ESTATE OF MILES C. BRACKIN by DEBORAH A. BUTZBACH, General Administratrix and Administratrix Ad Prosquendum, DEBORAH A. BUTZBACH, individually, and PHILLIP S. BRACKIN, JR., individually, Plaintiff-Appellant, vs. PHILIP SNOWDEN BRACKIN, III, PRIVILEGE UNDERWRITERS, INC., JOHN DOES 1-100 (fictitious names), and ABC CORP. 1 - 100 (fictitious names), JOHN DOES 1-10(Fictitious names), Defendant-Respondent.	**SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION** **DOCKET NO. A-1524-23** CIVIL ACTION ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MERCER COUNTY Sat below: Hon. Douglas Hurd, P.J.Cv. On appeal from Order Granting Motion to Dismiss in Lieu of an Answer

PLAINTIFFS'-APPELLANTS' BRIEF IN SUPPORT OF APPEAL

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Preliminary Statement

The life of thirteen-year-old Miles C. Brackin (herein, "Miles") was tragically cut short when he was killed in a motor vehicle collision that occurred on Route 295 north in Hamilton Township, New Jersey shortly after 6:00 p.m. on August 20, 2021. At the time of the accident, Miles was the front-seated passenger in a GMC Yukon operated by his brother, defendant Phillip S. Brackin, III. The Brackin vehicle left the roadway, overturned, and collided with a concrete overpass. Miles was rushed to Capital Health. He was medevacked from Capital Health to the Children's Hospital of Philadelphia where he succumbed to his injuries three (3) days later.

Miles' mother, plaintiff Deborah A. Butzbach, M.D. (herein, "Dr. Butzback"), and father, plaintiff Phillip S. Brackin, Jr., M.D. (herein, "Dr. Brackin") were sensibly well insured. Dr. Butzbach and Dr. Brackin maintained an automobile insurance policy with USAA Insurance Company that provided $500,000/$1,000,000 in liability coverage. Above and beyond the USAA policy, Dr. Butzbach and Dr. Brackin maintained an excess insurance policy with defendant PURE Insurance Group (herein, "PURE") that provided for $5,000,000 in excess liability coverage and $1,000,000 in excess uninsured/underinsured motorist (herein, "UM/UIM") coverage.

Dr. Butzbach and Dr. Brackin reasonably expected that any driver of their vehicles, including defendant Phillip S. Brackin, III, would be covered by the $5,000,000 excess liability provisions of PURE's policy. Failing the applicability of liability coverage, Dr. Butzbach and Dr. Brackin reasonably expected that they would at least be entitled to pursue excess UIM coverage that they purchased to cover themselves in the event that, as alleged by defendant PURE, the liability limits of a tortfeasor-defendant fell short of adequately covering the damages incurred.

Instead, having purchased $5,000,000 in liability coverage for themselves and operators of their vehicles, and having purchased $1,000,000 in excess UIM coverage, Dr. Butzbach and Dr. Brackin are faced with a situation they could have never reasonably expected – they are being told that neither the liability coverage nor the UIM coverage provides any benefits whatsoever as a result of this tragic accident.

Defendant PURE has relied upon an "intrafamily liability exclusion" to deny liability coverage for defendant Brackin. Specifically, PURE refuses to provide liability coverage for defendant Brackin simply, and for no other reason, than because Miles Brackin was a relative of defendant Brackin and living in the same household. Plaintiffs are asking that this Court, consistent with a recent unpublished Appellate Division decision, recognize that these types of

intrafamily liability exclusions offend current New Jersey public policy and are, therefore, unenforceable. Without mincing words, plaintiffs are aware that this would require the Court to address decades old precedent which, to a certain extent, declined to deem such provisions unenforceable. Plaintiffs submit, however, that the time is ripe invalidate these needless exclusions.

Plaintiffs also contend that PURE's denial of UIM benefits violates current existing law. Specifically, PURE relies upon a definitional exclusion, not in its own excess policy, but contained in the underlying automobile insurance policy issued by USAA Insurance Company. While plaintiffs do not contend that the definitional exclusion is unenforceable as applied to USAA, the application of that exclusion to the PURE excess policy creates an ambiguity and violates plaintiffs' reasonable expectations of coverage such that the exclusion is invalid.

Procedural History

Plaintiffs' Complaint was filed in the Superior Court of New Jersey, Law Division, Mercer County Vicinage on December 27, 2022. (Pa1-11). An Amended Complaint correcting a typographical error was filed on January 12, 2023. (Pa12-20). The Complaint and Amended Complaint included Wrongful Death and Survivorship claims asserted against defendant, Phillip S. Brackin, III, as well as Declaratory Judgment counts against defendant PURE for liability and/or UM/UIM coverage under an excess/umbrella policy issued by PURE to plaintiffs. (Pa12-20).

On February 9, 2023, defendant PURE filed a motion to dismiss in lieu of an Answer. On March 15, 2023, plaintiffs filed an opposition to defendant PURE's motion to dismiss. On March 27, 2023, defendant PURE filed a reply to plaintiff's opposition.

Oral argument was held before the Honorable Douglas Hurd, P.J.Cv. on March 31, 2023 (1T). Judge Hurd rendered his oral decision dismissing defendant PURE on May 3, 2023. (2T). An Order memorializing the Court's decision also entered on May 3, 2023. (Pa22).

The underlying case proceeded against defendant Brackin, which ultimately resulted in a settlement pursuant to Deblon v Beaton, 103 N.J. Super. 345 (Law Div. 1968) on or around November 28, 2024. The settlement

agreement resulted in a limited release that preserved plaintiffs' rights to pursue appellate relief as to excess coverage that may be owed by PURE to defendant Brackin. The settlement check consummating the settlement with defendant Brackin was received on or about December 13, 2023.

On December 27, 2023, plaintiffs filed a motion to dismiss their complaint against defendant Brackin without prejudice and to certify the dismissal as final since the settlement with defendant Brackin adjudicated all remaining trial-level claims. Defendant PURE filed a partial opposition to plaintiffs' motion on January 11, 2024. Plaintiffs filed a reply to defendant's opposition on January 11, 2024.

The trial court granted plaintiffs' motion to dismiss defendant Brackin without prejudice and certified the disposition as final under Court Order dated January 18, 2024. (Pa24-25). This appeal followed. (Pa133-137).

Standard Of Review

1. Trial Court Standard of Motions Practice Review

Defendant PURE was dismissed on a preliminary motion to dismiss in lieu of an answer. Unlike a summary judgment motion, a motion to dismiss for failure to state a claim pursuant to Rule 4:6-2(e) is based on the pleadings themselves. See Rider v. State Department of Transportation, 221 N.J. Super. 547 (App. Div. 1987). On a motion brought pursuant to Rule 4:6-2(e), the Complaint should be searched with depth to determine if a cause of action exists, even if only based on further discovery. See Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 772 (1989). The court must examine the "legal sufficiency of the facts alleged on the face of the complaint," giving the plaintiff the benefit of "every reasonable inference of fact." Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 107 (2019). All allegations pled in a complaint are assumed true and Plaintiff is entitled to "all reasonable actual inferences that those allegations support." F.G. v. MacDonell, 150 N.J. 550, 556 (1997). Furthermore, where all allegations are assumed to be true, a complaint should not be dismissed under this rule where a cause of action is suggested by the facts. Id.

A motion to dismiss brought under Rule 4:6-2(e) at the onset of litigation has an "extraordinarily limited range" and "is granted only in the rarest

instances." Geyer v. Faielle, 279 N.J. Super. 386, 389 (App. Div. 1995) certif. denied, 141 N.J. 95, (1995) (emphasis added); see also Lieberman v. Port Authority of New York and New Jersey, 132 N.J. 76 (1993); Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 772 (1989). For instance, in Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 772 (1989), the Supreme Court reversed the trial court's Order granting defendant's motion to dismiss in lieu of an answer and Appellate Division's subsequent affirmance of same as a way to "signal to trial courts to approach with great caution applications for dismissal under Rule 4:6-2(e)." Id. at 772.

2. Appellate Review Standard

Appellate Review of a trial court's dismissal of a defendant on motion pursuant to Rule 4:6-2(e) is taken de novo. See, e.g. Watson v. New Jersey Dep't of Treasury, 453 N.J. Super. 42, 47 (App. Div. 2017). An Appellate panel owes "no deference to the trial judge's conclusions." Mac Property Group LLC & The Cake Boutique LLC v. Selective Fire and Cas. Ins. Co., 473 N.J. Super. 1, 16 (App. Div. 2022) (internal quotations omitted). When reviewing the decision to dismiss plaintiffs' complaint on a motion pursuant to Rule 4:6-2(e), "the complaint's allegations are accepted as true and with all favorable inferences accorded to plaintiff," and the complaint "should be dismissed for failure to state a claim pursuant to Rule 4:6-2(e) only if the factual allegations are palpably

insufficient to support a claim upon which relief can be granted." Ibid. (internal quotations omitted).

Statement of Facts

The subject negligence and declaratory judgment matter from an automobile accident that occurred on Route 295 north in Hamilton Township, New Jersey. (Pa26-28). Plaintiffs' decedent, Miles Brackin, was the passenger in a GMC Yukon operated by defendant Phillip S. Brackin, III, which left the roadway, struck a concrete overpass, and killed Miles. (Pa26-28).

Miles' mother, plaintiff Deborah A. Butzbach, M.D. ("Dr. Butzbach"), was the registered owner of the 2019 GMC Yukon that defendant Brackin was driving at the time of this accident. (Pa26-28). The GMC Yukon was insured by USAA Insurance Company under a policy issued to Dr. Butzbach, which provided $500,000/$1,000,000 in both liability coverage and UM/UIM coverage. (Pa29-32). Plaintiffs also maintained an excess insurance policy with defendant PURE Insurance Group (herein, "PURE") that provided for $5,000,000 in excess liability coverage and $1,000,000 in excess UM/UIM coverage. (Pa77-80).

USAA has provided liability coverage up to its $500,000 limits for defendant Brackin as to plaintiffs' negligence claims against him. Although it is undisputed that defendant Brackin was an insured under the excess PURE policy, defendant PURE has denied liability coverage for defendant Brackin up to its $5,000,000 limits. Additionally, while denying defendant Brackin liability

coverage, hence leaving him with only $500,000 in coverage in the face of damages that well exceed same, PURE has also denied plaintiffs claim for UIM coverage up to the $1,000,000 policy limits.

Legal Argument

POINT I

PURE'S INTRA-FAMILY LIABILITY EXCLUSION IS UNENFORCEABLE AS A MATTER OF LAW BECAUSE IT VIOLATES NEW JERSEY PUBLIC POLICY (2T6:18 – 20:15)

An intrafamily liability exclusion is a provision in an insurance policy that eliminates otherwise valid liability coverage where the injured party is also an insured under the policy from which liability coverage is sought. See, e.g., Kish v. Motor Club of America Ins. Co., 108 N.J. Super. 405, 407-08 (App. Div. 1970). Most often, an injured individual is considered an insured under the same policy through which liability coverage is sought by virtue of living in the same household, and often related, to the person seeking liability coverage. For instance, if a parent is operating a vehicle that has $500,000 in liability coverage and causes an accident resulting in significant injury to his/her child-passenger, an intrafamily liability exclusion would exclude liability coverage (beyond the mandatory state minimum coverage) for the parent.

It is respectfully submitted to this Court that the time has come for intrafamily liability exclusions to be deemed void as a matter of public policy. "New Jersey courts have not hesitated to look to public policy when interpreting insurance contracts." Flomerfelt v. Cardiello, 202 N.J. 432, 460 (2010). In fact, as discussed below, these types of intrafamily exclusions have already been

questioned by this Court in a recent, albeit unpublished, decision. See Dela Vega v. Travelers Ins. Co., A-2272-19 (App. Div. 2022), certif. denied, 252 N.J. 234 (2022). Intrafamily liability exclusions harm defendants who are deprived of insurance coverage and are exposed to personal liability simply because the person asserting the claim against them is a family member/resident relative and not an unrelated party. Intrafamily liability exclusions harm plaintiffs who sustain injuries due to the negligence of an otherwise-insured party but against whom collecting a judgment personally may be difficult or impossible. In short, exclusions that disclaim a whole class of drivers from coverage for no reason other than the mere happenstance of a familial relationship so contravenes our State's public policy that same should be deemed unenforceable as a matter of law.

Determining whether such intrafamily liability exclusion clauses comport with our State public policy requires, in the first instance, an understanding of the dynamic between the consumer and the insurance carrier. It is axiomatic under our State's jurisprudence that "insurance policies that are contracts of adhesion and, as such, are subject to special rules of interpretation." Progressive Cas. Ins. Co. v. Hurley, 166 N.J. 260, 272 (2001); see also Longobardi v. Chubb Ins. Co., 121 N.J. 530, 537 (1990); Bromfeld v. Harleysville Ins. Companies, 298 N.J. Super. 62, 74-75 (App. Div. 1997). The basis for New Jersey's law in

this area is founded upon the notion that an insurance company is an "expert in its field and its varied and complex instruments are prepared by it unilaterally whereas the assured or prospective assured is a layman unversed in insurance provisions and practices." Allen v. Metropolitan Life Ins. Co., 44 N.J. 294, 305 (1965). The Courts of our State acknowledge that, as a practical matter, "insurance contracts are not typically read or reviewed by the insured, whose understanding is often impeded by the complex terminology used in the standardized forms." Bromfeld, supra, 298 N.J. Super. at 75.

Exclusions within insurance policies are viewed with even more scrutiny than other policy terms and conditions. Provisions in a policy that limit coverage "must be construed narrowly" and it is "the insurer [who] bears the burden of establishing that an exclusionary provision of the policy applies." Merck & Co., Inc. v. Ace American Ins. Co., 475 N.J. Super. 420, 434 (App. Div. 2023).

Consistent with the strict construction of insurance contracts in favor of the reasonable expectations of an insured and the general good of the consuming public, New Jersey Courts have acknowledged their primary role in vigilantly ensuring that insurance contracts are fair to consumers and comport with public policy. See Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165, 175 (1992) (holding that "because insurance policies are adhesion contracts, courts must

assume a particularly vigilant role in ensuring their conformity to public policy and principles of fairness"). As a matter of law, an insurance contract is not enforceable if it violates public policy. See Sparks, supra, 100 N.J. at 334; see also Zuckerman v. National Union Fire Ins. Co., 100 N.J. 304, 320 (1985) (noting that "[a] condition to the enforcement of insurance contracts is that they not violate public policy").

"Public policy" is a concept that "contemplates a standard measured by the impact upon the public at large rather than the individual." Zuckerman, supra, 100 N.J. at 320. In discussing more broadly the concept of "public policy," the Court in Allen v. Commercial Casualty Ins. Co. 131 N.J.L. 475 (E&A 1944) explained that:

> Much has been written by text writers and by the courts as to the meaning of the phrase "public policy." All are agreed that its meaning is as "variable" as it is "vague," and that there is no absolute rule by which courts may determine what contracts contravene the public policy of the state. The rule of law, most generally stated, is that "public policy" is that principle of law which holds that "no person can lawfully do that which has a tendency to be injurious to the public or against public good" even though "no actual injury" may have resulted therefrom in a particular case "to the public." It is a question of law which the court must decide in light of the particular circumstances of each case.
>
> The sources determinative of public policy are, among others, our federal and state constitutions, our public statutes, our judicial decisions, the applicable principles of the common law, the acknowledged

> prevailing concepts of the federal and state governments relating to and affecting the safety, health, morals and general welfare of the people for whom government -- with us -- is factually established.
>
> [Id. at 478 (internal citations omitted).]

With respect to the applicability of public policy considerations to insurance agreements, the New Jersey Supreme Court has recognized that "[o]n public policy grounds, insurance contracts have consistently been construed strictly against insurance companies. The rationale is that insurance contracts are contracts of adhesion since an individual's bargaining power is necessarily limited." Zuckerman, supra, 100 N.J. at 320. A provision in an insurance agreement that does not comport with public policy should be interpreted to reflect the reasonable expectations of an objective insured. Id. at 320-21 (holding that "such contracts are to be interpreted in a manner that recognizes the reasonable expectations of the insured").

Turning, then, to intrafamilial liability exclusions, as discussed above, such exclusions in insurance policies limit or exclude liability coverage for an individual when claims are brought against him or her by a household relative. Our New Jersey Courts have not extensively examined such exclusions in a published decision since the Supreme Court's decision in Zacarias v. Allstate Ins. Co., 168 N.J. 590 (2001), which dealt with boatowner's insurance, not an automobile insurance, policy.

Recently, however, the Appellate Division once again re-visited intrafamily liability exclusions in the context of automobile insurance policies in an unpublished decision. See Dela Vega v. Travelers Ins. Co., A-2272-19 (App. Div. 2022), certif. denied, 252 N.J. 234 (2022). (Pa133-160). In Dela Vega, the Appellate Division affirmed the trial court's decision to deny the enforceability of an intra-family liability step-down exclusion in an automobile insurance policy. Id. at *2. (Pa106). The Dela Vega decision arose from an automobile collision in which plaintiff, Dr. Cristina Dela Vega, was the passenger in a vehicle operated by her husband, defendant Dr. Sergio Dela Vega. Ibid. Plaintiff alleged that her husband pulled out from a parking lot into the path of another vehicle, causing her to sustain significant injuries. Ibid. Plaintiff and her husband, both medical doctors, had insured their vehicle under a policy issued by St. Paul Protective Insurance Company containing $100,000/$300,000 in liability coverage. Id. at *2-3. (Pa106-107). The policy contained an intra-family step-down exclusion that reduced the liability coverage afforded to defendant Dela Vega to the statutory minimum of $15,000/$30,000 for claims asserted against him by plaintiff Dela Vega. Id. at *3. (Pa107).

The Court in Dela Vega found that the intrafamily liability exclusion was unambiguous but the Court ultimately concluded that that it "was a hidden pitfall in plaintiff's auto policy contrary to her reasonable expectations as to coverage,

rendering it unenforceable." Id. at *3. (Pa107). The Court rejected defendant's argument that intrafamily exclusions had been endorsed as not violative of public policy by the Supreme Court in Zacarias v. Allstate Ins. Co., 168 N.J. 590 (2001). Dela Vega, supra, at *11. (Pa115). Instead, the Dela Vega Court differentiated the laws applicable to automobile insurance policies as opposed to the boater's insurance policy implicated in the Zacarias matter. Id. at *11. (Pa115).

Of relevance to the current appeal, the Appellate Division went further and commented upon whether such intrafamily liability exclusions, in fact, comported with our State's public policy. The Court stated:

> Although our conclusion that the intra-family liability step-down in this policy was a hidden trap, thwarting plaintiff's reasonable expectations as to the coverage afforded by her $100,000/$300,000 auto policy, makes it unnecessary for us to consider whether the exclusion is more broadly violative of public policy, we confess to finding the exclusion troubling. We think it fair to assume most purchasers of personal auto policies in this State would assume an injured family member passenger in an insured auto would have the benefit of the full policy limits purchased and would be surprised to learn otherwise. The absence of any indication of the reduced coverage on the declarations sheet where premiums are listed would also likely make it difficult for a member of the insurance-purchasing-public to fairly compare auto policies. The operation of this exclusion would mean a child severely injured in an accident caused by the parent-driver's negligence could recover only $15,000 in personal injury damages under a $100,000/$300,000 policy as here, whereas the child's

> friend sitting next to her and also severely injured in the accident could recover the $100,000 policy limits. This significant reduction in the liability protection the policyholder purchased — and the concomitant reduction in coverage available to an entire class of victims based solely on the injured victim's status as a named insured or resident family-member — is concerning. See Huggins v. Aquilar, 246 N.J. 75, 83, 248 A.3d 1213 (2021) (noting "[i]nsurance policy provisions that disclaim whole classes of drivers are problematic").
>
> [Dela Vega, supra, A-2272-19 (App. Div. 2022) at *2, FN2 (emphasis added). (Pa107).]

As alluded to by Judge Accurso in the Dela Vega decision, intrafamily liability exclusions run counter to our State's public policy of affording the broadest possible coverage for members of the public who purchase liability policies. See, e.g., Nav-Its, Inc. v. Selective Ins. Co., 183 N.J. 110, 118-19 (2005); Kievit v. Loyal Protective Life Ins. Co., 34 N.J. 475, 482 (1961) (holding that "[w]hen members of the public purchase policies of insurance they are entitled to the broad measure of protection"). Exclusions should be narrowly tailored and should be viewed with great scrutiny. See, e.g., Merck & Co., supra, 475 N.J. Super. at 434.

Additionally, intrafamily liability exclusions run counter to our State's laws, which permit interfamily liability claims. New Jersey has long since abandoned parental and interspousal immunities in tort matters. Interspousal immunity was abrogated in 1970 when the Supreme Court held that "the

[interspousal] immunity doctrine, at least so far as it applies to automobile negligence cases, has no place in our modern society." Immer v. Risko, 56 N.J. 482, 485 (1970). On the same day, the Supreme Court decided France v. A. P. A. Transport Corp., 56 N.J. 500 (1970), in which the Court extinguished parental immunities in the context of most tort claims. In France, the Court held that after reviewing "the arguments for and against the parent-child immunity doctrine, we are of the opinion that it should be abrogated in this State." Id. at 506.

Our Courts have deemed it appropriate to eliminate intrafamily immunities in the setting of personal injury claims, thus inviting consumers to purchase insurance to cover such claims or else run the risk of personal exposure to liability claims from family members. Our Courts have also expressed our State's public policy that citizens be afforded the widest breadth of liability insurance coverage under policies that they purchase. It is inapposite to allow intrafamily liability exclusions to persist in insurance policies where our Courts have expressly approved of intrafamily liability claims by abrogating intrafamily liability immunities and also expressed a public policy of expanding liability coverage for consumers.

Finally, intrafamily liability exclusions further run counter to our State's public policy of ensuring that injured individuals have adequate recourse to

compensation for economic and non-economic damages sustained due to the negligent acts of others. See, e.g., Felix v. Richards, 241 N.J. 169 (2020); Caviglia v. Royal Tours of Am., 178 N.J. 460 (2004); Verriest v. Ina Underwriters Ins. Co., 142 N.J. 401, 414 (1995). As discussed very poignantly in the Dela Vega case, intrafamily liability exclusions result in the widely disparate treatment of an entire class of victims. Dela Vega, supra, A-2272-19 (App. Div. 2022) at *2, FN2. (Pa135). The disparate treatment of victims of an accident based solely upon their relationship to the tortfeasor is contrary to New Jersey law. For instance, in Huggins v. Aquilar, 246 N.J. 75 (2021), the Supreme Court held that "[i]nsurance policy provisions that disclaim whole classes of drivers are problematic, and often found violative of public policy . . . ." Id. at 83.

The intrafamily liability exclusion contained in PURE's policy that is currently at issue reads as follows:

> We will not provide coverage for **damages**, defense costs or any other costs or expenses:
>
> 14. **Insured**
>
> For **personal injury** to you or an **insured** under this policy. This exclusion does not apply to coverage provided under Excess Supplementary Uninsured/Underinsured Motorist Coverage, if a limit for this coverage is shown on your Declarations.
>
> [(Pa90, Pa93).]

In the present matter, PURE has denied liability coverage for the underlying defendant, Phillip S. Brackin, III, as against the claims asserted by plaintiff based upon the intrafamily exclusion set forth above. PURE's exclusion violates public policy and should be deemed unenforceable.

First, PURE's exclusion frustrates our State's expressed policy of encouraging the broadest possible coverage for risks associated with operation of an automobile. The exclusion invoked here eliminates $5,000,000 in liability coverage for defendant Brackin.

Second, the State's public policy of affording coverage for intrafamily claims is significantly intertwined with our State's jurisprudence that has abrogated immunities for intrafamily claims. With the abrogation of these immunities, consumers are either left exposed to personal liability arising from intrafamilial claims or they must be able to procure insurance to cover such claims, which is frustrated by intrafamily liability exclusions.

While one may be led to believe that there would be no risk to personal exposure in an intrafamily liability claim, same is simply not true. As referenced above, an intrafamily liability exclusion would deny liability coverage for a driver-parent who injures their passenger-child in an automobile accident. One could imagine the result if the child's parents were divorced and not on amicable terms. A cause of action by the non-driver spouse against his or her ex-spouse

on behalf of the child would almost be inevitable. One could also imagine that the lack of insurance coverage would not dissuade (and perhaps may encourage) the prosecuting spouse from pursuing any and all personal assets from their ex-spouse whose actions injured their child in an automobile accident.

Third, such exclusions expose insureds to the very liability risk that they are paying a premium to insure against. More specifically, insureds purchase liability coverage to reduce or eliminate exposure to their own personal assets due to negligent, albeit inadvertent, actions, such as the negligent operation of a motor vehicle. One of the very few things that an insured actually controls when buying insurance is the amount of coverage to purchase. That decision is personal to each insured and is often based upon several factors such as risk-aversion, wealth, and personal assets. When insureds purchase insurance coverage, they can look to the declarations page that has been tailored to their selections (unlike the policy itself over which an insured has no control) and know that their personal assets are protected from liabilities up to the amount they have selected as evidenced on the declarations page. Exclusions in the policy that, unbeknownst to the insured, serve to reduce this coverage expose the insured to unexpected personal liability.

While it is understood that the Dela Vega opinion is unpublished, the decision represents the first occasion that our Courts have addressed intrafamily

liability exclusions in over two decades, and the first time our Courts have addressed intrafamily liability exclusions in context of automobile policies in over three decades. See Zacarias v. Allstate Ins. Co., 168 N.J. 590 (2001) (dealing with intrafamily liability exclusions in the context of a boating insurance policy). Furthermore, the facts in Dela Vega case are extraordinarily similar to the current matter. The Court in Dela Vega was concerned about the operation of an intrafamily exclusion, which "would mean a child severely injured in an accident caused by the parent-driver's negligence could recover only $15,000 in personal injury damages under a $100,000/$300,000 policy as here, whereas the child's friend sitting next to her and also severely injured in the accident could recover the $100,000 policy limits." Dela Vega, supra, A-2272-19 at *3, FN2. (Pa107). Miles Brackin died as a result of the subject automobile collision. Defendant PURE is attempting to eliminate all excess liability coverage that could compensate his Estate based upon the intra-family exclusion, thus limiting his recovery to the $500,000 underlying policy. If Miles' friend were in the vehicle and met the same unfortunate fate, that individual could recover up to the $5,000,000 liability limits under the PURE policy. The inequities are stark and are inconsistent with New Jersey law.

New Jersey public policy favors broad insurance coverage. New Jersey public policy disfavors exclusions that eliminate, without reason, whole classes

of drivers from the benefit of liability coverage they purchase. New Jersey public policy favors ensuring that injured individuals are justly and adequately compensated for damages sustained due to the negligent acts of others. The intrafamily liability exclusion contained in defendant PURE's policy runs contrary to these policies and respectfully should be deemed unenforceable.

POINT II

PLAINTIFFS ARE ENTITLED TO EXCESS UIM COVERAGE IN THE AMOUNT OF $1,000,000 AS PURCHASED FROM DEFENDANT PURE BECAUSE THE DEFINITIONAL EXCLUSION PURE RELIED UPON TO DENY COVERAGE AS CONTAINED IN THE UNDERLYING USAA POLICY WAS AMBIGUOUS AS APPLIED TO PURE AND FURTHER RESULTED IN A DENIAL THAT FAILED TO MEET PLAINTIFFS' REASONABLE EXPECTATIONS OF COVERAGE (2T20:16-25:22)

In addition to denying excess liability coverage for defendant Brackin (thus contending defendant Brackin's liability coverage is limited to $500,000 as provided by the underlying USAA policy), defendant PURE has also denied plaintiffs the benefit of the $1,000,000 underinsured motorist policy they purchased from PURE, claiming that defendant Brackin was not underinsured despite the $500,000 shortfall between the USAA liability policy and the PURE excess UIM policy. PURE relies upon a definitional exclusion, not in its own policy but in the underlying USAA policy, to substantiate the denial of UIM benefits. (Pa60). While plaintiffs do not contend that the definitional section in the USAA policy is invalid vis-à-vis USAA, plaintiffs contend that, as applied to PURE, the definitional section is ambiguous and fails to meet the reasonable expectations of plaintiffs.

1. Underinsured Motorist("UIM") Coverage Generally

Underinsured Motorist ("UIM") Coverage is a "first-party coverage insuring the policy holder, and others, against the possibility of injury or

property damage caused by the negligent operation of a motor vehicle whose liability insurance coverage is insufficient to pay for all losses suffered." Badiali v. New Jersey Mfrs. Ins. Group, 220 N.J. 544, 561-62 (2015). By statute, UIM coverage is defined as:

UIM coverage is defined by N.J.S.A. 17:28-1.1(e)(1), as:

> [I]nsurance for damages because of bodily injury and property damage resulting from an accident arising out of the ownership, maintenance, operation or use of an underinsured motor vehicle. . . . A motor vehicle is underinsured when the sum of the limits of liability under all bodily injury and property damage liability bonds and insurance policies available to a person against whom recovery is sought for bodily injury or property damage is, at the time of the accident, less than the applicable limits for underinsured motorist coverage afforded under the motor vehicle insurance policy held by the person seeking that recovery.

Furthermore, "limits for uninsured and underinsured motorist coverage shall not exceed the insured's motor vehicle liability policy limits for bodily injury and property damage." N.J.S.A. 17:28-1.1(b).

Succinctly, UIM coverage is insurance coverage that consumers purchase to protect themselves and their loved ones when a motor vehicle accident occurs that is caused by an individual who does not have high enough liability insurance coverage to satisfy the attendant damages and who likely does not have personal assets to satisfy any judgment beyond the liability coverage limits. Policyholders purchase this insurance so that they can pursue monetary damages

from their own insurance carrier when their damages exceed the liability coverage of the party responsible for the accident.

2. As Applied to PURE's Excess Policy, the Definitional Exclusion Contained in USAA's Underlying Policy Becomes Ambiguous and, As Such, Should Not Be Enforced. (2T20:16-25:22)

Defendant PURE has denied plaintiffs the benefit of $1,000,000 in UIM coverage that plaintiffs purchased based upon a definitional exclusion contained, not within the PURE excess policy, but within the underlying automobile insurance policy issued by USAA. PURE claims that the language from that policy applies to PURE's excess UIM coverage. Plaintiffs do not contest the validity of the definitional exclusion as it applies to USAA. However, the invocation of the definitional exclusion through the follow form language creates a significant ambiguity when applied to the facts of the current matter such that PURE should be precluded from denying coverage based upon same.

It is fundamental that any ambiguities in policies of insurance are to be construed in favor of the insured. See Gibson v. Callaghan, 158 N.J. 662, 670 (1999). Courts should consider whether use of "more precise language" in drafting of the insurance agreement would have removed all doubt as to the meaning of certain language. Ibid. As noted in Point I, supra, insurance policies are not traditional contracts entered into between parties with equal bargaining

power, equal expertise, and equal specialized knowledge. Insurance policies are contracts of adhesion. See, e.g., Progressive Cas. Ins. Co. v. Hurley, supra, 166 N.J. at 272 (2001). Insurance carriers are experts in drafting insurance agreements and those agreements are unilaterally prepared for layperson consumers. See Allen, supra, 44 N.J. at 305. Our courts have acknowledged that even the most astute consumer is disadvantaged by the complex terminology used in insurance agreements to the point where very often these agreements are not typically reviewed by the insured-consumer. See Bromfeld, supra, 298 N.J. Super. at 75.

Moreover, even when reviewed in detail, even the most knowledgeable and learned insured "must find his or her bargaining power is necessarily limited." Ibid. The onus is placed, therefore, upon the insurer to make absolutely clear the terms, conditions, and exclusions in an insurance policy. See, e.g., Progressive Cas. Ins. Co. v. Hurley, 166 N.J. 260, 274 (2001) ("When construing an ambiguous clause in an insurance policy, courts should consider whether clearer draftsmanship by the insurer would have put the matter beyond reasonable question."); Kook v. American Sur. Co., 88 N.J. Super. 43, 51 (App. Div.1965) ("[C]onsideration should be given [about] whether alternative or more precise language, if used, would have put the matter beyond reasonable question.").

Courts are bound to construe policy terms in favor of the insured and "to the end that coverage is afforded 'to the full extent that any fair interpretation will allow.'" Kievit v. Loyal Protective Life Ins. Co., 34 N.J. 475, 482 (1961) (quoting Danek v. Hommer, 28 N.J.Super. 68, 76 (App. Div.1953), aff'd, 15 N.J. 573 (1954)). And when the language of a policy term or exclusion "supports two meanings, one favorable to the insurer and the other to the insured, the interpretation favoring coverage should be applied." Lundy v. Aetna Cas. & Sur. Co., 92 N.J. 550, 559 (1983); see also Allen, supra, 44 N.J. at 305 (holding that courts have "consistently construed policy terms strictly against the insurer and where several interpretations were permissible, we have chosen the one most favorable to the assured").

In the current matter, defendant PURE is relying upon a definitional exclusion in the underlying USAA policy to deny plaintiffs' the benefit of the UIM coverage they purchased from PURE. (Pa60). PURE claims that its policy "follows the form" of the underlying USAA policy and is subject to the same terms and conditions of the USAA policy.

The relevant USAA policy language is contained in the UM/UIM section (Part C) of USAA's policy. The policy preliminarily begins by defining an underinsured vehicle and reads:

> C. "Underinsured motor vehicle" means a land motor vehicle or trailer of any type to which one or more

> liability bonds or policies apply, but the sum of the limits of liability for Bl or PD under all such bonds or policies is less than the sum of the applicable limits of liability for UM Coverage under this policy and all other policies affording UM Coverage to the covered person.
>
> [(Pa59).]

The USAA policy continues to state:

INSURING AGREEMENT

> A. **We** will pay compensatory damages which a **covered person** is legally entitled to recover from the owner or operator of an uninsured motor vehicle or underinsured motor vehicle because of:
>
> 1. **Bl** [bodily injury] sustained by a **covered person** and caused by an auto accident;
>
> . . . .
>
> [(Pa60).]

The USAA contains a definitional exclusion as follows:

> E. **"Uninsured motor vehicle"** and **"underinsured motor vehicle"** do not include any vehicle or equipment:
>
> 1. Owned by or furnished or available for the regular use of you or any **family member.**
>
> . . . .
>
> [(Pa60).]

PURE purports to adopt the entirety of this language from USAA's policy into its UIM coverage provisions. It relies upon the latter definitional exclusion to deny plaintiffs coverage because the vehicle operated by defendant Brackin was owned by plaintiffs and made available for defendant Brackin's use.

Plaintiffs are not contending this definitional language is ambiguous as applied to USAA on its face. For the reasons that follow, the ambiguity arises when this language is applied to an entirely different policy with different UIM limits.

First, plaintiffs could never expect that the definitional exclusion ("[o]wned by or furnished or available for the regular use of you or any family member") would have any bearing on the UIM coverages they purchased. That definitional exclusion could never affect plaintiffs' rights as it relates to USAA's UIM coverage obligations. Why? Because all of plaintiffs' vehicles were insured by USAA under a policy providing $500,000/$1,000,0000 in liability coverage. In other words, plaintiffs, de facto, could never claim UM/UIM benefits against the USAA policy when one of their vehicles was the tortfeasor vehicle in the accident because that vehicle would necessarily have liability limits equal to or great than the UM/UIM limits under USAA's policy – meaning that the vehicle could never be underinsured regardless of the definitional exclusion. See N.J.S.A. 17:28-1.1(b) ("[L]imits for uninsured and underinsured

motorist coverage shall not exceed the insured's motor vehicle liability policy limits for bodily injury and property damage.").

Stated plainly, plaintiffs avoided, or at least thought they were avoiding, the definitional exclusion in the USAA policy that is now being invoked by PURE by ensuring that all of the vehicles owned and made available for use by family members were insured under the USAA policy. Indisputably, given the facts of the current matter, USAA would never be in a position to invoke the definitional exclusion in its policy being invoked by PURE because plaintiffs obtained full liability coverage of all their vehicles with USAA.[1] It is ambiguous, to say the least, where a definitional exclusion is being invoked by an excess carrier that appears, not in the excess carrier's policy, but rather in the policy of an underlying insurance carrier who would never be able to invoke that exclusion.

Second, if PURE is correct and there is no ambiguity in its application of the definitional sections of the underlying USAA policy to PURE's UIM coverage, then PURE could deny plaintiffs UIM claim for any tortfeasor who has liability limits equal to or greater than $500,000, despite the fact that PURE sold plaintiffs a $1,000,000 UIM policy. USAA's policy defines an

[1] In contrast, plaintiffs could have insured 1 of their vehicles under the USAA policy with high liability and UM/UIM and liability limits and left the remaining vehicles with lower limits, in which case this exclusion could come into play.

"underinsured motor vehicle" as a vehicle that has liability coverage less than the UM coverage under "the applicable limits of liability for UM Coverage under this [USAA] policy." (Pa59). The USAA policy contains $500,000 in UM/UIM coverage. If the tortfeasor has $500,000 in liability coverage, or $600,000 in liability coverage, or $700,000 in liability coverage, or $800,000 in liability coverage, it would not be considered underinsured per the USAA policy definitions.

If plaintiffs' significant damages were caused by a third-party tortfeasor who was covered, for example, by $750,000 in liability insurance, it cannot seriously be argued that PURE would not be obligated to provide an additional $250,000 in coverage under the $1,000,000 UIM policy it sold to plaintiffs. Why else would plaintiffs have purchased a $1,000,000 excess UIM policy? Yet using the "follow form" argument that PURE now relies upon to apply the definitional section in USAA's policy, and applying those definitions to PURE's UIM coverage, a tortfeasor with $750,000 in liability coverage would not be considered "underinsured" (since it is not underinsured vis-à-vis the USAA $500,000 policy) despite having a liability policy that was significantly less than PURE's $1,000,000 UIM limits.

The above highlights the ambiguity in PURE's attempt to invoke definitions related to underinsured vehicles from a USAA policy that is not in-

play as it relates to plaintiffs' UIM claim in this matter. The language of the USAA policy itself may be permissible. The language of the USAA policy may also be unambiguous as it relates to claims against USAA. But the application of that language to an entirely different policy with entirely different UIM limits makes it ambiguous and culminates in a result that plaintiffs, as laypersons, could never have anticipated.

3. PURE Must Provide UIM Coverage Because New Jersey Law is Clear That Even Unambiguous Insurance Policy Language Should Be Set Aside if it Contravenes the Reasonable Expectations of An Insured. (2T20:16- 25:22)

Even if the Court were to conclude that the definitional section of USAA's policy is not ambiguous when applied to PURE's UIM coverage, the coverage fails to meet the reasonable expectations of plaintiffs. Plaintiffs rightfully assumed that when they purchased $1,000,000 in UIM coverage, they were purchasing the benefit of coverage in the event a tortfeasor's liability coverage failed to adequately meet the injuries caused by an accident.

A provision in an insurance agreement need not be ambiguous for it to be construed in favor of the insured by our Courts. Our Courts have recognized that "even an unambiguous [insurance] contract has been interpreted contrary to its plain meaning so as to fulfill the reasonable expectations of the insured." Bromfeld, supra, 298 N.J. Super. at 77 (emphasis added).

In Sparks v. St. Paul Ins. Co., 100 N.J. 325 (1985) the Supreme Court held that the "interpretation of insurance contracts to accord with the reasonable expectations of the insured, regardless of the existence of any ambiguity in the policy, constitutes judicial recognition of the unique nature of contracts of insurance." Id. at 338-39 (emphasis added). Rather the "objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.'" Id. at 338 (quoting Keeton, "Insurance Law Rights at Variance With Policy Provisions," 83 Harv. L. Rev. 961, 967 (1970)) (emphasis added).

The reasonable expectations doctrine espouses a construction of an insurance contract that enforces "only the restrictions and the terms in an insurance contract that are consistent with the objectively reasonable expectations of the average insured." Hurley, supra, 166 N.J. at 274. The rationale behind the State's firm case law regarding the reasonable expectations doctrine is the realization that "the fundamental principle of insurance law is to fulfill the objectively reasonable expectation of the parties." Bromfeld, supra, 298 N.J. Super. at 77. In Kievit v. Loyal Protective Life Ins. Co., 34 N.J. 475 (1961) the New Jersey Supreme Court left little doubt that courts in this State

should enforce only those provisions of an insurance policy that comport with what a reasonably situated insured would expect. The Court held that:

> When members of the public purchase policies of insurance they are entitled to the broad measure of protection necessary to fulfill their reasonable expectations. They should not be subjected to technical encumbrances or to hidden pitfalls and their policies should be construed liberally in their favor to the end that coverage is afforded to the full extent that any fair interpretation will allow.
>
> [Id. at 482 (internal quotations omitted) (emphasis added).]

In adhering to the reasonable expectations of the insureds, Courts have acknowledged that "[s]ince understanding of the contract through consent and negotiation rarely exists, one cannot assume that traditional contract consent applies with insurance contracts." Ibid. Rather, in Sparks, supra, 100 N.J. at 325, the Supreme Court held that:

> Such consent can be inferred only to the extent that the policy language conforms to public expectations and commercially reasonable standards . . . . In instances in which the insurance contract is inconsistent with public expectations and commercially accepted standards, judicial regulation of insurance contracts is essential in order to prevent over-reaching and injustice.
>
> [Id. at 338.]

On a more broadly stated level, in Harr v. Allstate Ins. Co., 54 N.J. 287 (1969) the Supreme Court described the law of reasonable expectation of the insured in the following manner:

> Our expressions have come in a variety of issues and contexts, but all have indicated as their keystone the goal of greater protection to the ordinary policyholder untutored in the intricacies of insurance. We have realistically faced up to the fact that insurance policies are complex contracts of adhesion, prepared by the insurer, not subject to negotiation, in the case of the average person, as to terms and provisions and quite unintelligible to the insured even were he to attempt to read and understand their unfamiliar and technical language and awkward and unclear arrangement . . . . We have stressed, among other things, the aim that average purchasers of insurance are entitled to the broad measure of protection necessary to fulfill their reasonable expectations; that it is the insurer's burden to obtain, through its representatives, all information pertinent to the risk and the desired coverage before the contract is issued; and that it is likewise its obligation to make policy provisions, especially those relating to coverage, exclusions and vital conditions, plain, clear and prominent to the layman.
>
> [Id. at 303-04.]

In short, it is the reasonable expectations of the insured, not the policy language that controls its interpretation. The insured's "reasonable expectations in the transaction may not justly be frustrated and courts have properly molded their governing interpretative principles with that uppermost in mind." Allen, supra, 44 N.J. at 305. Furthermore, the consideration of the "reasonable

expectations" of the insured necessarily entails a factual analysis as to what the insured in a given situation could have expected. Bromfeld, 298 N.J. Super. at 78-79 (remanding to the trial court for, in part, a determination of "the reasonable expectations of the insureds (plaintiffs)").

The current matter was dismissed on a motion in lieu of an answer, which requires that all facts and inferences be drawn in favor of the non-moving party, similar to a summary judgment motion. In the case at bar, therefore, the Court is compelled to view the facts in light most favorable to plaintiffs. It is respectfully submitted, therefore, that this Court must take as given that plaintiffs expected they would have UIM coverage under the provisions of the PURE policy in the circumstances giving rise to the accident of August 20, 2021. The only question, therefore, is whether these expectations were reasonable.

The expectations of an insured are largely governed by the declarations page. The importance of the declarations page of a policy has been the focus of significant emphasis by New Jersey courts when determining an insured's reasonable expectations under the policy. As stated by the court in Lehrhoff v. Aetna Cas. and Sur. Co., 271 N.J. Super. 340 (App. Div. 1994):

> We are, therefore, convinced that it is the declaration page, the one page of the policy tailored to the particular insured and not merely boilerplate, which must be deemed to define coverage and the insured's expectation of coverage. And we are also convinced that reasonable expectations of coverage raised by the

> declaration page cannot be contradicted by the policy's boilerplate unless the declaration page itself clearly so warns the insured.
>
> [Id. at 347.]

Page one (1) of the PURE declarations page contains the express declaration that plaintiffs were purchasing $1,000,000 in excess UM/UIM coverage. The policy was in full force and effect at the time of the subject accident. There is nothing in the declarations page to suggest anything less than $1,000,000 in UIM coverage. Moreover, nothing explicitly stated in PURE's own policy in any way limits the availability of UIM coverage under the facts presented in the current case. Quite to the contrary, the PURE policy states:

> We will pay **damages** for **bodily injury** and **insured** is legally entitled to receive from the owner or operator of an uninsured or underinsured **auto**. We will only pay those **damages** in excess of the **underlying insurance** or the minimum required underlying limits, whichever is greater.
>
> [(Pa87).]

Even under the intra-family exclusion of the PURE policy, which defendant PURE relies upon to deny liability coverage for defendant Brackin, the policy makes clear that excess UIM coverage would apply. Section III – Exclusions, Part A, Paragraph 14 states:

> We will not provide coverage for **damages**, defense costs or any other costs of expenses: . . .

. . . .

> 14. **Insured**. For **personal injury** to you or an **insured** under this policy. This exclusion does not apply to coverage provided under the Excess Supplemental Uninsured/Underinsured Motorist coverage, if a limit for this coverage is shown on your Declarations.
>
> [(Pa93).]

On its face, PURE's policy indicates that excess UIM coverage would be provided in instances presented under the facts of the current case; namely, where the driver of a vehicle (i.e., defendant Brackin) caused damages to an insured (i.e., Miles Brackin) which were in excess of the underlying insurance (i.e., the USAA $500,000 liability policy). The reasonable expectations of the plaintiffs, considering the PURE declarations page and PURE policy language *in toto*, was that they were covered for the exact circumstances that unfolded here. Plaintiffs expected that they purchased excess UIM coverage with PURE that would provide coverage in the event that the underlying liability limits were not sufficient to compensate plaintiffs for the damages sustained. This expectation was founded upon the fact that, as it relates to USAA, the exclusion invoked by PURE could never apply to plaintiffs. This expectation was founded upon the PURE declarations page advising they had purchased $1,000,000 in UIM coverage. This expectation was founded upon the PURE policy language

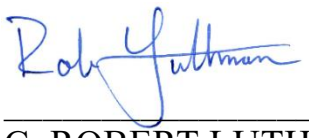
that an intrafamily exclusion would not apply to excess supplemental uninsured/underinsured motorist coverage.

It is respectfully submitted that, drawing all inferences in favor of plaintiffs, the expectation of coverage was imminently reasonable and that PURE should be compelled to provide coverage in accordance with plaintiffs' reasonable expectations.

Conclusion

For all of the aforementioned reasons, it is respectfully requested that the judgment of the trial court granting defendant PURE's motion to dismiss in lieu of an answer be reversed and that this matter be remanded to the trial level for further proceedings.

WEIR ATTORNEYS



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Dated: May 1, 2024

Superior Court of New Jersey

Appellate Division

Docket No. A-001524-23

ESTATE OF MILES C. BRACKIN by DEBORAH A. BUTZBACH, General Administratrix and Administratrix Ad Prosquendum, DEBORAH A. BUTZBACH, individually, and PHILLIP S. BRACKIN, JR., individually, *Plaintiffs-Appellants,* vs. PHILIP SNOWDEN BRACKIN, III, PRIVILEGE UNDERWRITERS, INC., JOHN DOES 1-100 (fictitious names), and ABC CORP. 1 - 100 (fictitious names), JOHN DOES 1-10(Fictitious names), *Defendants-Respondents.*	CIVIL ACTION ON APPEAL FROM THE FINAL ORDER GRANTING MOTION TO DISMISS IN LIEU OF AN ANSWER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MERCER COUNTY DOCKET NO.: MER-L-2215-22 Sat Below: HON. DOUGLAS HURD, P.J.CV.

BRIEF AND APPENDIX FOR DEFENDANT-RESPONDENT PRIVILEGE UNDERWRITERS, INC.

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I. PRELIMINARY STATEMENT

This is an action stemming from a single-car accident on August 20, 2021 in Hamilton, New Jersey that tragically resulted in the death of 13-year-old Miles C. Brackin. Defendant Phillip Brackin, III, Miles' brother, was operating the vehicle at the time of the accident. Plaintiffs-Appellants, the Estate of Miles Brackin and his parents, filed this action seeking a declaration as to coverage under the excess liability coverage part and excess underinsured motorist ("UIM") coverage part of a PURE Personal Excess Policy issued to the parents.

However, as Judge Douglas Hurd correctly determined, coverage is wholly precluded under both coverage parts. Coverage is barred under the excess liability coverage part based on the Injury to an Insured exclusion – this part of the policy is for excess liability coverage and explicitly precludes coverage for injuries to an insured. Decedent Miles Brackin constitutes an "insured" under the excess liability coverage part as a "family member" of his named insured parents.

Coverage under the excess UIM coverage part is barred because the vehicle in question is not an "underinsured motor vehicle." Here, the vehicle at issue was owned by Dr. Butzbach and made available for the use of her son. The PURE Policy's definition of "underinsured motor vehicle" excludes vehicles owned by the insured or made available for the use of a family member.

In this appeal, as to excess liability coverage, Appellants ask this Court to take the extraordinary step of deeming Injury to an Insured exclusions invalid as a matter of public policy. Appellants' argument should be rejected because it is based on one unpublished case that is wholly distinguishable from this matter because it involved a primary auto policy. Appellants would have this Court ignore the weight of authority upholding the application of Injury to an Insured exclusions in excess liability policies, such as the PURE Excess Policy.

Although ignored by Appellants in their briefing, this distinction between the types of policies is critical to this matter and invalidates any argument based on public policy. New Jersey drivers are required to have a primary auto liability policy, and coverage under such policies is mandated by statute. It is the mandatory nature and statutory restrictions on primary auto policies that motivates the restriction on Injury to an Insured exclusions in that context because such exclusions have been held to violate statutory requirements.

In contrast, excess liability policies are optional and offer broad coverage not only for excess auto liability, but also for excess personal liability in general, such as would typically fall under the liability coverage part of a homeowner's policy. Additionally, excess policies are not subject to the statutory mandates placed on primary auto insurance coverage. It is for this reason that Injury to an Insured exclusions are repeatedly upheld and found not to violate public policy

in connection with excess policies, or any policies other than primary auto insurance. Appellants suggest no compelling reason to apply to one form of insurance the statutory requirements governing another, or why the PURE Excess Policy should be rewritten.

In the alternative, Appellants argue that coverage is available under the excess UIM coverage part of the PURE Excess Policy based on the insureds' reasonable expectations. In essence, Appellants argue that because the PURE Excess Policy follows form to the underlying primary USAA policy, including as to the definition of "underinsured motor vehicle," coverage is ambiguous. This argument too is incorrect. Follow form policies are routinely used, including for excess UIM coverage, and are applied as written. The definition of "underinsured motor vehicle" applies equally to coverage under the primary USAA Policy, which also does not provide UIM coverage for this matter. Additionally, contrary to Appellants' assertions and as correctly found by Judge Hurd, the excess UIM coverage part of the PURE Excess Policy provides coverage in many scenarios, but not for the intra-family accident at issue in this matter. Appellants' hypotheticals purporting to demonstrate otherwise indicate a fundamental misunderstanding of excess UIM coverage.

For these reasons, this Court should affirm.

II. PROCEDURAL HISTORY

On December 27, 2022, Plaintiffs filed an action against Defendant Privilege Underwriters, Inc. ("PURE")[1], Defendant Phillip Brackin, III (the Brackins' older son, and driver of the vehicle in question), and certain John Does in the Superior Court of New Jersey, Law Division, Mercer County. (Pa 1-11). Plaintiffs filed an amended complaint on January 12, 2023 to fix a typographical error as to party names. (Pa 12-20). The Amended Complaint asserted a cause of action for survivorship and wrongful death against Defenant Brackin. *Id.* As to PURE, the Amended Complaint sought a declaration as to coverage under the excess liability coverage part, and the excess UIM coverage part of the PURE Excess Policy. *Id.*

On February 9, 2023, Defendant PURE moved to dismiss the Amended Complaint with prejudice pursuant to Rule 4:6-2(e). On March 15, 2023, Plaintiffs filed their opposition. On March 27, 2023, PURE filed its reply.

Oral argument on the motion to dismiss was held before Judge Douglas Hurd on March 31, 2023. (1T). Judge Hurd issued his oral decision granting PURE's motion to dismiss with prejudice on May 3, 2023. (2T). An Order memorializing the decision was also entered on May 3, 2023. (Pa 22). Judge

[1] The policy at issue in this matter was issued by "Privilege Underwriters Reciprocal Exchange" and not the named defendant, Privilege Underwriters, Inc. PURE reserves the right to assert that Appellants sued the wrong entity.

Hurd held that coverage is barred under the excess liability coverage part of the PURE Excess Policy pursuant to the plain meaning of the Injury to an Insured exclusion, and that coverage is barred under the excess UIM coverage part because the vehicle at issue is not an "underinsured motor vehicle."

On December 27, 2023, over six months after the lower court's decision, Plaintiffs filed a motion to dismiss their complaint against Defendant Brackin without prejudice. PURE filed its opposition to Plaintiffs' motion on January 11, 2024. Plaintiffs filed a reply on January 11, 2024.

On January 18, 2024, the Superior Court entered an order granting Plaintiffs' motion to dismiss Defendant Brackin without prejudice. (Pa 24-25). This appeal followed.

III. STATEMENT OF FACTS

A. The Allegations of the Complaint

This matter arises out of a single-vehicle accident that occurred on August 20, 2021 in Hamilton, New Jersey that tragically resulted in the death of 13-year-old Miles Brackin. The vehicle was being operated by defendant Phillip S. Brackin, III, Miles' older brother. (Pa 13-14). The vehicle at issue was a GMC Yukon owned by Miles' and Phillip's mother, Plaintiff, Deborah A. Butzbach, M.D. *Id.* At the time of the incident, Miles and Phillip, along with their parents, resided at a home at 24 Woodmere Way, Hopewell, NJ. (Pa 13).

Plaintiffs (the Estate of Miles Brackin, and Miles' parents) filed suit against PURE, among others, in connection with the accident. (Pa12-20). As to PURE, Plaintiffs seek a declaration as to coverage under the excess liability coverage part, and the excess UIM coverage part of the PURE Excess Policy. *Id.*

B. The Policies

1. The USAA Policy

The PURE Excess Policy is excess to a primary New Jersey Standard Auto Policy issued to Dr. Deborah A. Butzbach and Dr. Phillip S. Brackin Jr. by USAA Casualty Insurance Company (the "USAA Policy"). The USAA Policy contains liability and underinsured motorist coverage parts. (Pa 33).

Under the UIM coverage part of the USAA Policy, "covered person" is defined to mean:

> 1. **You** or any **family member**.[2]
> 2. Any other person **occupying your covered auto**.
> 3. Any person for damages that person is entitled to recover because of **BI** to which this coverage applies sustained by any person described in 1 or 2 above.

[2] Under both the liability and the UIM coverage part of the USAA Policy, "family member" is defined to mean "a person related to **you** by blood, marriage, registered civil union or adoption who resides primarily in **your** household. This includes a ward or foster child."

(Pa 59, at Part C, Uninsured Motorists Coverage). The insuring agreement of the UIM coverage part provides, in relevant part:

> A. **We** will pay compensatory damages which a **covered person** is legally entitled to recover from the owner or operator of an **uninsured motor vehicle** or **underinsured motor vehicle** because of:
>
> 1. **BI** [bodily injury] sustained by a **covered person** and caused by an auto accident; and
> 2. **PD** [property damage] caused by an auto accident. However, **we** will not pay for **PD** caused by a hit-and-run motor vehicle.

Id.

"Underinsured motor vehicle" is defined to mean a "land motor vehicle or **trailer** of any type to which one or more liability bonds or policies apply, but the sum of the limits of liability for **BI** or **PD** under all such bonds or policies is less than the sum of the applicable limits of liability for UM Coverage under this policy and all other policies affording UM Coverage to the **covered person**." *Id.*

However, importantly, "uninsured motor vehicle" and "underinsured motor vehicle" do not include any vehicle:

> 1. Owned by or furnished or available for the regular use of **you** [named insured and spouse] or any **family member**.

Id. Accordingly, there is no UIM coverage for an accident involving an at-fault vehicle that is owned by a named insured or made available for the regular use of a family member, both of which are the case here.

2. The PURE Excess Policy

PURE issued excess liability policy EX204932004 to "Deborah A. Butzbach" and "Dr. Phillip S. Brackin Jr." for the policy period June 14, 2021 to June 14, 2022 (the "PURE Excess Policy"). The PURE Excess Policy has limits of liability of $5 million under the excess liability coverage part, and $1 million under the excess UIM coverage part. (Pa 77). Both coverage parts are excess to the USAA Policy and/or any other underlying insurance.

Under the excess liability coverage part of the PURE Excess Policy, "insured" is defined in relevant part to mean "you or a **family member**." "Family Member" is then defined to mean "a person that lives in your household and is related to you by blood, marriage, registered domestic partnership under state law, or adoption." (Pa 83, at § 1 – Definitions).

The insuring agreement of the excess liability coverage part provides:

> We will pay for **damages** that an **insured** is legally obligated to pay as a result of **property damage** or **personal injury** caused by an **occurrence** to which this coverage applies:
>
> a. In excess of the **underlying insurance** or the minimum required underlying limits, whichever is greater; or
>
> b. From the first dollar where coverage provided by required **underlying insurance** does not apply or **underlying insurance** is not required.

(Pa 86. at § II – Coverages, A. Excess Liability).

The Injury to an Insured exclusion in the PURE Excess Policy provides:

> We will not provide coverage for **damages**, defense costs or any other costs or expenses:
>
> 14. **Insured**
>
> For **personal injury** to you or an **insured** under this policy. This exclusion does not apply to coverage provided under Excess Supplementary Uninsured/Underinsured Motorist Coverage, if a limit for this coverage is shown on your Declarations.

(Pa 93, at § III, Exclusions).

As to excess supplementary UIM coverage, the PURE Excess Policy provides:

> We will pay **damages** for **bodily injury** an **insured** is legally entitled to receive from the owner or operator of an uninsured or underinsured **auto**. We will only pay those **damages** in excess of the **underlying insurance** or the minimum required underlying limits, whichever is greater. The most we will pay as a result of an **occurrence** is the coverage limit for the Excess Supplementary Uninsured/Underinsured Motorists shown on your Declarations. This limit is the most we will pay, regardless of the number of claims, vehicles or people involved in the **occurrence**, or vehicles you own.
>
> This coverage only applies for an **occurrence** during the policy period. This coverage will **follow form**.

(Pa 90, at § II – Coverages, B. Excess Supplementary Uninsured and Underinsured Motorists Coverage).

IV. STANDARD OF REVIEW

This Court reviews de novo a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 4:6-2(e). *See Dimitrakopoulos v.*

Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 107-08 (2019). "In deciding whether to grant dismissal, the complaint's allegations are accepted as true and with all favorable inferences accorded to plaintiff." *MacProp. Grp. LLC & The Cake Boutique LLC v. Selective Fire & Cas. Ins. Co.*, 473 N.J. Super. 1, 16 (App. Div. 2022) (procedural history omitted). "A complaint should be dismissed for failure to state a claim pursuant to Rule 4:6-2(e) only if the factual allegations are palpably insufficient to support a claim upon which relief can be granted." *Id.* "If the complaint states no claim that supports relief, and discovery will not give rise to such a claim, the action should be dismissed." *Dimitrakopoulos*, 237 N.J. at 107-08.

A trial court's interpretation of an insurance policy's terms is "a legal determination, not a factual inquiry, and is accordingly reviewed de novo." *AC Ocean Walk, LLC v. Am. Guarantee & Liab. Ins. Co.*, 256 N.J. 294, 312 (2024). "An insurance policy will be enforced as written when its terms are clear in order that the expectations of the parties will be fulfilled, with undefined terms construed in accordance with their plain and ordinary meaning." *Id.* (internal quotations omitted). "'If the language is clear, that is the end of the inquiry,' and courts will not engage in 'a strained construction to support the imposition of liability' or write a better policy for the insured than the one purchased." *Id.*

(*quoting Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am.*, 195 N.J. 231, 238 (2008)).

V. LEGAL ARGUMENT

A. Excess Liability Coverage is Barred by the Injury to an Insured Exclusion

In this matter, Appellants seek a declaration that there is coverage for the accident under the excess liability coverage part of the PURE Excess Policy (i.e., liability coverage for the defendant driver Phillip Brackin, III for causing the accident resulting in the death of his brother). However, the PURE Excess Policy contains a broad and unambiguous Injury to an Insured exclusion that bars coverage for personal injury to an insured under the policy. As correctly found by the trial court, Miles, the injured party, is an "insured" as a "family member" of his named insured parents, and thus the exclusion applies to bar coverage.

Under New Jersey law, "the words of an insurance policy are to be given their plain and ordinary meaning . . . [and] [i]n the absence of any ambiguity, courts should not write for the insured a better policy of insurance than the one purchased." *Hampton Med. Group, P.A. v. Princeton Ins. Co.*, 366 N.J. Super. 165, 172 (App. Div. 2004) (*citing Zacarias v. Allstate Ins. Co.*, 168 N.J. 590 (2001)). "Exclusions are presumptively valid and will be given effect if

'specific, plain, clear, prominent, and not contrary to public policy.'" *Id.* (cited source omitted); *see also AC Ocean Walk, LLC v. Am. Guarantee & Liab. Ins. Co.*, 256 N.J. 294, 312 (N.J.) ("If the language is clear, that is the end of the inquiry, and courts will not engage in a strained construction to support the imposition of liability . . . .") (cited source and internal quotations omitted).

Here, the Injury to an Insured exclusion in the PURE Excess Policy precludes coverage for liability for "**personal injury** to you or an **insured** under this policy." (Pa 93, at § III, Exclusions). The plain meaning of this exclusion bars coverage for this matter because Miles was an "insured" as a "family member" of his named-insured parents.

New Jersey courts routinely enforce such exclusions in excess policies, such as the PURE Excess Policy at issue in this matter (although as discussed further below, such exclusions are not permitted in primary auto policies, where coverage provisions are mandated by statute). *See e.g.*, *Weitz v. Allstate Ins. Co.*, 273 N.J. Super. 548 (App. Div. 1994) (barring coverage under an excess liability policy pursuant to an injury to an insured exclusion and distinguishing such policies from primary auto policies, where such exclusions are invalid); *Zacarias v. Allstate Ins. Co.*, 775 A.2d 1262, 1268 (N.J. 2001) (applying an injury to an insured exclusion in a boat owners policy to deny coverage for the passenger-wife and noting that such exclusions are only invalid in the primary

auto insurance context); *Light v. U.S. Liab. Ins. Group*, 2006 WL 2042303, at *4 (N.J. Super. App. Div. July 24, 2006) (Da 1-4) (holding that an exclusion for injury to an insured barred coverage for a wrongful death action by the estate of a family-member passenger and noting that "[w]e recognize the gap in coverage that those terms, and the resulting exclusion create. Resident family members are likely to be frequent passengers in a policyholder's car, and in an accident where the driver is partly or wholly at fault, an excess (or umbrella) policy such as the Mt. Vernon Policy will provide no liability coverage for such family member's claims. . . . [T]his is the policy Shapiro bought, and we can find no legal basis for modifying it."); *Foley v. Foley*, 173 N.J. Super. 256, 258 (App. Div. 1980) (holding that an injury to an insured exclusion in a homeowner's policy applied and did not violate public policy, and distinguishing cases limiting the application of the exclusion because each involved primary auto liability policies).

1. Injury to an Insured Exclusions in Excess Policies Comport with Public Policy and This Court Should Not Overrule Existing Precedent

In their opening brief, Appellants do not distinguish or even address the above cases holding that similar Injury to an Insured exclusions in excess/umbrella policies are valid, enforceable, and do not violate public policy. Rather, Appellants cite only to *Dela Vega v. Travelers Ins. Co.*, A-2272-19,

2022 WL 1436461 (App. Div. May 6, 2022), *cert. denied*, 284 A. 3d 426 (N.J. 2022) (Da 5-13) in support of their position that "the time has come for intrafamily liability exclusions to be deemed void as a matter of public policy." *See* Appellants' Opening Brief, at 11.

Dela Vega is a narrow, unreported decision that is limited to the specific facts at issue, and wholly distinguishable in any event because the policy at issue in that matter was a primary auto policy. Further distinguishing *Dela Vega* is that fact that that case did not involve an Injury to an Insured exclusion, but rather an intra-family step-down provision. Thus, contrary to Appellants' assertions, *Dela Vega* does not represent a sea change in the law, but rather is consistent with the cases cited above holding that Injury to an Insured exclusions are only invalid as a matter of public policy when used in primary auto policies.

In *Dela Vega*, the plaintiff was a passenger in a car operated by her husband and suffered injuries in an accident when her husband pulled out of a parking lot and into the path of another vehicle. The policy at issue had liability limits of $100,000/$300,000 but also contained an intra-family step-down exclusion, which purported to lower coverage for damages to an insured to the "portion of damages that is less than or equal to the minimum limits required by New Jersey law." *Id.* at *3. "Minimum limits" was defined to mean the "limits of liability as required by New Jersey law, to be provided under a standard policy

of automobile liability insurance: . . . $15,000 for each person, subject to $30,000 for each accident with respect to 'bodily injury[.]'" *Id.* at *4. The claims adjuster apparently was unaware of the step-down provision and originally offered the inured the $100,000 limits of the policy. However, four months later the claims adjuster rescinded the offer, indicating that only $15,000 of coverage was available pursuant to the step-down provision.

Appellants correctly note that the Court held that the step-down provision was unenforceable as it was contrary to the insured's reasonable expectations as to coverage given the declarations page at issue. That is, the declarations page listed bodily injury limits of $100,000/$300,000 but did not alert the insured that the coverages and limits of liability were subject to the provisions of the policy. However, central to the Court's decision was the fact that the policy at issue provided primary auto insurance, and the Court expressly noted that similar step-down provisions and Injury to an Insured exclusions have been upheld under different types of policies. *Id.* at *8.

Appellants give great weight to a footnote in *Dela Vega* stating that this Court found the step-down provision "troubling" and referencing public policy concerns. *Id.* at *1, Fn. 2. However, this was in the context of a primary auto liability policy and the statutorily mandated coverage framework applicable to such policies. The Court's reasoning was based on the distinction between Injury

to an Insured exclusions and step-down provisions. As recognized by the Court, Injury to an Insured exclusions have been deemed invalid in primary auto policies because they violate statutory requirements as to minimum insurance. That is, New Jersey drivers are mandated to have a certain minimum amount of coverage in their primary auto policy as set forth in the omnibus coverage statute, and the Injury to an Insured exclusion eliminates coverage altogether for an intra-family accident and thus would violate the statutory requirement. *See Id.* at *8 (noting that in *Kish v. Motor Club of Am. Ins. Co.*, 108 N.J. Super. 405, 411 (App. Div. 1979) the Appellate Division deemed an injury to an insured exclusion in a primary auto policy "invalid as an attempt to limit the omnibus coverage required by statute and refused the carrier's request to reform the policy to the minimum limits").

In contrast, intra-family step-down exclusions do not preclude coverage altogether, and rather purport to "step-down" coverage to the minimum amount of primary auto coverage as required by the omnibus statute. And step-down provisions have previously been upheld in primary auto policies. *Id.* ("Defendant is correct to note that while intra-family exclusions have been declared invalid, step-down provisions, so long as they don't step down coverage to less than allowed by the omnibus statute, N.J.S.A. 39:6B-1, have been upheld in the auto context.").

Thus, this Court in *Dela Vega* noted its concern based on the interplay in primary auto policies between Injury to Insured exclusions (which are invalid) and intra-family step down provisions (which are allowed when appropriately designated). Thus, the public policy concerns referenced in *Dela* Vega in connection with intra-family step-down provisions exclusively arise in the primary auto liability context, and because of potential conflicts with the statutory requirements for that specific type of policy.

In contrast, the PURE Excess Policy is an excess liability policy. Excess liability policies are optional and offer broad coverage not just for excess auto liability, but for excess personal liability in general, such as would typically fall under the liability coverage part of a homeowner's policy. Accordingly, excess policies are not subject to the statutory mandates placed on primary auto insurance coverage, such as the requirement that primary auto policies may not contain intra-family exclusions.

This distinction was addressed in detail in *Weitz v. Allstate Ins. Co.*, 273 N.J. Super. 548, 551 (App. Div. 1994), which also held that the Injury to an Insured exclusion in an excess policy barred coverage for a liability claim by the wife-passenger against the husband-driver stemming from an auto accident. The Court rejected an argument similar to the one put forward by Appellants in this matter as to public policy concerns. There, the Court noted:

> Plaintiff contends that because her husband's primary automobile insurance policy could not have excluded coverage for claims brought by members of his household, *see N.J.S.A.* 39:6A–3 to –4, he would reasonably assume that his personal umbrella policy could not have contained such an exclusion. We disagree.
>
> **The Legislature has not required automobile insureds to purchase umbrella policies; and there is no legislation dictating the parameters of coverage contained in such policies. Unlike his underlying automobile policy whose scope is defined by statute, Mr. Weitz's umbrella policy is defined by the policy's plain language, unencumbered by the statutory requirements for automobile insurance.** Plaintiff suggests no compelling reason to tack onto one form of insurance the statutory requirements governing another. *See Horesh v. State Farm Fire & Cas. Co.,* 265 N.J. Super. 32, 37, 625 *A.*2d 541 (App.Div.1993) ("In the absence of any statutory or substantial public policy requirement to cover liability for an insured's injury, a homeowner's insurance policy may exclude such liability from coverage," even where such an exclusion could not be enforced if contained in an automobile liability insurance policy)[.] . . . The unambiguous exclusion set forth in Allstate's umbrella policy must be enforced as written.

Id. at 551-52 (emphasis added).

As in *Weitz*, coverage under the PURE Excess Policy is not determined by statutory requirements but rather by the plain language of the policy. As described above, New Jersey courts have held in an unbroken line of cases that Injury to an Insured exclusions are valid and not against public policy when used outside of the primary automobile coverage context. In doing so, those cases also rejected similar public policy arguments, finding that the policies applied based on their plain language because coverage under such policies was not mandated by statute. *See, e.g.*, *Horesh v. State Farm Fire & Cas. Co.*, 265 N.J.

Super. 32, 37 (App. Div. 1993) (holding that the reason why Injury to an Insured exclusions are valid in homeowner's policies but violate public policy when used in primary auto policies is because: "Auto policies are mandated, are heavily regulated and are required by law to contain particular coverages. The exclusion of auto injuries to an insured is not permitted by law."); *see also Stiefel v. Bayly, Martin, and Fay*, 242 N.J. Super. 643, 653 (App. Div. 1990) (noting that no public policy or statute requires uninsured motorist coverage to be read into an umbrella policy as it could be read into the primary automobile insurance policy).

Simply, unlike in *Dela Vega*, the PURE Excess Policy is not a primary automobile policy. Based on this distinction alone, *Dela Vega* is inapposite, and does not support Appellants' argument that Injury to an Insured exclusions violate public policy when used in excess policies.

In any event, as noted above, the Court in *Dela Vega* acknowledged that intra-family step-down provisions (and Injury to an Insured exclusions) have been upheld by New Jersey courts, and did not purport to overrule or challenge the holding of such cases. *Id.* at *8 (*citing Aubrey v. Harleysville Ins. Companies*, 140 N.J. 397 (N.J. 1995); *Hanko v. Sisoukraj*, 364 N.J. Super. 41 (App. Div. 2003); *Rao v. Universal Underwriters Ins. Co.*, 228 N.J. Super. 396 (App. Div. 1988)). Rather, the court found that those cases were distinguishable

because none of them "limited coverage and benefits to the purchaser of the policy – as this one does." *Id.* This matter is like the prior precedent and unlike *Dela Vega* given that liability coverage is being sought not by the purchaser of the policy, but on behalf of Defendant Phillip Brackin, III as the operator of the vehicle and son of the named insureds.

Finally, Appellants argue without citation that Injury to Insured exclusions "frustrate" New Jersey's jurisprudence that purportedly abrogated certain immunities for intra-family claims. *See* Appellants' Opening Brief, at 21. This argument too should be rejected. Even if certain intrafamilial immunities have been eliminated as Appellants assert, this does not mean that exclusions in insurance policies are invalid if they reach such claims. Rather, the weight of case law demonstrates the opposite. That is, the essential factor in evaluating the validity of Injury to an Insured exclusions is whether they violate statutory requirements and thus violate public policy as expressed by the legislature. If they do not, the parties' right to freedom of contract means that such exclusions may be used. *See, e.g.*, *Foley v. Foley*, 173 N.J. Super. At 259 (upholding an Injury to an Insured exclusion in a homeowner's policy); *see also Kieffer v. High Point Ins. Co.*, 422 N.J. Super. 38, 49 (App. Div. 2011) ("While public policy mandates that those who operate vehicles across this state must have liability insurance, collision insurance is not mandated. . . . Therefore,

provisions in a policy limiting the extent to which an insurer will compensate an insured for damages to an insured's vehicle and expressly excluding certain types of collision coverage do not contravene public policy.").

Contrary to Appellants' assertions, New Jersey law demonstrates that Injury to an Insured exclusions are enforceable and do not violate public policy when used outside of the primary automobile context. Additionally, *Dela Vega*, the lone case Appellants cite in favor of their position is completely distinguishable from this matter. Accordingly, Appellants have not presented compelling grounds for why the PURE Excess Policy should be re-written, or why the unbroken line of cases holding that Injury to an Insured exclusions do not violate public policy when used outside of the primary auto context should be overruled.

Rather, as correctly highlighted by Judge Hurd, the Injury to an Insured exclusion in the PURE Excess Policy is unambiguous and applies based on its plain meaning to bar coverage for injury to an insured under the Policy. (*See* 2T, at 17:20–22 ("[T]he terms of plaintiff's auto excess policies are unambiguous and have to be enforced.")). Accordingly, PURE requests that this Court affirm the lower court's ruling that the Injury to an Insured exclusion bars coverage for this matter under the excess liability coverage part of the PURE Excess Policy. *See Zacarias v. Allstate Ins. Co.*, 168 N.J. 590, 595 (2001) ("In the absence of

any ambiguity, courts should not write for the insured a better policy of insurance than the one purchased.").

B. There is No Excess UIM Coverage Because the Vehicle is Not an "Underinsured Motor Vehicle"

The vehicle at issue is not an "underinsured motor vehicle" under the PURE Excess Policy, and so excess UIM coverage is not available. Appellants argue that excess UIM coverage is available based on the insureds' reasonable expectations of coverage. In essence, Plaintiffs argue that because the PURE Excess Policy follows form to the underlying primary USAA Policy, including as to the definition of "underinsured motor vehicle," coverage is ambiguous. This argument is meritless and should be rejected.

Appellants fail to address the cases cited by PURE in its motion to dismiss establishing that similar definitions of "underinsured motor vehicle" are frequently upheld (and that follow form policies are common in the insurance industry, including with respect to UIM coverage). Rather, Appellants cite only to general principles of New Jersey law on grounds that the insureds' "reasonable" expectations of coverage should override the clear and unambiguous language of the PURE Excess Policy. Contrary to Appellants' assertions, and as correctly held by the lower court, the plain language of the PURE Excess Policy applies to the facts alleged in the Amended Complaint, and bars coverage under the excess UIM coverage part.

1. Excess UIM Coverage is Barred Because the Vehicle at Issue is not an "Underinsured Motor Vehicle"

The excess UIM coverage part of the PURE Excess Policy follows form to the underlying primary USAA Policy. As to underinsured motorist coverage, the insuring agreement of the USAA Policy provides in relevant part:

> **We** will pay compensatory damages which a **covered person** is legally entitled to recover from the owner or operator of an **uninsured motor vehicle** or **underinsured motor vehicle** because of: (1) BI sustained by a **covered person** and caused by an auto accident[.] . . .

(Pa 59, USAA Policy, at Part C – Underinsured Motorist Coverage). Thus, as a condition of coverage, the insuring agreement requires that the accident involve an "underinsured motor vehicle" as defined in the USAA Policy. The definition of "underinsured motor vehicle" expressly excludes any vehicle "[o]wned by or furnished or available for the regular use of **you** [named insured] or any **family member**." *Id.* A "family member" is defined in the USAA Policy in relevant part to include "a person related to **you** by blood, marriage . . . who resides primarily in **your** household." (Pa 35, at Definitions (F)).

The vehicle at issue was owned by named insured Deborah Butzbach and was furnished for the use of "family member" Defendant Phillip Brackin, III. Because the vehicle was owned by the named insured and made available for the use of a family member, the accident did not involve an "underinsured motor vehicle," and the insuring agreement is not satisfied. The PURE Excess Policy

follows form to the USAA Policy (and the "resident relative" exception), and therefore, there is no coverage under the excess UIM coverage part of the PURE Excess Policy.

Indeed, policy definitions that exclude vehicles owned by or available to resident "family members" are routinely applied by New Jersey courts in connection with UIM coverage. *See e.g.*, *Aubrey v. Harleysville Ins. Companies*, 140 N.J. 397, 405 (N.J. 1995) (overruling an earlier Appellate Division decision stating that the "resident family member" exception from the definition of "underinsured motor vehicle" violated New Jersey statutes, and noting that such an exclusion from the definition was viable and should have applied in that instance); *French v. New Jersey Sch. Bd. Ass'n Ins. Group*, 149 N.J. 478, 492 (1997) ("[N]o public policy or statute prevents the exclusion of UIM coverage when it is the underinsured vehicle of the resident family member that causes the injury."); *Shah v. Geico Ins. Co.*, 2011 WL 3444269, at *1 (N.J. Super. App. Div. Aug. 9, 2011) (Da 14-19) (holding that a similar exclusion for injury to relatives by an underinsured motor vehicle owned by you or a relative barred coverage for an accident because the vehicle at issue was owned by a relative and/or family member that resided in the same household).

2. The Excess UIM Coverage Part is Clear and Unambiguous

Appellants first seem to assert that the definition of "underinsured motor vehicle" is ambiguous because it is defined in the underlying USAA Policy (to which the PURE Excess Policy follows form) and not directly in the PURE Excess Policy. Appellants do not contend that follow form policies are ambiguous or invalid in general and nor can they do so given that follow form policies are routinely used in the insurance industry (including with respect to excess UIM coverage) and are applied as written. *See e.g.*, *AstenJohnson, Inc. v. Columbia Cas. Co.*, 562 F.3d 213 (3d Cir. 2009) (discussing excess follow form coverage and applying follow form provision as written).

However, Appellants' argument is contradictory and highlights the principal issue: that UIM coverage does not apply to a single car accident involving multiple insureds. That is, Appellants first state that they are not contesting the validity of the definition of "underinsured motor vehicle" as applied to the primary USAA Policy. *See* Appellants' Opening Brief, at 27. But at the same time, Appellants argue that the definition is ambiguous because it could "never affect plaintiff's rights as it relates to USAA's UIM coverage obligations." *Id.* at 31.

These points are difficult to reconcile, but it appears that Appellants are asserting that the definition is ambiguous because it could never apply to UIM coverage under the primary USAA Policy.

This is incorrect. As correctly found by the lower court, the USAA Policy contains the same definition of "underinsured motor vehicle," and the vehicle at issue does not meet the definition because it is owned by the named and insured and made available for the regular use of a family member. Therefore, the insuring agreement is not satisfied. (*See* 2T, at 25:15 ("[T]he definition of underinsured motor vehicle applies equally to UIM coverage under the primary USAA policy, which also does not provide coverage for this matter.")). It is likely for this reason that USAA paid the limits of its bodily injury liability coverage part and not the UIM coverage part.[3]

Appellants next refer to a hypothetical intended to show that the PURE Excess Policy does not provide excess UIM coverage in all circumstances when certain underlying UIM coverage is at issue. *See* Appellants' Opening Brief, at 32 ("[I]f PURE is correct and there is no ambiguity in its application of the

[3] Although not the subject of this appeal, the PURE Excess Policy provides only ***excess*** UIM coverage. Appellants have not contended that their primary UIM coverage is exhausted, or that the matter was otherwise reported to USAA for UIM coverage. PURE reserves the right to assert that other exclusions, conditions and/or limitations in the PURE Excess Policy also apply to preclude or limit coverage.

definitional sections of the underlying USAA policy to PURE's UIM coverage, then PURE could deny Plaintiffs UIM claim for any tortfeasor who has liability limits equal to or greater than $500,000, despite the fact that PURE sold plaintiffs a $1,000,000 UIM policy."). This flawed hypothetical reflects a fundamental misunderstanding of underinsured motorist coverage.

As a general matter, underinsured motorist coverage is determined by comparing the liability limits of the tortfeasor's policy(ies) to the underinsured motorist coverage limits of the claimant/injured party. *See Sel. Ins. Co. of Am. v. Thomas*, 847 A.2d 578, 580 (N.J. 2004) ("A motor vehicle is underinsured when the sum of the limits of liability under all bodily injury and property damages liability bonds and insurance policies available to a person against whom recovery is sought . . . is . . . less than the applicable limits of underinsured motorist coverage afforded under the motor vehicle insurance policy *held by the person* seeking that recovery.") (*quoting* N.J.S.A. 17:28-1.1e(1)). UIM coverage is meant to be a gap filler to compensate for the difference between the liability limits of the at-fault driver's policy and the underinsured motorist limits of the victim's policy. *Id.*

Contrary to Appellants' assertions, this does not mean that the PURE Excess Policy provides no coverage in any instances, or no coverage when the underlying vehicle has $500,000 in liability coverage. Rather, coverage must be

determined by comparison of the respective policies at issue and will apply (given its gap filler nature) when the bodily injury limits of the tortfeasor's policy are less than the UIM limits of the insured (under the policy providing the highest amount of UIM coverage). As noted above, the Brackins have UIM limits of $1,000,000 under the PURE Excess Policy. Accordingly, UIM coverage would be implicated in any scenario where a tortfeasor (who is not a resident-family member) had bodily injury coverage of less than $1,000,000, subject to the terms and conditions of the PURE Excess Policy. Thus, contrary to Appellants' assertions and as again correctly recognized by the lower court, the PURE Policy provides broad UIM coverage, but not for an intra-family accident. (*See* 2T, at 25:19 – 25:22 ("[T]he UIM coverage part of the PURE excess policy provides coverage in many scenarios, but not for the intra-family accident at issue in this matter.").

3. A Reasonable Insured Would Not Expect Coverage Here

Finally, Appellants assert that even if the definition of "underinsured motorist" as applied to the PURE Excess Policy is not ambiguous (which it is not), it should not be applied because it fails to meet the reasonable expectations of the insureds. Simply, the insureds' expectations here have no bearing on coverage under the PURE Excess Policy because such purported expectations are objectively unreasonable. This is because (1) the PURE Excess Policy

follows form to the primary USAA Policy; and (2) the same definition bars UIM coverage in the USAA Policy and the PURE Excess Policy. Additionally, the scope and application of UIM coverage is clearly set forth in the PURE Excess Policy and similar provisions have been repeatedly upheld to bar UIM coverage for vehicles owned by or available to resident "family members." Accordingly, the plain language of the PURE Excess Policy should be applied as written.

In support of its position that the insureds' reasonable expectations require that UIM coverage be provided, Appellants cite only to general principles of law in relatively older decisions by the New Jersey Supreme Court. However, none of those cases supports the conclusion that an insured's reasonable expectations override clear policy language in this context. *See* Appellants' Opening Brief, at 34-38 (citing *Sparks v. St. Paul Ins. Co.*, 100 N.J. 325 (1995); *Kievit v. Loyal Protective Life Ins. Co.*, 34 N.J. 475 (1961); and *Harr v. Allstate Ins. Co.*, 54 N.J. 287 (1969)). Rather, in each such case the determination involved whether the insured's expectations were "objectively reasonable."

Simply, the insureds' expectations have no bearing on coverage when such expectations are objectively unreasonable. *See, e.g.*, *Cassilli v.Soussou*, 408 N.J. Super. 147, 155 (App. Div. 2009) (holding that the plain language of the policy barred coverage and the insured's purported reasonable expectations of coverage did not override this result, and noting "[A]lthough the declarations

page failed to specify a 'named insured,' under the circumstances, Soussou could not have entertained a reasonably objective expectation that he qualified as such. At the time of the accident, Soussou did not own any of the vehicles listed on the policy; did not pay any premiums on the policy; used only one vehicle on the policy once a week; and his primary vehicle, the Chevy Venture minivan which only he drove, was insured through a different insurance company.").

Further, as the New Jersey Supreme Court made clear in *Zacarias*, insurance policies should be construed "against the insurer, consistent with the reasonable expectations of insureds" only "when those policies are overly complicated, unclear, or written as a trap for the unguarded consumer." *Zacarias v. Allstate Ins. Co.*, 168 N.J. 590, 604 (N.J. 2001); *see also AC Ocean Walk, LLC v. Am. Guarantee & Liab. Ins. Co.*, 256 N.J. 294, 312 (2024) ("'If the language is clear, that is the end of the inquiry,' and courts will not engage in 'a strained construction to support the imposition of liability' or write a better policy for the insured than the one purchased.'') (*quoting Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am.*, 195 N.J. 231, 238 (2008)).

Here, the insureds' purported expectation of coverage is objectively unreasonable and thus has no bearing on coverage. As discussed above, the primary USAA Policy contains the same definition of "underinsured motor

vehicle" as under the PURE Excess Policy, and barred UIM coverage for the same reason. The PURE Excess Policy follows form and is excess to the primary USAA Policy. It is objectively unreasonable to expect a follow form excess policy to provide coverage when the underlying primary policy does not, particularly when the same operative provision is used in both policies.

Appellants also assert that their expectation of coverage was reasonable because of the structure of the declarations page in the PURE Policy and because the Injury to an Insured exclusion in the excess liability coverage part states that it does not apply to UIM coverage. These arguments too are meritless.

Appellants argue that they had a reasonable expectation of coverage because the PURE declarations page lists a limit of $1,000,000 for excess UIM coverage, and does not list the definition of "underinsured motor vehicle." However, as noted by Judge Hurd in the order granting PURE's motion to dismiss (in connection with Appellants' now abandoned argument that the declarations page of the PURE Policy was ambiguous as applied to the excess liability coverage part), the declarations page of the PURE Excess Policy is unambiguous and applies as written. (*See* 2T, at 20:3-15).

First, the declarations page of the PURE Excess Policy clearly indicates that the scope of coverage is not set forth based on review of the limits in a vacuum, but rather by review of the policy as a whole. (Pa 77, at Declarations

("Your Declarations summarizes your coverage and premium. Please read your policy, any attached forms and endorsements and your Declarations for a full description of your coverage.")). Additionally, as confirmed by the New Jersey Supreme Court, an insurer is not obligated to include all relevant definitions and exclusions on the declarations page because such a requirement would be unworkable. *See Zacarias v. Allstate Ins. Co.*, 168 N.J. 590, 603 (2001) ("A rule of construction forcing insurers to avoid all cross-referencing in policies would require them to reprint the entire definition section on each page of the policy, or to define each term every single time it is used. The proliferation of fine print would itself demand strenuous study and run the risk of making insurance policies more difficult for the average insured to understand."). Thus, the structure of the declarations page of the PURE Excess Policy is clear and unambiguous and does not impact the reasonable expectations of the insured.

Appellants next argue that the insureds' expectation of coverage was reasonable because the Injury to an Insured exclusion, which is included in the separate excess liability coverage part, has an exception stating that the exclusion does not apply to excess UIM coverage. Again, this argument should be rejected. The Injury to an Insured exclusion does not apply to excess UIM coverage because of the nature of such coverage. UIM coverage functions similarly to first party coverage in connection with damages suffered by an

insured when a tortfeasor (other than a resident family member) does not have sufficient insurance. It would be nonsensical to include an exclusion for injuries to an insured with respect to UIM coverage when that is exactly the type of coverage contemplated by the policy. Thus, the exception in the Injury to an Insured exclusion has no bearing on the Insureds' reasonable expectation of coverage under the independent excess UIM coverage part.

Additionally, Appellants' argument appears to again misconstrue UIM coverage. As discussed above, policy definitions that exclude coverage for vehicles owned by or made available for the use of resident "family members" are routinely held to be unambiguous and applied as written by New Jersey courts to bar UIM coverage for intra-family accidents. UIM coverage under the Pure Excess Policy then is not unclear or a trap, but rather is consistent with frequently applied definitional terms. Thus, based on the plain and unambiguous language of the excess UIM coverage part of the PURE Excess Policy (and the primary USAA Policy to which it follows form), there is no coverage for the intra-family accident at issue in this matter. The insureds' purported expectations of coverage do not change this result.

VI. CONCLUSION

As a matter of law, no coverage is available under the PURE Excess Policy for the tragic incident at issue. For the foregoing reasons, PURE respectfully requests that the judgment of the trial court granting PURE's motion to dismiss with prejudice be affirmed in all respects.

Respectfully submitted,

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ESTATE OF MILES C. BRACKIN by DEBORAH A. BUTZBACH, General Administratrix and Administratrix Ad Prosquendum, DEBORAH A. BUTZBACH, individually, and PHILLIP S. BRACKIN, JR., individually, Plaintiff-Appellant, vs. PHILIP SNOWDEN BRACKIN, III, PRIVILEGE UNDERWRITERS, INC., JOHN DOES 1-100 (fictitious names), and ABC CORP. 1 - 100 (fictitious names), JOHN DOES 1-10(Fictitious names), Defendant-Respondent.	**SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION** **DOCKET NO. A-1524-23** CIVIL ACTION ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MERCER COUNTY Sat below: Hon. Douglas Hurd, P.J.Cv. On appeal from Order Granting Motion to Dismiss in Lieu of an Answer

PLAINTIFFS'-APPELLANTS' REPLY BRIEF IN SUPPORT OF APPEAL

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POINT I

INTRAFAMILY LIABILITY EXCLUSIONS SHOULD BE DEEMED UNENFORCEABLE AS A MATTER OF PUBLIC POLICY REGARDLESS OF WHETHER THEY APPEAR IN PRIMARY OR EXCESS INSURANCE POLICIES BECAUSE THE NET RESULT IS THE SAME, NAMELY SUCH PROVISIONS LEAVE DEFENDANTS UNDERINSURED AND PLAINTIFFS WITHOUT RECOURSE FOR RECOVERY.

Defendant's brief spends a significant amount of time attempting to draw a meaningful distinction between excess and primary insurance policies in the context of intrafamily liability exclusions/step-downs. As it relates to the public policy argument raised by plaintiffs, there is no material difference whether the intrafamily exclusion is used to significantly reduce the liability coverage that a consumer has paid for as within a primary or excess policy. The rationale and concerns expressed in the Court's decision in Dela Vega v. Travelers Ins. Co., A-2272-19 (App. Div. May 6, 2022), certif. denied, 252 N.J. 234 (2022) was not, in any way, premised upon the policy at issue being a primary automobile insurance policy rather than an excess/umbrella policy. Instead, the Court in Dela Vega was more generally concerned with situations in which consumers purchase liability insurance to cover themselves and their loved ones, only to have that coverage pulled out from underneath them.

To be clear, an intrafamily liability *step-down* in a primary automobile insurance policy, such as the one in Dela Vega, has the exact same effect as an

intrafamily liability *exclusion* in an excess policy, such as currently at issue. "Step-down" and "exclusion" are used interchangeably in the Dela Vega case. Both provisions dramatically reduce the liability coverage limits purchased by a consumer and indicated on the consumer's insurance declarations page. In a primary policy, the intrafamily step-down operates to reduce defendant's liability coverage to an amount less than they purchased, such as the State statutory minimum as was the case in Dela Vega. The exclusion in an excess policy operates to step down the available liability coverage from the limits set forth in the declarations page under the excess policy to the limits of the primary policy – whether those primary policy limits be $15,000, $50,000, $500,000, or some other amount. The provisions do not wholly eliminate liability coverage but both operate to dramatically reduce the coverage purchased by the consumer.

The Dela Vega court was not concerned with the type of policy involved but rather the effect, on the whole, of intrafamily liability limitations in insurance policies. Defendant attempts to couch the Dela Vega decision as being premised upon a finding that the intrafamily limitation violated our State's statutorily mandated minimum automobile liability laws. Such a position was never raised by either of the parties in Dela Vega. In fact, the Court in Dela Vega acknowledged that the defendant-insurer's intrafamily liability "exclusion has an exception, however, to make plaintiff's policy compliant with the omnibus statute." Id. at 12. In other

words, the intrafamily liability exclusion at issue in Dela Vega was, in fact, compliant with our State's minimum insurance laws since it did not wholly eliminate liability coverage, which would, of course, violate the omnibus statute. Violation of our statutory minimum insurance laws was simply never an issue in Dela Vega.

The significant concern over intrafamily liability coverage limitations expressed by the Court in Dela Vega v. Travelers Ins. Co. centered upon the general application of such clauses that indiscriminately reduce the liability coverage indicated on the declarations pages of the policies purchased by consumers as against the claims of certain classes of plaintiffs. The Dela Vega Court was concerned over the effect of such exclusions generally – not, as defendant would have this Court believe, only in the context of primary automobile insurance policies. Specifically, the Dela Vega Court explicitly stated that it was "troubled" by the intrafamily liability exclusion in the insurance policy. Id. at *2. (Pa106). The Court was troubled by the fact that the operation of the intrafamily liability provision caused an 85% reduction in liability coverage purchased by the insured. The Court was troubled by the fact that most consumers assume that "an injured family member passenger in an insured auto would have the benefit of the full policy limits purchased," without distinction as to whether those were policy limits purchased under a primary automobile insurance policy or an excess policy. Dela Vega, supra, A-2272-19 (App. Div. May 6, 2022) (slip op. at 2, FN2) (emphasis added). (Pa107).

The Court was troubled by the "reduction in coverage available to an entire class of victims based solely on the injured victim's status as a named insured or resident family-member." Ibid.

The troubling nature of the intrafamily liability limitations/exclusions as expressed by the Court in Dela Vega has absolutely nothing to do with whether they are contained in primary or excess policies but rather with the very nature of clauses that eliminate the liability coverage purchased by a consumer and indicated on the policy declarations' pages. Whether or not this Court shoulder share in the concerns expressed by the Dela Vega court has been addressed in plaintiffs' moving brief; however if, as suggested in plaintiffs' moving brief, those concerns are shared by this Court, then they are equally applicable to both primary and excess liability policies.

POINT II

NOT A SINGLE NEW JERSEY CASE CITED BY DEFENDANT HAS UPHELD THE UIM DEFINITIONAL EXCLUSION INVOKED HERE AS APPLIED TO AN EXCESS/UMBRELLA POLICY BY VIRTUE OF A "FOLLOW FORM" CLAUSE BECAUSE SUCH CONSTRAINED INSURANCE POLICY LANGUAGE AND INTERPRETATION IS AMBIGUOUS AND DOES NOT COMPORT WITH THE INSUREDS' REASONABLE EXPECTATION OF COVERAGE.

Defendant next contends that plaintiffs have a "fundamental misunderstanding of underinsured motorist coverage." Db27. Respectfully, plaintiffs are well aware as to the dynamics of underinsured motorist coverage and what UIM coverage is supposed to provide – namely, gap protection for an insured where the tortfeasor's liability limits fall below the UIM coverage limits that the insured has purchased. Here, defendant PURE has denied liability coverage for the defendant-tortfeasor driver, which would have provided $5,000,000 in liability coverage to the tortfeasor. Instead, PURE asserts that the only liability coverage available to the tortfeasor is the $500,000 underlying liability limits provided by the USAA policy. Although plaintiffs dispute defendant PURE's position on liability coverage, assuming defendant is correct and the defendant-tortfeasor's liability coverage is limited to the $500,000 provided by the underlying USAA policy, then these limits fall well below the $1,000,000 in UIM coverage purchased by plaintiffs from PURE.

As a starting point, using defendant's own analysis, see Db27-28, the defendant-tortfeasor driver is underinsured vis-a-vie the PURE UIM coverage purchased by plaintiffs since his liability limits ($500,000) are significantly less than the UIM coverage ($1,000,000). The "gap filler" function of UIM coverage comes into play to bridge the $500,000 gap between the tortfeasor's liability coverage limits with USAA and the UIM coverage purchased by plaintiffs from PURE.

The issue then becomes whether PURE can pirate a definitional exclusion in the USAA policy to eliminate its UIM coverage obligations under the PURE policy, or whether doing so is contrived and ambiguous when applied to the facts of this specific case.

First, it is undisputed that the definitional exclusion that PURE invokes is not included in its own policy but in the underlying USAA policy and that PURE attempts to invoke "follow form" language to adopt the exclusion into its own coverage. The USAA definitional exclusion that PURE relies upon states that a vehicle "[o]wned by or furnished or available for the regular use of you or any family member" cannot be an underinsured vehicle. (Pa60). Significantly, plaintiffs had no reason to expect that this definitional exclusion was of practical import to their UIM coverage because it is superfluous as it relates to the availability of UIM coverage through the policy in which it was contained, namely the USAA policy.

Why so?

It is undisputed that, as a preliminary matter (and as discussed above), the first step in determining whether UIM coverage is implicated under any given policy is to compare the tortfeasor's liability limits with the UIM limits. In this case, all of plaintiffs' vehicles were insured by USAA under a policy providing $500,000/$1,000,000 in *liability* coverage. The USAA policy also provided $500,000/$1,000,000 in *UIM* coverage. Regardless of the UIM definitional exclusion cited in USAA's policy for household vehicles, none of plaintiffs' household vehicles could *ever* be underinsured vis-a-vie USAA's UIM coverage since the liability limits of the policy match the UIM limits. Factually, this is not a situation where plaintiffs elected to insure 3 of their vehicles under policies with $15,000/$30,000 in liability coverage and then a fourth vehicle with $500,000/$1,000,000 in UIM coverage. In this latter scenario, an exclusion that would preclude an insured from seeking the full extent of UIM coverage under the $500,000/$1,000,000 UIM policy where the tortfeasor vehicle was one of the three vehicles with $15,000/$30,000 in liability coverage makes perfect sense. An insured cannot pay for cut rate insurance for 3 vehicles and expect to reap the benefit under 1 vehicle that they fully insure. That is not the scenario here. The household vehicle exclusion in USAA's policy could never apply to extinguish a UIM claim against USAA where the tort-vehicle was also household vehicle because all of plaintiffs' household vehicles were fully insured by USAA with liability limits that matched

the UIM limits. When reading this definitional exclusion in USAA's policy, plaintiffs were led to believe they had nothing to worry about as far as compromising their available UIM coverage as long as they insured all of their household vehicles with USAA at the same liability limits, which they did.

Moreover, the exclusion invoked by PURE to deny UIM coverage only becomes applicable by virtue of the fact that PURE also denied liability coverage for the tortfeasor-driver. If PURE had not denied liability coverage for the tortfeasor-driver, then the liability limits of the tortfeasor would have exceeded PURE's excess UIM coverage and there would be no UIM claim in the first instance. In other words, even if plaintiffs were able to anticipate that the definitional exclusion in the USAA policy would have some applicability to their excess UIM coverage, they certainly would not have thought the exclusion could ever effect their excess UIM coverage with PURE since all of the vehicles in plaintiffs' household were likewise insured under a $5,000,000 excess liability policy issued by PURE. Not only could the definitional exclusion in the USAA policy never limit USAA's UIM exposure given the facts of this case (namely, that all of plaintiffs' vehicles had full and equal liability coverage from USAA), but applying the definitional exclusion to the PURE policy would likewise never apply absent PURE's denial of liability coverage. It is impossible to think that plaintiffs could have reasonably expected to lose all UIM

coverage given the tangled way in which exclusions have been invoked by PURE from both within and outside the PURE policy.

Furthermore, defendant has not cited to a single case in which our Courts have enforced the UIM definitional exclusion involved here as invoked by an excess carrier through a "follow form" clause.

The first case cited by defendant PURE is Aubrey v. Harleysville Ins. Cos., 140 N.J. 397 (1995). The Aubrey decision had absolutely nothing to do with a household vehicle exclusion in a UIM policy, let alone in an excess policy issued to an insured. The case dealt with a step-down clause in a garage policy issued by an automobile dealership. Id. at 399 ("The issue is whether plaintiff, Theresa Aubrey, a purchaser under contract of an automobile from Chris Koch Toyota (Koch), is covered under the underinsured motorist (UIM) provisions of a garage policy issued to Koch by defendant, The Harleysville Insurance Companies (Harleysville), for injuries Aubrey sustained while operating a loaned automobile with Koch's permission."). Harleysville insured a car dealership who had given permission to a plaintiff-customer to drive a car that the plaintiff-customer was intending on purchasing and had, in fact, signed a contract to buy pending loan approval. Id. 399-400. The Harleysville garage policy contained $1,000,000 in UIM coverage. Id. at 400. The plaintiff was also insured under her own personal automobile insurance policy providing $15,000 in UIM coverage. Ibid. The Aubrey court concluded that

defendant Harleysville could invoke a step-down clause that limited their UIM coverage to the amount that plaintiff had selected under her own policy. Id. at 400-01. Nothing about the step-down had anything to do with the tortfeasor vehicle being a household vehicle. Nothing about the step-down language had anything to do with the policy language invoked by PURE in the current matter. In short, the case has nothing to do with any issue relevant to the current appeal.

Interestingly though, the Court in Aubrey court went to great lengths to emphasize that an "insured's reasonable expectations" for UIM coverage would be the amount that the insured purchased. Id. at 404, 405 ("The right to recover UIM benefits depends on the UIM limits chosen by the insured"). The Court noted:

> Here, [plaintiff] Aubrey purchased UIM coverage in the amount of $ 15,000. Thus, the amount of UIM coverage "held" by her, as "the person seeking recovery," was $15,000. **Accordingly, she could reasonably expect UIM coverage in that amount**. When she purchased her UIM coverage, Aubrey could not reasonably have anticipated the possibility of receiving benefits under UIM endorsements issued in favor of [the car dealership]. To allow her to recover under [the car dealership's] UIM policy would distort the meaning of an insured's "reasonable expectations."
>
> [Id. at 404 (emphasis added).]

In the present matter, plaintiffs are seeking exactly what they reasonably expected – UIM coverage in the amount that they themselves purchased through PURE, namely $1,000,000. As set forth by the Court in Aubrey, plaintiffs have the

right to reasonably expect that they would have UIM coverage in the amount that they procured from PURE.

A similar issue was presented in the next case cited by defendant, French v. N.J. Sch. Bd. Ass'n Ins. Group, 149 N.J. 478 (1997). In French, plaintiff was operating a school bus when injured in an automobile accident by a tortfeasor insured under a $25,000 liability policy. Id. at 480-81. At the time of the accident, the school bus was covered under a policy issued to the school board that provided $1,000,000 in UM/UIM coverage. Id. at 481. Plaintiff was insured under her own personal policy that provided $25,000 in UM/UIM coverage. Ibid. Plaintiff sought UIM benefits under the $1,000,000 school policy and was denied coverage. The trial court and Appellate Division granted defendant's summary judgment motion finding that plaintiff was not entitled to benefits under the $1,000,000 school board UIM policy. In doing so, the lower courts concluded that plaintiff's UIM recovery was limited to the $25,000 available under her personal policy. Id. at 481. In departing from the Court's decision in Aubrey, the Court in French concluded that plaintiff had a valid UIM claim against the school's $1,000,000 UIM policy. Id. at 495. The decision in French, therefore, expanded the rights of plaintiffs to seek UIM coverage under multiple policies. But, again, this case has nothing to do with the definitional exclusion involved in the current matter.

The first case cited by defendant that at least touches upon the exclusionary language involved in the subject matter is the unpublished decision of Shah v. GEICO Ins. Co., a-2216-09 (App. Div. Aug. 9, 2011) (Da14-19). In Shah, the Court upheld a similar household vehicle exclusion as is at issue in the current matter *to a primary automobile insurance policy where the exclusion was specifically contained in that policy*. Plaintiffs in the case at bar have conceded in their initial moving brief that such an exclusion in the primary policy issued by USAA is not ambiguous or unlawful *as it applies to USAA* (as discussed above, the exclusion would never be invoked by USAA given the liability coverage maintained by plaintiffs but, regardless, the exclusion is not *per se* invalid). (Pb31). For the reasons stated above, such exclusions are appropriate – namely, to prevent people who try to 'game the system' by only insuring 1 vehicle in a multi-vehicle household with high limit coverage while leaving other vehicles in the household underinsured by low-premium policies. The ambiguity arises when that exclusion is engrafted upon an excess policy that has denied liability coverage thereby creating the very gap between liability and UIM coverage for which benefits are sought.

In short, despite no caselaw addressing the facts of the current matter, PURE is asking the Court to accept that, at the time they purchased their $5,000,000 liability policy and $1,000,000 UIM policy from PURE, plaintiffs should have reasonably known and anticipated that PURE would deny liability coverage for the vehicle they

owned and insured with PURE, thus making the vehicle underinsured. And then plaintiffs were expected to know that PURE would turn around and invoke a definitional exclusion for underinsured vehicle that is not contained in its policy but is rather contained in USAA's policy, even though USAA itself would never have occasion to invoke the exclusion in order to deny UIM coverage. Taken as a whole, the invocation of the exclusion by PURE under these circumstances could not reasonably be understood by any policyholder. The collective pieces that plaintiffs would have had to put together to understand PURE's denial are scattered and convoluted. The policy has been rendered ambiguous and contrary to plaintiffs' reasonable expectations. As such, PURE's motion to dismiss should have been denied.

Conclusion

For all of the aforementioned reasons, it is respectfully requested that the judgment of the trial court granting defendant PURE's motion to dismiss in lieu of an answer be reversed and that this matter be remanded to the trial level for further proceedings.

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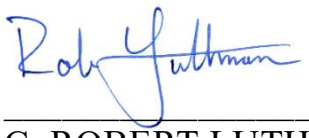

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