

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ZURICH AMERICA INSURANCE )  
COMPANY, )  
 )  
Petitioner, )  
 )  
v. ) Civil Action No. 4095-VCP  
 )  
ST. PAUL SURPLUS LINES, INC., )  
 )  
Respondent. )

**MEMORANDUM OPINION**

Submitted: August 13, 2009  
Decided: December 10, 2009  
Revised: April 14, 2010

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*Attorney for Petitioner*

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LLP, Wilmington, Delaware; *Attorneys for Respondent*

**PARSONS, Vice Chancellor.**

This action follows a curious decision by an arbitrator refusing to take jurisdiction over an insurance subrogation claim mandated to arbitration by statute. The purpose of arbitration is to provide parties with a streamlined and efficient alternative dispute resolution mechanism. Delaware law upholds this purpose by requiring that parties who enter a written agreement to arbitrate be held to that decision and by severely limiting the ability of courts to review arbitral awards arising from consensual, binding arbitration. These laws, and their underlying policies, provide a similarly limited role for courts reviewing awards arising from statutorily-mandated arbitration proceedings.

In addition to implicating such policies and the very purpose of arbitration, the arbitrator's decision challenged in this case exposes an apparent chink in the legal framework for deciding no-fault insurance claims. In Delaware, an insurer must pay Personal Injury Protection ("PIP") benefits to its insured, if the insured is a victim of an automobile accident, regardless of whether the insured was at fault or whether the accident took place outside of Delaware. Following that payment, the victim's insurer may then seek subrogation against the insurer of the party who caused the accident. The Delaware Legislature has determined that such claims may not be heard in court, but instead must be handled in arbitration by a statutorily-selected arbitration forum. That arbitral forum, however, appears to employ certain internal rules under which an arbitrator has authority to refuse to take jurisdiction over a subrogation claim where the underlying accident occurred in a state other than the one where relief is being sought. Consequently, because the Delaware Legislature has cut off access to the courts and the arbitral forum with which the State has contracted to decide PIP insurance subrogation

claims has refused to hear this case, it appears that, under the current system, insurance companies seeking to exercise PIP subrogation rights pertaining to Delaware insureds arising from accidents outside of Delaware have no recourse within this State.

While this unfortunate dilemma may suggest the need for some type of systemic modification, the inquiry currently before this Court is quite limited. Specifically, that question is to what extent, if any, an arbitrator's refusal to decide an insurance subrogation claim based on a supposed lack of jurisdiction can be reviewed, modified, or vacated. For the reasons set forth in this Memorandum Opinion, and in order to avoid undercutting the practical benefits of arbitration, I find no grounds for modifying or vacating the award. Because the arbitrator's decision constitutes nothing more than a refusal to take jurisdiction over the disputed claim, however, I hold that the arbitrator's dismissal of the claim is without prejudice. Thus, the plaintiff remains free to seek relief through any appropriate avenues.

## **I. FACTUAL BACKGROUND**

### **A. The Parties**

Plaintiff, Zurich America Insurance Company ("Zurich"), issued an insurance policy to Tri-State Waste Solutions ("Tri-State"), a nonparty Delaware corporation with its principal place of business in New Castle, Delaware. The policy provided PIP benefits for employees operating vehicles owned by Tri-State as well as property damage coverage for such vehicles.

Defendant, St. Paul Surplus Lines, Inc. ("St. Paul"), issued an insurance policy to Stone Express, Inc. ("Stone Express"), a nonparty Delaware corporation with its principal

place of business in Middletown, Delaware. Among other things, the policy covered liability for bodily injury caused to others by Stone Express employees operating Stone Express vehicles in the scope of their employment.

### **B. Facts and Arbitral History**

On June 22, 2004, at the intersection of Route 213 and Bohemia Church Road in Chesapeake City, Maryland, a vehicle driven by an employee of Stone Express negligently collided with a vehicle driven by a Tri-State employee. Both employees were driving Delaware-registered vehicles insured in Delaware. Following the accident, Zurich paid PIP benefits amounting to \$74,984.59 to the driver of the Tri-State vehicle in accordance with Tri-State's insurance policy.

Seeking to have that payment reimbursed by St. Paul, one of two companies that insured Stone Express,<sup>1</sup> Zurich filed an insurance subrogation claim against St. Paul in Delaware Superior Court in June 2006. Stone Express promptly moved to dismiss the action, claiming the case was subject to compulsory inter-company arbitration. Zurich then changed course and brought its claims for reimbursement to Arbitration Forums, Inc. ("AF") as required by the statutory mandate in 21 *Del. C.* § 2118(g)(3).<sup>2</sup>

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<sup>1</sup> Stone Express was insured by both AIG and St. Paul. Zurich acknowledges, however, that AIG already tendered its policy limit, leaving St. Paul liable for the excess. *See* Defs.' Op. Br. ("DOB") 2.

<sup>2</sup> *See infra* Part II.B.2. In pertinent part, the statute requires that "[d]isputes among insurers as to liability or amounts paid . . . shall be arbitrated by the Wilmington Auto Accident Reparation Arbitration Committee or its successors." 21 *Del. C.* § 2118(g)(3). AF is the successor to the Wilmington Auto Accident Reparation Arbitration Committee. *See* Pl.'s Op. Br. ("POB") 7.

After initially refusing to examine the case, AF heard the matter on July 10, 2008.<sup>3</sup> Six days later, the arbitrator issued a two-page form decision (the “Arbitral Award” or “Award”), which states on the first page that damages had been proven in the amount claimed by Zurich.<sup>4</sup> Nevertheless, the arbitrator refused to enter an order to that effect

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<sup>3</sup> On March 24, 2008, Zurich filed its first PIP-Form application with AF. On that form, Zurich correctly listed the location of the accident as “Chesapeake City, MD.” See POB Ex. A. AF refused arbitration based on this first application, noting that “[w]e don’t arbitrate PIP in the State of Maryland.” *Id.* A short time later, Zurich filed a second PIP-Form application that duplicated the first in every respect except that it listed the location of loss as “Chesapeake City, DE.” See POB Ex. B. Zurich, however, did indicate the correct location in a “Contentions Sheet” attached to the second application. *Id.*

Part of the reason for the difficulty of this case—and this Court’s limited ability to address the potential systemic problems it exposes—arises from the fact that then-counsel for Zurich, Michael Galbraith, though alerted early on to the difficulty of pursuing PIP subrogation claims arising from accidents outside Delaware through AF, apparently attempted to get AF to take the case by misrepresenting the location of the accident. This maneuvering may have been, to some extent, tactical and intended to circumvent the apparent gap in the legal system; nevertheless, its propriety is questionable under several provisions of the Delaware Lawyers’ Rules of Professional Conduct, including Rule 3.3 (“A lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal . . .”) and Rule 8.4 (“It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”). As these rules make clear, Delaware attorneys “may not, knowingly or otherwise, engage in conduct which may reasonably be perceived as misleading” to any tribunal, including an arbitrator sitting in binding arbitration. See *State v. Guthman*, 619 A.2d 1175, 1179 (Del. 1993); Del. Lawyers’ Rules of Prof’l Conduct R. 1.0(m) (“‘Tribunal’ denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity.”).

<sup>4</sup> DOB Ex. B, AF Decision.

based on his conclusion that he lacked jurisdiction because the accident occurred outside of Delaware.<sup>5</sup>

After receiving this decision, Zurich wrote a letter to AF asking them to reconsider the arbitrator's decision, noting that the accident involved two Delaware-registered, Delaware-insured vehicles owned by Delaware companies.<sup>6</sup> On August 20, 2008, a representative of AF rejected Zurich's request for reconsideration, writing that the decision of an arbitrator in the PIP forum is "final and binding unless there is a clerical or jurisdictional error."<sup>7</sup> In its final letter to AF, Zurich argued that, based on the definition given in AF's rules, a jurisdictional error did occur because "the arbitrator dismissed a case where no one raised an objection of jurisdiction."<sup>8</sup> AF did not respond to this letter.

At no time during any arbitral or judicial proceedings has St. Paul denied or contested the liability of its insured or raised any affirmative defense to Zurich's subrogation claim. Rather, St. Paul's Answer to Zurich's second PIP-Form application

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<sup>5</sup> In full, the AF Decision on this point states, "THIS IS A MARYLAND VENUE LOSS. DE ARBITRATION PANEL DOES NOT HAVE JURISDICTION." *Id.* Although the AF Decision does not indicate whether the arbitrator refused to decide the case based on a lack of personal or subject matter jurisdiction, I understand the ruling to be on subject matter jurisdiction grounds.

<sup>6</sup> POB Ex. E, Zurich's July 28, 2008 Letter to AF.

<sup>7</sup> POB Ex. E, AF's Aug. 20, 2008 Letter to Zurich.

<sup>8</sup> POB Ex. E, Zurich's Aug. 25, 2008 Letter to AF; Def.'s Reply Br. ("DRB") Ex. I, PIP Arbitration Definitions. According to AF's definition, a Jurisdictional Error "[o]ccurs when an arbitrator(s) improperly proceeds with a hearing without resolving a pled jurisdictional impediment or dismisses a case where a party(ies) has not raised an objection of jurisdiction." *Id.*

states that “[St. Paul] does not contest liability for this occurrence [the accident],” but then somewhat obliquely adds that “[s]ubject to review for applicability, [St. Paul] will reimburse [Zurich] for those necessary expenses directly attributable to and arising solely out of this accident.”<sup>9</sup>

### **C. Procedural History**

Having exhausted its efforts to have AF reconsider its Award, Zurich instituted an action in the Delaware Superior Court seeking a judgment against St. Paul for \$74,984.59.<sup>10</sup> The Superior Court granted a motion to dismiss, however, noting that Zurich’s remedy must be found, if at all, in the Court of Chancery.<sup>11</sup> On October 14, 2008, Zurich filed a petition to correct and confirm the arbitration award in this Court. St. Paul and Zurich then filed cross motions for summary judgment on May 11 and June 11, 2009. The parties briefed these motions and I heard argument on August 13.

### **D. Parties’ Contentions**

Zurich seeks modification of the AF Arbitral Award based on 10 *Del. C.* § 5715(a)(3), claiming that the award is imperfect in a matter of form, not affecting the merits of the controversy. St. Paul contends that the Court of Chancery plays only a limited, circumscribed role in matters arising out of arbitration proceedings and may modify awards only when the requirements of Section 5715 are met. Specifically,

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<sup>9</sup> POB Ex. C (emphasis added).

<sup>10</sup> DOB 3-4.

<sup>11</sup> DOB Ex. D at 8.

St. Paul argues that this case does not fall within Section 5715(a)(3) because the Arbitral Award is not imperfect in form and because granting Zurich's desired modification would affect the merits of the controversy. St. Paul effectively argues that AF's refusal to enter an order of damages based on lack of jurisdiction constitutes a binding arbitral award and that Zurich simply failed to meet its burden of showing that AF had jurisdiction over an accident that occurred outside of Delaware. St. Paul further urges the Court to deny Zurich's petition because, otherwise, "every losing party" in an arbitration could "file a similar petition citing an alleged error" in an attempt to gain a favorable decision.<sup>12</sup>

In response, Zurich avers that AF correctly found that it had proven its damages against St. Paul, but then erroneously dismissed Zurich's claim on jurisdictional grounds.<sup>13</sup> Consequently, Zurich contends that the Arbitral Award should be modified under 10 *Del. C.* § 5715(a)(3) because the Award is imperfect in that the arbitrator decided a matter not submitted to him and, on that basis, refused to carry out his duty. Zurich further posits that the Court may correct this error without reaching the merits of

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<sup>12</sup> DOB 8.

<sup>13</sup> Zurich further asserts that, even though St. Paul never contested jurisdiction in any proceeding, St. Paul now appreciates the "potential windfall due to the arbitrator's error" and, therefore, defends the arbitrator's jurisdictional mistake because it provides St. Paul "a rare opportunity to get out of its debt." *See* POB 4, 11.

Because St. Paul for the most part does not contest liability for the accident and has stated that it would reimburse applicable expenses, Zurich's frustration in this regard is understandable. *See supra* note 9.

the controversy because jurisdiction was never disputed. Zurich argues that the Award properly may be vacated under 10 *Del. C.* § 5714(c) because, by dismissing the claim, the arbitrator exceeded his powers or, at least, “so imperfectly executed them that a final and definite award upon the subject matter submitted was not made.”<sup>14</sup>

Before turning to the analysis, I must first resolve a threshold controversy regarding whether the arbitrator’s decision constitutes an “arbitral award.” St. Paul contends that, by dismissing the case for lack of jurisdiction, AF effectively entered a final and binding award for \$0.<sup>15</sup> In contrast, Zurich argues that the arbitrator’s decision does not constitute a binding order, but, rather, a “blatant violation [of] the statute which calls for arbitration” before AF.<sup>16</sup> According to Zurich, the arbitrator found that it was entitled to damages of \$74,984.59 but mistakenly refused to enter an order to that effect.<sup>17</sup>

I accept St. Paul’s position. By refusing to enter an order awarding damages to Zurich based on lack of jurisdiction, the arbitrator issued a final Arbitral Award under

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<sup>14</sup> See 10 *Del. C.* § 5714(c). Zurich contends that under this statutory provision, the Court has authority to vacate the Arbitral Award to the extent it constitutes such an Award. As discussed below, I find that the arbitrator’s decision does represent a binding Arbitral Award. Thus, I examine Zurich’s argument that the Award may be vacated *infra* Part II.B.2.

<sup>15</sup> DRB 8. In the alternative, St. Paul suggests that if the Court determines that no arbitral award was entered, this action should be dismissed as being outside the Court’s jurisdiction. *Id.* at 5.

<sup>16</sup> See POB 3 (citing 21 *Del. C.* § 2118).

<sup>17</sup> *Id.*

which Zurich took nothing. Whether the arbitrator violated 21 *Del. C.* § 2118(g)(3) by dismissing the case for lack of jurisdiction, as Zurich claims, does not change the fact that the arbitrator made his decision. Consequently, for purposes of this Memorandum Opinion, I treat the arbitrator’s decision as a final arbitral award.

## II. ANALYSIS

### A. Legal Standard for Cross Motions for Summary Judgment

Summary judgment is an appropriate judicial mechanism when reviewing an arbitration award because the whole of the factual record lies before the court and no *de novo* hearing is permitted.<sup>18</sup> Under Court of Chancery Rule 56, summary judgment will be granted where the record shows that (1) there is no genuine issue as to any material fact and (2) the moving party is entitled to judgment as a matter of law.<sup>19</sup> In determining whether this burden is met, the court must view facts in the light most favorable to the nonmoving party.<sup>20</sup> In cases where, as here, the parties file cross motions for summary judgment and do not argue that there is “any issue of fact material to the disposition of either motion,” the court “shall deem the motions to be the equivalent of a stipulation for

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<sup>18</sup> See *Mansoori v. SC&A Const., Inc.*, 2009 WL 2140030, at \*2 (Del. Ch. July 9, 2009) (citing *City of Wilm. v. AFSCME*, 2005 WL 820704, at \*3 (Del. Ch. Apr. 4, 2005)).

<sup>19</sup> *Viking Pump, Inc. v. Century Indem. Co.*, 2009 WL 3297559, at \*6 (Del. Ch. Oct. 14, 2009); *Twin Bridges Ltd. P’ship v. Draper*, 2007 WL 2744609, at \*8 (Del. Ch. Sept. 14, 2007).

<sup>20</sup> *Judah v. Del. Trust Co.*, 378 A.2d 624, 632 (Del. 1977).

decision on the merits based on the record submitted with the motions.”<sup>21</sup> Thus, despite the limited record before me, I will treat the parties’ motions as a stipulation for decision on the merits based on that record.

**B. What is the Court’s Ability to Review, Modify, or Vacate Arbitral Awards?**

The policies supporting resolution of disputes through arbitration are well-established in Delaware. Chiefly, arbitration allows parties a method “to resolve controversies cheaply and promptly without litigation.”<sup>22</sup> Arbitration also permits parties to “resolve their disputes in a specialized forum more likely to be conversant with the needs of the parties and the customs and usages of a specific industry than a court of general legal or equitable jurisdiction.”<sup>23</sup> Recognizing the need to maintain these benefits, the Delaware Legislature has provided that, in a case such as this, the Court of Chancery may only vacate or modify arbitral decisions pursuant to the limited authority found in the Delaware Uniform Arbitration Act (“DUAA”).<sup>24</sup> As a result, this Court does not review an arbitrator’s legal findings or procedural actions as would an appellate

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<sup>21</sup> Ct. Ch. R. 56(h).

<sup>22</sup> *Meades v. Wilm. Hous. Auth.*, 2003 WL 939863, at \*5 (Del. Ch. Mar. 6, 2003); *see also Ruggiero v. State Farm Mut. Auto. Ins. Co.*, 1999 WL 499459, at \*6 (Del. Ch. June 23, 1999) (“[A]rbitration practice is designed as an alternative dispute resolution mechanism and is intended to expedite, streamline, and efficiently resolve disputes in a manner which saves prospective litigants time and expense.”).

<sup>23</sup> *See N.H. Ins. Co. v. State Farm Ins. Co.*, 643 A.2d 328, 330-31 (Del. Super. Aug. 13, 1993) (corrected Apr. 22, 1994).

<sup>24</sup> 10 *Del. C.* §§ 5701-5715.

court,<sup>25</sup> but instead confines its examination to narrow categories specifically authorized by law.<sup>26</sup>

The desire to “keep arbitration a streamlined, efficient” process is so strong, in fact, that the court sometimes sanctions arbitral rulings contrary to Delaware law rather than risk undue judicial interference with arbitration.<sup>27</sup> Such was the case in *Ruggiero*, where the court reinstated an arbitration panel’s original arbitral award and vacated a subsequent, modified award because the arbitrators “exceeded their authority” by essentially engaging in post-hearing motion practice not authorized by the parties’ arbitral agreement.<sup>28</sup> In so doing, the court acknowledged that a necessary, though unfortunate, side-effect of the decision was the confirmation of an arbitral opinion that “subsum[ed] a ruling contrary to Delaware law.”<sup>29</sup> *Ruggiero* illustrates the Delaware courts’ appreciation of the importance of maintaining the role of arbitration as a separate and distinct dispute resolution mechanism.

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<sup>25</sup> See *Meades*, 2003 WL 939863, at \*5 (“[The] purpose [of arbitration] would be defeated if courts were allowed to become appellate tribunals empowered to review the merits of arbitration awards on the basis of legal or factual error.”).

<sup>26</sup> See *Ruggiero*, 1999 WL 499459, at \*4.

<sup>27</sup> *Id.* at \*6-7.

<sup>28</sup> *Id.* at \*6.

<sup>29</sup> *Id.* at \*7.

With these policies in mind, I now turn to the issues presented in this case. Because Zurich primarily argued that the Court should modify the Arbitral Award and placed only secondary weight on vacating the Award, I begin my analysis there.

**1. May the court properly modify the arbitral award?**

Consistent with the policy favoring arbitration, the statutory grounds upon which a court may *modify* an arbitral award are quite limited. Specifically, this Court may modify an award only where (1) there was an evident miscalculation of figures or other mistake in the description of a person, place, or thing referred to in the award, (2) the arbitrators ruled on a matter not submitted to them, or (3) the award is imperfect in a matter of form, not affecting the merits of the controversy.<sup>30</sup> In large measure, the governing statute thus only provides for modification of an arbitral award on technical or clerical grounds and

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<sup>30</sup> See *Kuhn v. Hess*, 2000 WL 1336780, at \*1 (Del. Ch. Aug. 16, 2000) (citing 10 *Del. C.* § 5715). Section 5715 provides in pertinent part:

(a) Upon complaint or on application in an existing case made within 90 days after delivery of a copy of the award to the applicant, the Court shall modify or correct the award where:

(1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;

(2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or,

(3) The award is imperfect in a matter of form, not affecting the merits of the controversy.

does not authorize the Court to alter the substance of the decision reached by the arbitrators.<sup>31</sup>

Zurich bases its petition for modification of the Arbitral Award solely on its contention that the Award is imperfect in form and such imperfection can be corrected without affecting the merits of the controversy.<sup>32</sup> Specifically, Zurich contends that the Award is imperfect in that it (1) amounts to a refusal by AF to carry out its statutorily-mandated duty to adjudicate the case and (2) was decided on a matter that was never submitted to the arbitrator.<sup>33</sup> Zurich further argues that modifying the award by removing this jurisdictional “mistake” is appropriate because the Court may do so without reaching the substantive merits of the controversy.

An imperfection in form refers to a clerical, as opposed to a legal, error. That is, an award is “imperfect in a matter of form” where it “suffers from a scrivener’s error” or

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<sup>31</sup> See *Ruggiero*, 1999 WL 499459, at \*4 (noting that, under the statute, the Court essentially may only do such things as “correct a math error, relabel ‘St. Charles Plaza,’ ‘St. Charles Place,’ delete awards not within the scope of arbitration, and square away an award flawed in form.”).

<sup>32</sup> As St. Paul noted, because Zurich focuses its argument solely on 10 *Del. C.* § 5715(a)(3), any argument for modification based on Section 5715(a)(1) or 5715(a)(2) has been waived. See DRB 3; *Emerald P’rs v. Berlin*, 2003 WL 21003437, at \*43 (Del. Ch. Apr. 28, 2003), *aff’d*, 840 A.2d 641 (Del. 2003) (“It is settled Delaware law that a party waives an argument by not including it in its brief.”).

<sup>33</sup> The second part of Zurich’s contention also informs my determination of whether to vacate the Arbitral Award. See *infra* Part II.B.2.

“otherwise does not deliver on the arbitrator’s stated purpose in granting relief.”<sup>34</sup> For instance, a Massachusetts court of appeals found such an imperfection in form where an arbitral award did not allocate the benefits or burdens of the award among the individual owners of the fourteen joint ventures referred to in the award.<sup>35</sup> A claimed imperfection in the “form,” however, will not justify a Court’s modification of the substance of an arbitral award. Consequently, in keeping with the policies underlying arbitration,<sup>36</sup> this Court has no power to “review the merits” of an arbitrator’s decision or “modify the substance” of that decision.<sup>37</sup>

In seeking to modify the Award based on an imperfection in form, Zurich essentially asks the Court to delete the portion of the Award dismissing the case for lack of jurisdiction. According to Zurich, that portion of the Award represents an off-the-wall jurisdictional error, which eviscerates the arbitrator’s previous finding that Zurich had

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<sup>34</sup> *Grain v. Trinity Health, Mercy Health Servs. Inc.*, 551 F.3d 374, 379 (6th Cir. 2008); *see also McCashin v. Rucker*, 2002 WL 31458221, at \*3 (Cal. App. 2d Nov. 5, 2002) (refusing to modify an award that failed to state the exact theory upon which the award was based). This Court previously has held that the DUAA is consistent with the Federal Arbitration Act (“FAA”). *See Country Life Homes, Inc. v. Shaffer*, 2007 WL 3196337, at \*3 n.17 (Del. Ch. Jan. 31, 2007). Moreover, the Supreme Court has observed that “Delaware arbitration law mirrors federal law.” *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 79 (Del. 2006). Thus, though it examines the FAA counterpart to 10 *Del. C.* § 5715(a)(3), the interpretation provided in *Grain* applies equally to the DUAA.

<sup>35</sup> *Barletta v. French*, 607 N.E.2d 410, 416 (Mass. App. Ct. 1993) (interpreting provision in the Massachusetts version of the Uniform Arbitration Act with language identical to 10 *Del. C.* § 5715(a)(3)).

<sup>36</sup> *See supra* Part II.B.

<sup>37</sup> *See Ruggiero*, 1999 WL 499459, at \*4.

“proven” its damages and, therefore, should be disregarded.<sup>38</sup> To support its claim, Zurich asks the Court to relegate the arbitrator’s statement dismissing the case for lack of jurisdiction to the level of mere dicta. But doing so would directly contradict the plain meaning of the Award.

As the Award indicates, the arbitrator heard Zurich’s PIP subrogation claim, made a short notation indicating “proven” damages, and then dismissed the case for lack of jurisdiction. I can conceive of no context where such a dismissal—whether by a court or arbitrator—could be held not to have affected the merits of the controversy. Whether the dismissal was “unsolicited, incorrect, [or] even illegal”<sup>39</sup>—an issue I address further below—it certainly was not a clerical error. To modify the Award as Zurich suggests would amount to erasing the arbitrator’s statement dismissing the case and requiring St. Paul to pay the “proven” damages of \$74,984.59. Such an order would affect the merits of the controversy in contravention of 10 *Del. C.* § 5715(a)(3). Thus, because there is no imperfection in a matter of form and modifying the Award to, in Zurich’s words, “have the arbitrator’s uninvited and incorrect jurisdiction opinion redacted and the arbitrator’s findings entered as an order” would affect the merits of the controversy, I deny the relief Zurich seeks.<sup>40</sup>

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<sup>38</sup> That comment, located on the first page of the two-page arbitral decision, reads simply, “Damages Proven: \$74,984.59.” *See* AF Decision.

<sup>39</sup> POB 9.

<sup>40</sup> *Id.* at 7.

Having declined to grant a modification, I next consider Zurich’s contention that the Arbitral Award should be vacated because the arbitrator exceeded his powers or “so imperfectly executed them that a final and definite award upon the subject matter submitted was not made.”<sup>41</sup>

## **2. May the court properly vacate the arbitral award?**

Similar to the carefully circumscribed grounds upon which the Court may modify an award, the Court may *vacate* an arbitral award only if (1) the award was procured by fraud or other undue means, (2) the arbitrator exhibited clear partiality or corruption, (3) the arbitrator exceeded or imperfectly executed his authority, (4) the arbitrator refused to appropriately postpone a hearing, hear material evidence, or guarantee adequate notice or due process, or (5) no valid arbitration agreement existed, the terms of that agreement were not complied with, or the arbitrated claim was barred by a time limitation.<sup>42</sup>

The sole ground upon which Zurich seeks to vacate the Arbitral Award is 10 *Del. C.* § 1514(a)(3). When determining whether to vacate an arbitral award based on Section 1514(a)(3), the Court operates under the presumption that the arbitrator did not exceed her authority and that the award should be upheld, provided the record points to any ground supporting the arbitrator’s decision.<sup>43</sup> This presumption may be overcome,

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<sup>41</sup> See *supra* note 14.

<sup>42</sup> 10 *Del. C.* §§ 5714(a)(1) - 5714(a)(5); see also *Balt. Barn Builders v. Jacobs*, 1990 WL 237094, at \*1 (Del. Ch. Dec. 17, 1990).

<sup>43</sup> See *Pocket Change Kahunaville, Inc. v. Kahunaville of Eastwood Mall, Inc.*, 2003 WL 1791874, at \*3-4 (Del. Ch. Mar. 21, 2003) (“Because of the strong policy in

however, by strong and convincing evidence that the arbitrator clearly exceeded or imperfectly executed her authority.<sup>44</sup> For instance, as noted above, the Court in *Ruggiero* examined actions taken by a panel of arbitrators who attempted to vacate their original arbitral award in favor of a subsequent, modified award.<sup>45</sup> The modified award followed the release of a Supreme Court decision that reached the opposite conclusion of the arbitrators' original award.<sup>46</sup> The Court vacated the modified award and reinstated the original, however, because "after rendering a final award resolving all outstanding issues" the arbitrators exceeded their authority "by entertaining a post-hearing motion" that was not authorized by the parties.<sup>47</sup> Similarly, this Court has vacated an arbitral award where an arbitrator exceeded her authority by acting "'in direct contradiction to the express terms of the agreement of the parties.'"<sup>48</sup>

Here, the parties' "agreement" to arbitrate initially is derived from and largely influenced by statute. The governing statute, 21 *Del. C.* § 2118(g)(3), mandates

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favor of arbitration, the Court must presume that the arbitrator did not exceed his authority and uphold the award as long as any grounds for the award can be inferred from the facts on the record.").

<sup>44</sup> *Id.* at \*4 (citing *Wier v. Manerchia*, 1997 WL 74651, at \*2 (Del. Ch. Jan. 28, 1997)).

<sup>45</sup> *See supra* notes 26-29.

<sup>46</sup> *See Ruggiero v. State Farm Mut. Auto. Ins. Co.*, 1999 WL 499459, at \*1-4 (Del. Ch. June 23, 1999).

<sup>47</sup> *Id.* at \*7.

<sup>48</sup> *Mansoori v. SC&A Const., Inc.*, 2009 WL 2140030, at \*2 (Del. Ch. July 9, 2009) (quoting *Malekzadek v. Wyshock*, 611 A.2d 18, 21 (Del. Ch. 1992)).

arbitration before AF for PIP subrogation claims.<sup>49</sup> My task, then, is to scrutinize the statute, the Arbitral Award, and the AF arbitration rules, procedures, and governing arbitral agreements to determine whether the arbitrator “complied with the [statutory and] contractual terms for arbitration authorizing [him] to resolve the dispute.”<sup>50</sup> I first examine whether the Legislature intended PIP subrogation claims to be heard in Delaware even when the underlying accident occurred in a foreign jurisdiction, such as Maryland. As discussed below, I find that the language of the statute evinces the Legislature’s intent that AF take jurisdiction over all PIP subrogation claims properly brought in Delaware, even those arising from non-Delaware accidents.

Delaware courts consistently have held that “[t]he goal of statutory construction is to determine and give effect to legislative intent.”<sup>51</sup> Thus, when construing a statute, the Court must give a reasonable and sensible meaning to the words of the statute “in light of their intent and purpose.”<sup>52</sup> Where the language is clear and unambiguous, “[the] statute must be held to mean that which it plainly states, and no room is felt for construction.”<sup>53</sup>

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<sup>49</sup> See *supra* note 2.

<sup>50</sup> *Ruggiero*, 1999 WL 499459, at \*5.

<sup>51</sup> *Eliason v. Englehart*, 733 A.2d 944, 946 (Del. 1999); see also *State v. Skinner*, 632 A.2d 82, 85 (Del. 1993) (“It is well settled that statutory language is to be given its plain meaning and that when a statute is clear and unambiguous there is no need for statutory interpretation.”).

<sup>52</sup> See *E.I. du Pont de Nemours & Co., Inc. v. Clark*, 88 A.2d 436, 438 (Del. 1952) (citations omitted).

<sup>53</sup> *Balma v. Tidewater Oil Co.*, 214 A.2d 560, 562 (Del. 1965).

The governing statute in this case is 21 *Del. C.* § 2118, which, among other things, establishes the mechanism for resolving subrogation claims between insurers for PIP benefits paid pursuant to that statute. In pertinent part, it requires that:

Disputes among insurers as to liability or amounts paid pursuant to paragraphs (1) through (4) of subsection (a) of this section *shall* be arbitrated by the Wilmington Auto Accident Reparation Arbitration Committee or its successors.<sup>54</sup>

The legislative use of “shall” in this section makes arbitration mandatory for PIP subrogation claims and allows no other avenue for resolution of such claims in Delaware.<sup>55</sup> Notably, the statute does not distinguish between “disputes among insurers” arising from accidents within Delaware and those disputes arising from accidents outside Delaware.

Based on the plain language of the statute, it appears that the Legislature intended that all disputes between insurers arising from policies issued under Delaware’s no-fault insurance law must be submitted to AF. Neither party has identified any carve-outs from this mandatory arbitration provision. Additionally, the fact that the statute elsewhere addresses insurance policies issued and accidents occurring outside the State of

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<sup>54</sup> 21 *Del. C.* § 2118(g)(3) (emphasis added).

<sup>55</sup> In both contracts and statutes, the term “shall” is used to make an act mandatory. *See Stockman v. Heartland Indus. P’rs, L.P.*, 2009 WL 2096213, at \*6 (Del. Ch. July 14, 2009) (“[T]he plain meaning of “shall be advanced” is that advancement is mandatory.”).

Delaware<sup>56</sup> indicates that the Legislature foresaw “that not all disputes among insurers regarding liability or amounts paid pursuant to PIP policies written under Delaware no-fault law would arise from Delaware Accidents.”<sup>57</sup> Thus, I find that the Legislature intended that insurer-to-insurer subrogation claims based on Delaware-issued PIP insurance policies be heard in Delaware by AF, even for accidents occurring in a foreign jurisdiction.

Complementing the statute, parts of Section 603 of Title 18 of the Delaware Administrative Code also bear on this issue.<sup>58</sup> Specifically, Article 4 of Section 603 provides that the phrase “the Wilmington Auto Accident Reparation Arbitration Committee or its successors,” found in 21 *Del. C.* § 2118(g)(3), includes insurance industry forums overseeing arbitrations under the Automobile Accident Reparations

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<sup>56</sup> See 21 *Del. C.* § 2118(a)(2)(g) (“The coverage required by this paragraph shall be considered excess over any similar insurance for passengers, other than Delaware residents, when the accident occurs outside the State.”); see also *Deel v. Rizak*, 474 F. Supp 45, 48 (D. Del. 1979) (“[T]he Court concludes that the language of [21 *Del. C.* § 2118(j)] means that if an insurance company, which is authorized to issue motor vehicle liability policies in Delaware, issues such policies, outside of the State, on motor vehicles which are or intended to be registered and operated in Delaware, those policies shall be deemed to embody the benefits and conform to the requirements of § 2118(a)(2) and (3).”).

<sup>57</sup> *W. Am. Ins. Co. v. Del. Auto. Reparations Arbitration Forum*, 1989 WL 135722, at \*1 (Del. Super. Oct. 18, 1989).

<sup>58</sup> Title 18 of the Delaware Administrative Code contains regulations promulgated by the Delaware Insurance Commissioner.

Arbitration Agreement (“AARAA”), a nationwide agreement administered by AF.<sup>59</sup> Additionally, Article 10 provides that insurance companies authorized to write auto insurance policies in Delaware “shall be deemed signatory companies of the insurance industry forums arbitration agreements,” including the AARAA and AF’s PIP (No-Fault) Arbitration Agreement (“AF PIP Agreement”).<sup>60</sup> Article 10 effectively brings all companies providing automobile insurance to Delaware residents, including Zurich and St. Paul, “within the purview of the arbitration agreements and under the industry arbitration procedures.”<sup>61</sup>

From this review of the relevant statutes and regulations, I conclude that the Legislature intended to delegate resolution of all Delaware PIP subrogation claims to arbitration, regardless of the location of the underlying accident. Nevertheless, as *Ruggiero* and 18 *Del. Admin. C.* § 603(10) suggest, the terms of the AF PIP Agreement also bear on the issue of the AF arbitrator’s power and authority to determine jurisdictional questions.<sup>62</sup> Thus, the question remains whether the arbitrator might have

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<sup>59</sup> See 18 *Del. Admin. C.* § 603(4); *N.H. Ins. Co. v. State Farm Ins. Co.*, 643 A.2d 328, 329 (Del. Super. Aug. 13, 1993) (corrected Apr. 22, 1994) (“AF is a nationwide administrator of arbitration agreements, including the two agreements involved in this case—the Nationwide Intercompany Arbitration Agreement, which covers claims for property damage, and the [AARAA] . . . , which covers PIP payments.”); *W. Am. Ins. Co.*, 1989 WL 135722, at \*1.

<sup>60</sup> See 18 *Del. Admin. C.* § 603(10).

<sup>61</sup> *N.H. Ins. Co.*, 643 A.2d at 329.

<sup>62</sup> *Ruggiero v. State Farm Mut. Auto. Ins. Co.*, 1999 WL 499459, at \*5 (Del. Ch. June 23, 1999).

had a legitimate basis for rejecting Zurich’s claim based on AF internal rules or the terms of the controlling arbitration contract.<sup>63</sup>

St. Paul contends that the arbitrator properly dismissed Zurich’s claim for lack of jurisdiction because Zurich failed to meet its burden of showing that AF had subject matter jurisdiction over subrogation claims based on accidents occurring outside of Delaware.<sup>64</sup> In that regard, St. Paul points to Article 3 of the AF PIP Agreement, which states that “the decision of the arbitrator(s): (a) shall be based on local jurisdictional law consistent with accepted claim practices.”<sup>65</sup> St. Paul suggests that, under the thus-applicable jurisdictional law of Delaware, the arbitrators may, like Delaware courts, address issues of subject matter jurisdiction even if no party raised the issue.<sup>66</sup>

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<sup>63</sup> While 18 *Del. Admin. C.* § 603(10) does not specifically mention the AF PIP Agreement, there appears to be no dispute that this agreement controls AF arbitration of PIP insurance subrogation claims.

<sup>64</sup> DRB 5.

<sup>65</sup> *See* DRB Ex. I, Art. 3.

<sup>66</sup> *See, e.g., Mehiel v. Solo Cup Co.*, 2005 WL 1252348, at \*6 n.47 (Del. Ch. May 13, 2005) (Although neither party questioned the Court’s jurisdiction, the Court expressed “confiden[ce] in its ability to dismiss an action *sua sponte* when it discovers it lacks subject matter jurisdiction.”); *Christiana Town Ctr. LLC v. New Castle Cty.*, 2003 WL 21314499, at \*3 (Del. Ch. June 6, 2003) (stating that judges in the Delaware Court of Chancery are obligated to decide whether a matter comes within the equitable jurisdiction of this Court regardless of whether the issue has been raised by the parties); *Texcel v. Commercial Fiberglass*, 1987 WL 19717, at \*2 (Del. Super. Nov. 3, 1987) (“Jurisdiction over the subject matter . . . is a question of law that can be raised by the court *sua sponte* at any time, and it can neither be waived nor conferred by consent of the parties.”).

In addition to Article 3 of the AF PIP Agreement, St. Paul relies on Rule 1-1 of AF's PIP Arbitration Rules and Regulations, which states that "[c]ompulsory arbitration under Article First shall conform to the statute or endorsement giving recovery rights in the state in which the accident occurred."<sup>67</sup> This Rule arguably could be read as empowering an AF arbitrator to dismiss a Delaware PIP subrogation claim arising from a Maryland accident. The abbreviated record created by the parties, however, is insufficient to enable the Court to state with confidence what Rule 1-1 means in the context of this case, how it applies here, if at all, or whether the AF arbitrator would have been justified in dismissing the underlying arbitration based on it.<sup>68</sup> St. Paul merely quotes the rule and then cites a Delaware Superior Court case for the unremarkable proposition that Delaware courts can raise subject matter jurisdiction *sua sponte*.<sup>69</sup> Based on the record before me, however, I cannot rule out the possibility that the arbitrator may have had a plausible basis under AF's internal rules and procedures for denying jurisdiction over Zurich's subrogation claim.

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<sup>67</sup> See DRB Ex. J, PIP Arbitration Rules and Regulations. At argument, St. Paul indicated that PIP subrogation arbitration between insurance companies does not exist under Maryland law. Tr. 3. According to St. Paul, in Maryland, unlike Delaware, the victim of an accident may sue the alleged tortfeasor directly for all medical bills and other damages and recover its "boardable" medical bills. Tr. 3, 40. St. Paul argued that fear of double payment or double recovery may have been one of the reasons AF declined to take jurisdiction over Zurich's Delaware PIP subrogation claim. Tr. 5.

<sup>68</sup> See DRB 6.

<sup>69</sup> DRB 5 (citing *Texcel v. Commercial Fiberglass*, 1987 WL 19717 (Del. Super. Nov. 5, 1987)).

The difficulty inherent in St. Paul's argument is that if AF legitimately can disregard the Legislative intent behind 21 *Del. C.* § 2118(g)(3) and dismiss Zurich's claim based on the AF PIP Agreement and the AF PIP Arbitration Rules, certain insurance companies may be left in a legal Catch-22. Under St. Paul's view of the interplay between the statute and AF's internal rules, if an insurance company pays its Delaware insured's PIP expenses and then asserts a PIP subrogation claim against an insurance company for the culpable driver in connection with an out-of-state accident, as Zurich originally did here, Section 2118(g)(3) would require the court to dismiss the claim in favor of arbitration before AF. If, however, that company instead seeks to have the claim decided by AF in arbitration, as the statute seems to require, AF presumably would deny jurisdiction based on the premise that its own internal rules preclude it from taking jurisdiction over Delaware PIP subrogation claims arising from out-of-state accidents. Such an interpretation effectively leaves insurance companies in Zurich's position with no recourse in the state of Delaware.

While interesting and, perhaps, even perplexing, this conundrum cannot be solved through judicial review of an arbitral award. The Court of Chancery rarely hears personal injury cases and is ill-equipped to address the nuances of subrogation practice as to PIP claims within the no fault automobile insurance industry or the inner workings of AF. It is beyond the Court's ken, for example, to know whether AF's refusal to hear Zurich's claim represents a systemic problem or an isolated outlier, and what steps should be taken to correct the perceived problem. Yet, whether AF erroneously dismissed Zurich's claim—which appears likely based on the Legislature's intent to have AF hear

and decide all PIP subrogation claims—it is within AF’s bailiwick to make such a dismissal. By requiring that all PIP subrogation claims be submitted to arbitration, the Delaware General Assembly intentionally extinguished the right of insurance companies to a formal judicial proceeding with strict adherence to court rules, complete with precise findings of law and fact as well as the right to judicial review of the case’s substantive merits.<sup>70</sup> In so doing, the Legislature also made all Delaware insurance companies subject to AF PIP Arbitration Rules and the AF PIP Agreement, both of which, arguably, grant AF arbitrators the authority to dismiss a Delaware PIP subrogation claim arising from an out-of-state accident based on lack of jurisdiction.<sup>71</sup>

Thus, whether or not the Arbitral Award at issue in this case is contrary to the legislative intent of Section 2118(g)(3), the AF arbitrator did not exceed his authority or materially abuse his discretion in dismissing the case based on AF’s internal rules and the governing arbitral agreement. As illustrated in Part II.B above, the policies supporting arbitration “strongly favor[] judicial validation of an arbitrator’s award by limiting the scope of judicial review.”<sup>72</sup> This Court has no authority to vacate an arbitral award on grounds outside the narrow categories specified in 10 *Del. C.* § 5714—even if the award appears contrary to the intent of the Legislature that AF have jurisdiction over all PIP

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<sup>70</sup> See *Kuhn v. Hess*, 2000 WL 1336780, at \*1 (Del. Ch. Aug. 16, 2000).

<sup>71</sup> See *supra* note 61 and accompanying text.

<sup>72</sup> *Ruggiero v. State Farm Mut. Auto. Ins. Co.*, 1999 WL 499459, at \*4-5 (Del. Ch. June 23, 1999).

subrogation claims regardless of the location of the underlying accident. Because the arbitrator did not exceed his authority, Zurich has failed to establish any basis for vacating the Arbitral Award.

### III. CONCLUSION

For the foregoing reasons, I grant St. Paul's motion for summary judgment to confirm the July 16, 2008 Arbitral Award and deny Zurich's cross motion for a summary judgment modifying or vacating the Award. I further hold, however, that the arbitrator's decision to dismiss Zurich's claim for lack of subject matter jurisdiction in the unusual circumstances of this case does not constitute a decision on the merits and is without prejudice to Zurich's claim for subrogation. Zurich, therefore, remains free to pursue its subrogation claim through any other means available.<sup>73</sup>

**IT IS SO ORDERED.**

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<sup>73</sup> I recognize, of course, that even though the arbitrator's decision to dismiss the case is without prejudice, Zurich's subrogation claim remains, in many ways, stuck in a procedural quagmire. Nevertheless, Zurich conceivably may be able to seek some form of relief from the Delaware Insurance Commissioner or Legislature or through the courts of Delaware or Maryland, if not through AF. *See W. Am. Ins. Co. v. Del. Auto. Reparations Arbitration Forum*, 1989 WL 135722, at \*1 (Del. Super. Oct. 18, 1989) (granting a mandamus action compelling DARAF—a successor to the Wilmington Auto Accident Reparation Arbitration Committee and a party to the suit—to take jurisdiction over a PIP subrogation claim arising out of an accident that occurred in New Jersey). I express no opinion, however, on the viability of any such option.