UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WISCONSIN

In re:

CHARLES R. COLE, Case No. 94-27002

Debtor. Chapter 13

MEMORANDUM DECISION DETERMINING
CLAIM OF ALBERT CALBOW

Mr. Calbow was injured in 1991 when the debtor's car crashed into a Town of Mount Pleasant fire truck which in turn collided with numerous vehicles, including Mr. Calbow's vehicle. Litigation ensued in state court to determine the proportionate liabilities and damages attributable to the debtor and the municipality. As Mr. Cole was uninsured, Mr. and Mrs. Calbow filed a claim against their insurance carrier, Midwest Security Insurance Company, under the clause insuring the Calbows against damage caused by an uninsured motorist. When Mr. Cole filed his chapter 13 petition, Midwest Security filed a subrogation claim to recover any amounts for which they would later be found liable to the Calbows. Until that determination was made in state court (the stay was lifted for that case to continue), by agreement of the claimants, both Mr. Calbow and Midwest Security were receiving equal payments from the debtor's estate. The state court litigation has now come to a close and, in light of subsequent events, this court shall reconsider Mr. Calbow's claim. Fed. R. Bankr. P. 3008.

The Calbows eventually settled their claim with the municipality's insurer for $250,000. As part of that settlement, the Calbows entered into a *Pierringer*[1] release freeing the town, its agents, and insurer from all liability for damages arising out of the accident. The release

[1]*See Pierringer v. Hoger*, 21 Wis.2d 182, 124 N.W.2d 106 (1963).

specifically and validly preserved the Calbows' right to collect from Mr. Cole the amount of damages equal to the proportion of Mr. Cole's negligence in causing the accident.

With the municipality out of the way, the Calbow's claim against Mr. Cole was advanced against the Calbows' uninsured motorist (UM) coverage in their Midwest Security Insurance Company policy. As required by the policy, the parties submitted the Calbows' claim to an arbitration panel. The arbitrator's panel established that the Calbows' total damages were $131.000 ($130.000 for Mr. Calbow and $1.000 for Mrs. Calbow). The panel deferred the allocation of causal negligence and did not determine whether the *Pierringer* release impacted the Calbows' right to coverage under Midwest Security's policy's uninsured motorist provision.

After Midwest Security denied the Calbow's request for a liability determination between Mr. Cole and the municipality, as well as any UM recovery, the Calbows filed a declaratory judgment action seeking recovery of UM benefits. Midwest Security's motion for summary judgment was granted by the trial court. The court concluded that because the Calbows had been fully compensated by the *Pierringer* release, the reducing clauses under both underinsured motorist (UIM) and UM benefits were valid because they prevented a double recovery. Midwest Security's UIM benefits reducing clause provides "The Limit of Liability ... shall be reduced by all sums paid because of bodily injury by or on behalf of persons or organizations who may be legally responsible." Likewise, Midwest Security's UM benefits reducing clause states that "Any amounts otherwise payable for damages under this coverage shall be reduced by all sums ... [p]aid because of the bodily injury by or on behalf of persons or organizations who may be legally responsible."

The state court of appeals affirmed the trial court order that enforced the insurance

policy's reducing clause in favor of the UM insurer. *Calbow v. Midwest Sec. Ins. Co.*, 217 Wis.2d 675, 579 N.W.2d 264 (Ct. App.), *cert. denied*, 216 Wis.2d 615, 579 N.W.2d 46, *and review denied*, 584 N.W.2d 124 (1998). The appellate court noted that invoking the reducing clause prevented a "double recovery." *Id.* at 682; 579 N.W.2d at 267. Because the purpose of UM coverage is not to provide a "fully compensated party with a windfall," the Calbows were not entitled to recover from Midwest Security beyond the $250,000 recovered from the municipality pursuant to the *Pierringer* release. *Id.* As to Midwest Security's obligations to the Calbows, the determinations of the state trial and appellate courts are binding on this court. *See* 28 U.S.C. § 1738; *see also E.B. Harper & Co. v. Nortek, Inc.*, 104 F.3d 913, 921 (7th Cir. 1997); *Lindas v. Cady*, 183 Wis.2d 547, 558, 515 N.W.2d 458, 463 (1994); *Landess v. Schmidt*, 115 Wis.2d 186, 198, 340 N.W.2d 213, 219 (Ct. App. 1983) (issue preclusion cases). Thus, the denial of recovery by the Calbows from their uninsured motorist carrier means that Midwest Security has no right to recover on its claim against the debtor. Funds recovered while the action was pending must be returned to the debtor's estate, and Midwest Security stands ready and willing to do so. Whether the Calbows' claim against the debtor's estate survives is another question.

The Calbows contend that the arbitrator's determination of damages has no relationship to the earlier settlement amount except on the issue of the reducing clause in the UM policy. The reducing clause insulates Midwest Security; however, according to the Calbows, it does not insulate Mr. Cole. Mr. Calbow's purchase of an insurance policy, thus, does not waive his rights to assert his claim against the debtor's estate.

The debtor claims that Mr. and Mrs. Calbow have been overcompensated, their damages having been determined at $131,000 by the arbitration panel, and funds received by the Calbows

during the pendency of the chapter 13 should be returned to the trustee for distribution to creditors other than the Calbows with allowed unsecured claims.

The parties agree that the Calbows executed a release freeing the town, its agents and the town's insurer from all liability in accordance with *Pierringer v. Hoger*, 21 Wis.2d 182, 124 N.W.2d 106 (1963). In *Pierringer*, the plaintiffs sued a number of alleged joint tortfeasors who, in turn, cross-complained against each other for contribution. Prior to trial, all the defendants but one settled with the plaintiffs. *Id.* at 183, 124 N.W.2d at 107. In exchange for these settlements, the plaintiffs agreed to "credit and satisfy that portion of the total amount of damages" caused by the negligence of the settling defendants, and to "release and discharge" that "*fraction and portion and percentage*" of their total claim for damages against all parties proportionate to the negligence later attributed to the settling defendants. *Id.* at 184-85, 124 N.W.2d at 108 (emphasis added). They also agreed to indemnify the settling tortfeasors for any judgments obtained against them for contribution. *Id.* at 185, 124 N.W.2d at 108. The releases reserved the balance of the plaintiffs' whole cause of action against the non-settling defendant. *Id.*

The supreme court determined that the releases extinguished the non-settling joint tortfeasor's rights to contribution. *Id.* at 188-89, 124 N.W.2d at 110. As a result, the only damages for which the non-settling joint tortfeasor remained potentially liable were those attributable to his own negligence. Since he could no longer be held liable for damages caused by the settling joint tortfeasors' negligence, the non-settler's rights to contribution against the settlers were extinguished. *Id.* As another court explained:

> In the practical world of negotiating a settlement, when a joint tort-feasor agrees to settle and execute a *Pierringer* release ... it purchases by contract an unspecified portion of the total liability for negligence and, in turn, is dismissed from the action with certain well-

known protections. In doing so, it assumes the possible risk of paying too much for its peace of mind.

*Unigard Ins. Co. v. Insurance Co. of N. Am.*, 184 Wis. 2d 78, 87, 516 N.W.2d 762, 766 (Ct. App. 1994). Thus, in this case the *Pierringer* release leaves Cole responsible only for that portion of the damages attributable to his own negligence – a percentage yet to be determined.

Cole and Midwest Security argue that the portion of damages attributable to Cole should be reduced by the excess pretrial settlement the Calbows received from the town's insurer. The court rejects this argument. As noted above, the Wisconsin Supreme Court has held that nonsettling torfeasors are liable for their *percentage* of the causal negligence. *Pierringer*, 21 Wis. 2d 182, 124 N.W.2d 106; *see also Peiffer v. Allstate Ins. Co.*, 51 Wis.2d 329, 335-36, 187 N.W.2d 182, 185 (1971) (holding that plaintiff limited to recovery to the unsatisfied *percentage* of the damages). The supreme court has never qualified this rule by holding that if the settling tortfeasor settles for an amount exceeding his or her jury-determined liability, then the nonsettling tortfeasor may apply this excess to reduce his or her jury-determined liability.

The appellate court decision in this case, which held that the Calbows are not entitled to recover from Midwest Security beyond the $250,000 *Pierringer* release, should not be expanded beyond its scope. The court construed a specific clause within a specific contract between two specific parties. *Calbow v. Midwest Sec. Ins. Co.*, 217 Wis.2d 675, 579 N.W.2d 264 (Ct. App. 1998). The court concluded that the reducing clause in the insurance contracted between Midwest Security and the Calbows should be invoked in order to prevent a double recovery. *Id.* at 682, 579 N.W.2d at 267. There is no such contractual agreement between the Calbows and Mr. Cole to invoke. Accordingly, to the extent Mr. Cole was at fault in the accident, he is liable

to the Calbows for a percentage of their damages equal to the percentage of his negligence.

This conclusion furthers the policy of encouraging effective and expeditious resolution of lawsuits. *See Brandner v. Allstate Ins. Co.*, 181 Wis.2d 1058 at 1071, 512 N.W.2d 753 at 760. If plaintiffs bear the risk and reap the benefits of the settlement, then they will have a greater incentive to reach a fair settlement. On the other hand, if the nonsettling tortfeasor reaps the benefit of a settling tortfeasor's overpayment, such an outcome would reduce the incentive on any tortfeasor to settle a dispute outside of court.

As was stated above, this court is bound by the finding of the state court with respect to the Calbow's damages, $131,000, under the doctrine of issue preclusion. Unfortunately, neither the arbitrator nor the court needed to determine the relative negligence of the municipality and the debtor, and it is impossible for this court to quantify the amount of the Calbow's claim in the bankruptcy case without knowing the percentage of the debtor's negligence. Furthermore, the bankruptcy court cannot determine or estimate the amount of a personal injury claim as a core proceeding. 28 U.S.C. § 157(b)(2)(B). In light of this uncertainty, the court will set a status conference at which time the parties may be heard on whether the issue should be remanded to state court for a finding as to the debtor's percentage of negligence, if any. The court will also order that Midwest Security return to the trustee funds it has received from the estate, and the trustee shall hold these funds until further order of this court determining the appropriate distribution on allowed claims.

Dated at Milwaukee, Wisconsin, February 24, 1999.

BY THE COURT:

Honorable ~~Margaret Dee McGarity~~
United States Bankruptcy Judge