume that the Legislature intended this anomalous result, which is not required by the statutory language, I would decline to impose it.

589 A.2d, at 1279.

Likewise in the present case, if Mrs. Finney had had no liability insurance at all, Jack would have been able to receive the full $100,000 of his damages from York under the uninsured

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[2] The cases discussed were *Wescott v. Allstate Ins.*, 397 A.2d 156 (Me.1979); *Lanzo v. State Farm Mut. Ins. Co.*, 524 A.2d 47 (Me.1987); and *Young v. Greater Portland Transit Dist.*, 535 A.2d 417, 419-20 (Me.1987).

portion of the policy. If Mrs. Finney had carried only the statutory minimum of $20,000 in liability coverage, Jack would have been unquestionably entitled to at least $80,000 in underinsured coverage from York. It makes no sense to give York a windfall in savings because of the "paper" coverage which Mrs. Finney had in the amount of $50,000 per individual if in reality Jack could only recover $15,211.98 from her liability carrier.

The fallacy of using "policy limits" as synonymous with "coverage" is clearly illustrated in cases such as this where there are split limits (e.g., $50,000/$100,000) and multiple claimants. Although Mrs. Finney's insurance provided single person limits of $50,000, it did not provide single person coverage in that amount. Only if the policy had provided $250,000 for per accident limits, enough to guarantee $50,000 coverage for each of the five injured persons, would there have been real coverage of $50,000 for each individual. As it is, the coverage under Mrs. Finney's policy is illusory and should not be the basis for determining the plaintiffs' rights against York.

Commentators have criticized the *Mullen* decision as being out of step with all other interpretations of Maine's Uninsured Motorist statute. See, e.g., *Maine Tort Law*, Zillman, et al., §18.06. See also the recent article in the *Maine Lawyer Review* by Daniel Kagan, July 22, 1998, page 21, where he writes:

> A low point in the development of UM law in Maine occurred with the Law Court's decision in *Mullen v. Liberty Mutual Insurance*, 589 A.2d 1275 (Me. 1991).

* * *

> The *Mullen* decision denies insureds the benefit of the bargain they reach with their insurers. In purchasing UM coverage, the insured buys certainty that a certain amount of coverage will be available to pay for her tortiously-caused injuries, regardless of other claimants. *Mullen* interjects arbitrary limitations on that agreement, with bizarre results. For example, as Justice Collins pointed out in the dissent, Mullen would have been better off if the tortfeasor had been uninsured rather than underinsured!

In view of the arbitrary results that can occur from the application of the *Mullen* decision, it is time that it be reconsidered and overruled. Then this branch of underinsured motorist law will conform to the purpose which has otherwise been applied to the statute.

II. The *Mullen* decision can and should be distinguished from the present case rather than be extended to apply here.

Even without overruling *Mullen*, however, the defendant's reliance on that case is misplaced. There are two basic differences between the facts of *Mullen* and the present case, which should be the basis for distinguishing them.

First, in *Mullen* the plaintiff had purchased less underinsured motorist coverage ($45,000) than there was liability coverage available ($100,000). In the instant case, we have the reverse; the underinsured coverage contracted for by the plaintiffs ($100,000) was more than even the theoretical amount of the tortfeasor's coverage ($50,000).

The Law Court's decision in *Mullen* turned on using a policy-limits-to-policy-limits test for determining whether there was underinsured status:

> ... [T]he determination of whether Boody's vehicle was underinsured is based entirely on whether the total liability insurance on that vehicle is exceeded by the total of the insurance provided [by the underinsured motorist carriers].

589 A.2d, at 1278. [Emphasis added.] The Court then made that comparison and found there was no underinsured status.[3] If the Law Court were to make the same preliminary determination in the present case, it would find the opposite: that the tortfeasor was underinsured because the policy limit of $50,000 even theoretically available to Jack was less than the underinsured coverage. York has even admitted that the tortfeasor in the present case was underinsured.

What is in dispute in this case, therefore, is not whether Mrs. Finney was underinsured, but by how much she was underinsured. *Mullen* does not get to that question because of its different threshold facts, and therefore it does not answer the "how much" question. We are thus dealing with a different dispute than the one which *Mullen* resolved.

The second basic difference between this case and *Mullen* is that the latter was not a split limits case. In *Mullen* there was a straight $100,000 in liability coverage. There were thus no illusory rights created by split limits and multiple claimants. The claimants in *Mullen* simply had to share the $100,000. In the

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[3] Confirming the fact that the issue in *Mullen* was the tortfeasor's status as underinsured or not, see *Botting v. Allstate Insurance Co.*, 1998 ME 58, ¶5; 707 A.2d 1319, 1321.

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present case, with a $50,000/$100,000 split limit available to the tortfeasor, there is, as discussed above, an illusory $50,000 available to each victim, at least whenever there are more than two victims. Thus *Mullen* might have been decided differently had there been this further indication before the Court that policy coverage and policy limits are not synonymous terms.

The Law Court has itself recently shown an inclination to limit the effect of *Mullen* rather than to expand upon it. In *Bottling v. Allstate Insurance Co.*, 1998 ME 58, 707 A.2d 1319, the Court turned back Allstate's attempt to use *Mullen* to avoid underinsured status when the underinsured motorist policy contained split limits.

Because of the reasons described in the prior section of this memorandum and the fact that *Mullen* is such a departure from the Law Court's other holdings on the remedial purposes of the Uninsured Motorist Statute, it should not be extended here to answer the question of "how much" Mrs. Finney was underinsured with respect to Jack's coverage. That determination should return to basic principles.

III. The insurance policy issued in this case expands coverage beyond the limitations of *Mullen*.

The basic principles which apply here are established by the statute and the insurance policy issued to the plaintiffs. The statute, and its remedial purposes, have been discussed above. The insurance policy issued by York reads, in Part C, as follows:

> A. We will pay compensatory damages which an

> "insured" is legally entitled to recover from the owner or operator of an "uninsured motor vehicle" because of "bodily injury"
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> 1. Sustained by an "insured;" and
>
> 2. Caused by an accident.

The main part of the policy then goes on to define what is an uninsured motorist in ways which do not include underinsured motorists coverage. In order to comply with Maine law, which in §2902 requires a policy to include underinsured motorist coverage, a rider is attached to the York policy to change the definitions within Maine. The rider defines an uninsured motor vehicle as follows:

> B. "Uninsured motor vehicle" means a land motor vehicle or trailer of any type:
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> 2. To which a bodily injury liability bond or policy applies at the time of the accident. In this case its limit for bodily injury liability must be less than the limit of liability for this coverage.

Read together and paraphrased, these provisions promised the plaintiffs that York would pay Jack the amount he was entitled to recover in compensatory damages (which by agreement is $100,000) as a result of this accident if Mrs. Finney was underinsured. These sections thus provide a broad duty to pay full compensatory damages to the insured simply if he is hurt by what the policy defines as an uninsured motorist. So far the policy language does not include any limit on the amount to be paid.

For the only limitations on the amount to be paid, it is necessary to look to a third section of Part C, entitled "Limits

of Liability," which provides in full as follows:

> A. The limit of liability shown in the Declarations for this coverage is our maximum limit of liability for all damages resulting from any one accident. This is the most we will pay regardless of the number of:
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> 1. "Insureds;"
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> 2. Claims made;
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> 3. Vehicles or premiums shown on the Declarations; or
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> 4. Vehicles involved in the accident.
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> B. Any amounts otherwise payable for damages under this coverage shall be reduced by all sums:
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> 1. Paid because of "bodily injury" by or on behalf of persons or organizations who may be legally responsible. This includes all sums paid under Part A; and
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> 2. Paid or payable because of the "bodily injury" under any of the following or similar law:
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> a. workers' compensation law; or
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> b. disability benefits law.
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> C. Any payment under this coverage will reduce any amount that person is entitled to recover for the same damages under Part A.

[Emphasis added.]

Thus the only applicable limitation contained in the policy on the $100,000 due to Jack is the amount "paid" to him by the tortfeasor. No limitation even arguably limits York's exposure further by any formula which looks at the theoretical policy limits in the tortfeasor's insurance policy.

Applying the principle of giving words their plain meaning,

the term "paid" cannot mean anything other than what the plaintiffs actually received from Allstate. Therefore, even if the *Mullen* decision would have permitted York to limit coverage in this case based on a policy-limit-to-policy-limit comparison, York failed to take advantage of that possibility.

Put another way, *Mullen* does not compel an insurance company to use the arbitrary formula of comparing policy-limit-to-policy-limit in determining coverage; at worst it permits it. York has chosen not to use such a formula. Its policy just looks to the amount of the insured's damages, the amount of underinsured motorist coverage, and what the tortfeasor actually has paid the insured. In this case that math is simple: $100,000 minus $15,211.98 = $84,788.02 (less further the $50,000 already paid by York).

CONCLUSION

The *Mullen* decision is inapplicable to this case. It is wrong in its basic approach and, in any event, it is distinguishable from the facts presented here. At worst *Mullen* might have allowed York to write a more restrictive policy provision regarding underinsured motorist coverage than it did but, absent that, its contract with the plaintiffs should be enforced. Plaintiffs should recover judgment for $34,788.02, plus interest and costs.

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