



**ARIZONA SUPREME COURT  
ORAL ARGUMENT CASE SUMMARY**

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***Jean Cundiff, on her own behalf and on behalf of a class of similarly situated persons v. State Farm Mutual Automobile Ins.***  
2 CA-CV 05-0209 (Opinion); CV-07-0057-PR

**PARTIES AND COUNSEL:**

*Petitioner:* Cundiff is represented by Elliot Glicksman, Bruce Burke, and John Tully.

*Respondent:* State Farm is represented by Lawrence Scarborough and J. Alex Girmsley of the Bryan Cave law firm.

*Amici:* United Policyholders is represented by Stanley Feldman, Haralson, Miller, Pitt, Feldman & McAnally. Arizona Trial Lawyers Association is represented by David Abney, Law Offices of Charles M. Brewer.

**FACTS:**

This case concerns whether a tort victim's underinsured ("UIM") insurance carrier may reduce the amount of insurance coverage payable to its insured by deducting the benefits the insured received from his or her workers' compensation carrier. Cundiff was injured in a work-related accident due to the other driver's ("tortfeasor's") fault. She received almost \$30,000 in workers' compensation benefits, consisting of \$11,109.35 in temporary disability (lost wage) benefits, and \$18,695.48 in medical benefits from State Farm, her insurance company. She also received permanent disability benefits of \$482 per month for life as a result of the accident, the present value of which exceeded \$80,000. She settled a lawsuit against the tortfeasor for the \$15,000 liability limits of the tortfeasor's insurance policy, all of which was paid either to her attorney or to satisfy part of the workers' compensation lien.

Cundiff and State Farm could not agree on the extent of her injuries, and she commenced UIM arbitration under the policy which provided \$25,000 in UIM coverage. The issue at arbitration was quantifying the damages that she could collect from the tortfeasor. At arbitration, she sought an award of \$140,000, submitting into evidence \$18,695.98 in medical bills paid by her workers' compensation carrier. She did not seek any other damages that had been paid by any collateral source. She and her arbitration counsel suggested that, in calculating that amount, they omitted the \$11,109.04 in temporary disability benefits that she received, but included her workers' compensation medical benefits. State Farm argued that her medical bills related to spinal injuries she sustained in two prior work-related auto accidents.

The arbitrator awarded her \$40,000 as full compensation for her loss but he did not address whether any medical bills were included in the award. He said her medical retirement was not caused by the accident in issue, but noted the Worker's Compensation Fund did not compensate her for pain and suffering from this accident. She did not appeal that award.

The State Farm automobile policy's workers' compensation offset provision says:

Any amount payable under this coverage shall be reduced by any amount paid or payable to or for the insured under any workers' compensation, disability benefits or similar law. This does not reduce the limits of liability required by law for this coverage.

Applying that provision, State Farm argued that Cundiff was fully compensated by the more than \$100,000 in workers' compensation benefits. She hired a new lawyer, more negotiations ensued, and State Farm paid her \$10,000 in UIM benefits.

She filed this lawsuit on behalf of herself and a putative class seeking a declaratory judgment that State Farm was not entitled to offset her workers' compensation benefits against her UIM coverage. She sought damages alleging that State Farm had breached its insurance contract because the UIM offset provision in her policy was unenforceable as a matter of Arizona law. In the alternative, she argued that under the facts of this case, State Farm's application of offsets for amounts the Fund paid her violated the UMA because, in offsetting those amounts, State Farm deprived her of the right to be made whole.

Both parties filed motions for summary judgment. The trial court denied Cundiff's motion, ruling that the offset provision was enforceable. However, the court granted summary judgment to her on her alternate theory, stating that because the award is not a duplication of workers' compensation benefits, the non-duplication endorsement in the policy that would have otherwise entitled State Farm to a set-off does not apply and State Farm was not entitled to offset the \$11,904.04 in disability benefits that she had received because her arbitration had failed to include that sum in her \$140,000 damages request. The court found that, at most \$18,695.48 [the medical bills], had been previously paid by another source and she had not received compensation for \$21,304.52 of the damages. Thus State Farm was obligated to pay that principal sum, plus prejudgment interest.

Cundiff appealed the determination that the offset provision is not *per se* unenforceable. State Farm cross-appealed the damages judgment. In this opinion, the court affirmed the part of the judgment holding that the offset provision was enforceable because it does not prevent the insured from obtaining full compensation and did not violate the collateral source rule. The court held that Cundiff's effort to look behind the arbitrator's award was an unauthorized collateral attack on the award's finality. The court reasoned that UIM coverage does not insure the tortfeasor against liability, but insures the

UIM insurer's policyholder against the risk of inadequate compensation for compensable injuries. The collateral source rule does not apply. There is no authority "suggesting a UIM insurer should be treated as a tortfeasor for purposes of the collateral source rule."

The court reversed Cundiff's damages award, ruling that the trial court erred in modifying the arbitration award and in ruling, despite the arbitration award's clear language to the contrary, that her damages award in the arbitration reflected something less than full compensation. Such a reversal in the compensation to Cundiff was not permitted absent a timely modification motion. *See* A.R.S. §12-1513.

## **ISSUES:**

- “1. Does the Arizona UM/UIM Act, §20-259.01 (the “UMA”) permit a underinsured(“UIM”) insurer to enforce a policy's offset provision that is not authorized by the statute to prevent the insured from obtaining the full amount of damages she would have obtained if the tortfeasor had sufficient liability coverage?
2. If so, can the insurer apply an offset provision even when there has been no duplication of payment in the arbitration award and application of the offset provision prevents the insured from obtaining payment of damages for which she had never received compensation from a collateral source?
3. Does Arizona's collateral source rule apply to UIM claims?”

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