

**PA 14-156**

HB5450

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return to the call of the Calendar. And will the  
Clerk please call Calendar 360.

THE CLERK:

House Calendar 360 on page 27, favorable report  
of the joint standing committee of judiciary,  
substitute House Bill 5450, AN ACT CONCERNING  
ARBITRATION IN MOTOR VEHICLE ACCIDENT CASES.

DEPUTY SPEAKER ORANGE:

Representative Gerald Fox, you have the floor,  
Sir.

REP. G. FOX (146th):

Thank you, Madam Speaker. I move for the  
acceptance of the joint committee's favorable report  
and passage of the bill.

DEPUTY SPEAKER ORANGE:

The question before the Chamber is on acceptance  
of the joint committee's favorable report and passage  
of the bill. Representative Fox.

REP. G. FOX (146th):

Thank you, Madam Speaker. This is a bill that  
comes to us that addresses those situations where  
parties to a personal injury action involving a motor  
vehicle case seek to resolve their dispute by going to  
arbitration and by submitting what's called a high low

arbitration agreement. What that means is that the parties agree in advance what the high award would be as well as what the low award would be and they then proceed to arbitration and the arbitrator will then issue an award.

What the bill does though is it also seeks to make it clear that that -- that award would not then preclude the plaintiff in the action from then proceeding under the terms and conditions of their automobile policy for underinsured motorist coverage and bringing a claim at that stage after the decision of the arbitrator is reached if they qualify pursuant to the terms of their policy. What this would do and what it -- what it -- what I think it does is it adopts what people have often thought was the case in that you could go to these arbitrations, reach a resolution there and then proceed on to the underinsured motorist claim.

Madam Speaker, there was a case that brought into question as to whether or not the plaintiff would be collaterally stopped from then bringing the subsequent claim and what this bill is intended to do is to make it clear that that claim can actually still be brought and I would urge passage of the bill.

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DEPUTY SPEAKER ORANGE:

Thank you, Representative. Will you care to remark further? Representative Rebimbas of the 70th.

REP. REBIMBAS (70th):

Thank you, Madam Speaker. And I'd like to thank the Chairman for the description of the proposal that's here before us. Just a few questions for clarification purposes, through you, Madam Speaker.

DEPUTY SPEAKER ORANGE:

Please proceed.

REP. REBIMBAS (70th):

Thank you. Through you, Madam Speaker, to the Chairman of the judiciary committee would this proposal apply to other circumstances other than an underinsured motorist type of claim? Through you, Madam Speaker.

DEPUTY SPEAKER ORANGE:

Representative Fox.

REP. G. FOX (146th):

Through you, Madam Speaker. I don't see where else it would apply. I think that it's intended for that.

DEPUTY SPEAKER ORANGE:

Representative Rebimbas.

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REP. REBIMBAS (70th):

Thank you, Madam Speaker. And through you, Madam Speaker, for the participation in the arbitration in fact both parties would have to agree to that. So in other words -- and when we say both parties it would be the individual that's claiming damages and the attorney for the insurance. So this is voluntary on both parties. Is that correct? Through you, Madam Speaker.

DEPUTY SPEAKER ORANGE:

Representative Fox.

REP. G. FOX (146th):

Through you, Madam Speaker, that is correct.

DEPUTY SPEAKER ORANGE:

Representative Rebimbas.

REP. REBIMBAS (70th):

Thank you, Madam Speaker. I do rise in support of the legislation that's before us not only for everything that's already been highlighted by Chairman Fox but it is correct that this was the mode of practice already in place. We did have this court decision that certainly put it to question. But arbitration is there for a purpose. Arbitration is

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there to essentially move things along in the courthouse.

And this again is a voluntary basis. So when you have someone speaking in opposition to let's say a representative from an insurance company they at all times and still under this piece of legislation has the ability to say no, we do not want to arbitrate. We would like to take this to trial. This does not take the right from doing so. What this essentially does as I had indicated that it moves cases along.

When you have a small policy let's say for example a \$25,000 insurance policy you're not going to expect those parties to bring in all of their witnesses, all of their evidence even though you know that the damages that's being alleged clearly could be beyond the \$25,000 because what both parties are doing in arbitration is truly trying to speed -- speed line the situation in the sense of do what you have to for the arbitration.

Certainly the individual who has been damaged should continue to have the right to then file a claim under their underinsured motorists and not have a limited circumstances of arbitration and again when I say limited, limited evidence and testimony of

witnesses, things of that nature which everyone agrees again for arbitration purposes is the normal practice, to still file a claim under their underinsured motorist.

That's why we have underinsured motorist to have that ability to do it. And we should not be limited by that. And certainly what this piece of legislation does is codify the current practice and making sure again arbitration is purely voluntary for both parties and then still the person who has damages rightfully has the ability to exercise a claim under their underinsured motorist without having to again put on their entire case in chief with witnesses in arbitration when more likely than not when you're doing the high low it's the low policy limit. So again, Madam Speaker, I do rise in support of the legislation that's before us.

DEPUTY SPEAKER ORANGE:

Thank you, Madam. Will you care to remark further on the bill before us? Will you care to remark? Representative Shaban, you have the floor, Sir.

REP. SHABAN (135th):

Thank you, Madam Speaker. If I may a few questions to the proponent.

DEPUTY SPEAKER ORANGE:

Please proceed.

REP. SHABAN (135th):

Thank you, Madam Speaker. And through you, if this act -- for sake of clarity and recollection I voted no on this because I wasn't sure about this in judiciary and I'm trying to iron out my questions still. If this act is only intended for uninsured motorist claims after the high low arbitration would it not be more prudent to say as much in the actual statute? Through you.

DEPUTY SPEAKER ORANGE:

Representative Fox.

REP. G. FOX (146th):

Thank you, Madam Speaker. And through you -- let's see. It's -- I mean it would be a situation where you would have to show you're underinsured coverage, your own automobile policy and the terms and conditions that are related to that. You would have had to satisfy those conditions.

And what this would help you to do is to show to them that if you follow the parameters of this bill

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you would then have followed the -- what is necessary in order to make yourself eligible for the underinsured coverage. So while it does not specifically say it I think it it is what it is intended and it is what it would be used for. So through you, Madam Speaker.

DEPUTY SPEAKER ORANGE:

Thank you, Sir. Representative Shaban.

REP. SHABAN (135th):

Thank you, Madam Speaker. And I thank the gentleman. And that's what I've heard and what colleagues of mine, attorneys have said the same thing. And I don't practice in this area so I'm trying to get up to speed. Through you, Madam Speaker, a hypothetical popped into my head and I'm wondering if the gentleman could help me. It's not a hypothetical but a fact pattern then that applies to this. If a -- if a plaintiff and a defendant settle pursuant to high low arbitration, whatever the number is.

Assume 20,000 bucks and it's over but then a second defendant is found. It was a big car wreck or whatever it is. Under this bill would that second defendant be precluded from pulling back the -- in the

-- pulling in the case the first defendant in a subsequent action for purposes of apportionment of liability? Through you, Madam Speaker, if I was clear.

DEPUTY SPEAKER ORANGE:

Representative Fox.

REP. G. FOX (146th):

Through you, Madam Speaker. I will -- I think I got it and I will see if I can -- can respond.

The -- the claim -- based upon the hypothetical and the way I would understand it the claim from the -- the plaintiff against the first defendant would be resolved and the plaintiff would not be able to pursue any additional claim against that first defendant because that claim is done through the arbitration process and they -- you know assuming they went through that process that's over with.

If another defendant were to -- were to then be found for some -- for some reason in an automobile action type setting then the plaintiff could perhaps bring a claim against that individual but certainly not -- I mean the claim against the first defendant is resolved based upon the terms of the high low arbitration.

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DEPUTY SPEAKER ORANGE:

Representative Shaban.

REP. SHABAN (135th):

Thank you, Madam Speaker. Yeah and I think my hypothetical drifted and I think the gentleman -- I was with you for 80 percent of the way. The question I was trying to ask and I may not have is if that second defendant is found and -- and sued by the plaintiff can that second defendant under this bill bring the first defendant in the action for a portion of liability purposes? Through you.

DEPUTY SPEAKER ORANGE:

Representative Fox.

REP. G. FOX (146th):

Through you, Madam Speaker. They may make -- and I'm trying to follow the hypothetical and I suppose I could envision a possibility for apportionment purposes but they would not have to actually pay any funds because that would have been resolved against the -- any -- any funds that would have been due from the first defendant to the plaintiff would have been resolved in the arbitration.

DEPUTY SPEAKER ORANGE:

Representative Shaban.

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REP. SHABAN (135th):

All right. I thank the gentleman. I think I get where this is going and my -- again my colleagues of whom I respect in both parties and all different attorneys have -- for the most part telling me that this is a good thing. So I'm going to continue to listen and read and I thank the gentleman for his responses.

DEPUTY SPEAKER ORANGE:

Thank you, Sir. Will you care to remark further? Representative O'Dea, you have the floor, Sir.

REP. O'DEA (125th):

Thank you, Madam Speaker. I rise in support of this bill. In looking at it I do actually do practice in this area of law and often am in arbitration. It does protect both the tortfeasor with a low policy limit and it protects the plaintiff who has a large claim so that they can actually get the policy.

The tortfeasor can be protected and that plaintiff can go out and get a UM UIM claim against their own carrier without having to worry about what amount they collected under the original tortfeasor. The bill makes sense. It actually will save money for insurance companies on the front end of the tortfeasor

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claim because that tortfeasor won't have to defend the action all the way through to the conclusion of the case. So I believe it's good for the insurer on the tortfeasor initial claim and it's also good for the plaintiff bringing the claim. So I rise in support of the case -- or the bill.

And to the question that was asked I agree with the proponent of the bill that if you apportioned in that initial defendant they would be in for apportionment purposes only but have not exposure financially in the case. So I rise in support of the bill and I urge support with -- from all my colleagues. Thank you very much, Madam Speaker.

DEPUTY SPEAKER ORANGE:

Thank you, Representative. Will you care to remark further? Will you care to remark?  
Representative Smith, you have the floor, Sir.

REP. SMITH (108th):

Thank you, Madam Speaker. Just a few questions to the good Chairman of the judiciary committee please.

DEPUTY SPEAKER ORANGE:

Please proceed, Sir.

REP. SMITH (108th):

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As I'm reading through the language of the bill it seems very narrow in its scope and just so my understanding it and my reading is I believe to be accurate just for legislative intent purposes it looks like this only applies to bodily injury claims that arise out of a motor vehicle accident. Is that correct? Through you, Madam Speaker.

DEPUTY SPEAKER ORANGE:

Representative Fox.

REP. G. FOX (146th):

Through you, Madam Speaker, yes that is correct.

DEPUTY SPEAKER ORANGE:

Representative Smith.

REP. SMITH (108th):

So just to take that a step further if I'm walking down the sidewalk and I step in a hole and hurt myself because the sidewalk was defective this bill would not apply to that type of claim. Through you, Madam Speaker.

DEPUTY SPEAKER ORANGE:

Representative Fox.

REP. G. FOX (146th):

Through you, Madam Speaker, that is correct.

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DEPUTY SPEAKER ORANGE:

Representative Smith.

REP. SMITH (108th):

And then just a few more questions because most of my questions have been answered by the prior parties who have spoken on this bill. Once the parties go through the arbitration through the voluntary procedure there's been some questions that have been posed by others who have concerns about this bill that the plaintiff -- once that arbitration is resolved the plaintiff could then bring another claim other than the underinsured claim against the defendant or tortfeasor.

As I read the bill they would collaterally stopped from doing that. So I just want to make sure that really it's only -- the only claim available is the underinsured claim but not any other claim. Through you, Madam Speaker.

DEPUTY SPEAKER ORANGE:

Representative Fox.

REP. G. FOX (146th):

Through you, Madam Speaker. I would agree with that reading. The plaintiff would not be able to

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bring another claim against the -- the defendant who's part of the arbitration.

DEPUTY SPEAKER ORANGE:

Representative Smith.

REP. SMITH (108th):

And then just I believe one final question. In terms of the arbitration proceeding where they have the high low award, is the arbitrators finding binding only as to the damage award or is it also binding as to liability? Through you, Madam Speaker.

DEPUTY SPEAKER ORANGE:

Representative Fox.

REP. G. FOX (146th):

Through you, Madam Speaker. I would -- I would think that the -- the arbitrators decision would not be binding or it specifically states that it's -- reflect the damage award. So the damage award is what would be not used in a subsequent proceeding.

DEPUTY SPEAKER ORANGE:

Representative Smith.

REP. SMITH (108th):

So as I understand the good Chairman, so the damage award cannot be used in the underinsured claim.

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I think that's what I heard him say. Is that correct?

Through you, Madam Speaker.

DEPUTY SPEAKER ORANGE:

Representative Fox.

REP. G. FOX (146th):

Well I did say that and I do think that is correct but also I should say the -- the decision -- the findings of the arbitrator would be limited to these because if you look at the -- the last sentence but then if you look at the sentences before that it does say that the -- the findings of the arbitrator are binding upon the parties to the civil action exclusively for the purposes of such civil action.

So I -- the -- if the case were then to be brought after the finding of the arbitrator and if it were found to be eligible for underinsured motorist coverage then all of the issues would still be on the table for that hearing.

DEPUTY SPEAKER ORANGE:

Representative Smith.

REP. SMITH (108th):

Thank you for that clarification. I too stand in support of this bill. I do think it will save a lot of costs with the litigants and allow the parties and

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encourage the parties to go through the arbitration process which would -- is a huge not only time saver on our judicial resources but also a huge cost saver for the litigants. And I urge my colleagues to support it. Thank you, Madam Speaker.

DEPUTY SPEAKER ORANGE:

Thank you, Representative. Will you care to remark further? Representative Candelora, you have the floor, Sir.

REP. CANDELORA (86th):

Thank you, Madam Speaker. Madam Speaker, if I may a couple of questions to the proponent.

DEPUTY SPEAKER ORANGE:

Please proceed, Sir.

REP. CANDELORA (86th):

Thank you, Madam Speaker. Sort of along the same lines I'm trying to get my -- my head around this. I think I understand the intent of what this bill is proposing and how we are trying to limit it to -- to underinsured claims. And I just wanted to sort of maybe pose a couple hypotheticals or a question. In -- in the lines eight through nine as I'm reading it where the finding of the arbitrator shall be binding upon the parties to the civil action exclusively for

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the purposes of such civil action. Is that language meant to keep intact the -- the collateral estoppel that would apply in any civil action? Through you, Madam Speaker.

DEPUTY SPEAKER ORANGE:

Representative Fox.

REP. G. FOX (146th):

Though you, Madam Speaker. I think it's intended limit the -- any collateral estoppel and what -- what I think it's saying is that the resolution of these issues would be resolved by this arbitration and would only be -- the only parties that would be held to the issues involving the arbitration are those parties themselves, the plaintiff and defendant.

DEPUTY SPEAKER ORANGE:

Representative Candelora.

REP. CANDELORA (86th):

Thank you, Madam Speaker. And I guess my hypothetical -- it's been a while since I practiced law but I think I remember enough to be dangerous. And if -- if a civil action is brought, in this case in a motor vehicle -- a motor vehicle civil action were the facts that apply to this law and a necessary defendant has not been brought under the action.

If it is litigated -- the case is litigated and a damage award is issued my understanding is that a plaintiff would be prohibited from bringing an action against a defendant who has not been named if they were a necessary party to the action, that collateral estoppel would apply as a defense for a defendant that might be subsequently named. Would -- would this piece of legislation affect that or am I not correct in that summation? Through you, Madam Speaker.

DEPUTY SPEAKER ORANGE:

Representative Fox.

REP. G. FOX (146th):

Through you, Madam Speaker... It may -- first of all I think the Representative is correct or at least the possibility for a claim for collateral estoppel would certainly exist under the initial parts of this hypothetical. And I think if I go to the -- if I return to the question that was posed to me by Representative Shaban if there is another defendant then the decision in this arbitration would not be binding with respect to those parties only to the extent that if there were a claim for some type of apportionment of liability as Representative O'Dea said that might -- could potentially happen but the

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defendant who is part of the arbitration could not be subject to any additional financial exposure.

DEPUTY SPEAKER ORANGE:

Representative Candelora.

REP. CANDELORA (86th):

Thank you, Madam Speaker. That -- that is helpful then. So under this -- this new law then the plaintiff -- if the plaintiff and defendant have subjected themselves to arbitration and then subsequent to that arbitration the plaintiff brings a civil action against another defendant they would not -- I guess would this bill then preclude that defendant from asserting a claim of collateral estoppel based on the -- the necessary party rule? Through you, Madam Speaker.

DEPUTY SPEAKER ORANGE:

Representative Fox.

REP. G. FOX (146th):

Well I think the -- and the objective here is -- and the case that -- that triggered this was a case Marquez versus All State and that was a case in which the collateral estoppel rule was utilized when a -- it was determined that the decision of the arbitrator was a binding decision for purposes of collateral

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estoppel. And what was -- been the purpose of the bill is to make it clear that you can then go after or can continue to pursue a claim under your own underinsured motorist coverage if you agree to the binding arbitration as set out here with the high low parameters.

And I -- one of the things I probably should mention which I didn't get into enough is the reason why people try to do this because often -- I mean the lowest policy you can have in Connecticut would be a \$20,000 policy and I'm veering off the question so -- a little bit but I just want to get this stated. If you agree to high low arbitration and -- or if you need to exhaust the \$20,000 policy before you can go after or make a claim under your own underinsured motorist coverage and it may -- you may not want to put on your full case just because of the expense of doing so.

You may not want to bring in all of your doctors and all of your expert witnesses because they alone can be extremely expensive and it's just not a conducive use of resources. And you don't need it to get to the \$20,000 threshold. So that's more of the reasoning behind this bill. Thank you, Madam Speaker.

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DEPUTY SPEAKER ORANGE:

Representative Candelora.

REP. CANDELORA (86th):

Thank you, Madam Speaker. And I -- I agree with that. I appreciate that. And I do see in the OLR report how there's reference to the court case and reference to trying to narrow that -- the issue to these specific cases. But when I look at the language of the bill it -- it's open ended sort of to any case and I guess that's what I'm concerned about is what impact it would have in cases just dealing with collateral estoppel in general.

Is -- is there a particular section of statute that this language will be inserted that might be dealing only with underinsured cause of action or -- because I don't see where the -- a statute reference of where we're amending. So I'm just wondering how the language of this bill is specifically narrowed to the -- the facts that were outlined in that appellate decision in the OLR report. Through you, Madam Speaker.

DEPUTY SPEAKER ORANGE:

Representative Fox.

REP. G. FOX (146th):

Through you, Madam Speaker, I don't have the specific section in my -- that it's going to be placed near but there is a section I do know that deals with underinsured coverage. It may also go in the arbitration section dealing with that -- that area. Through you.

DEPUTY SPEAKER ORANGE:

Representative Candelora.

REP. CANDELORA (86th):

Thank you, Madam Speaker. I appreciate the answers to my questions. And I guess I sort of struggle with this particular bill. I agree with the intent of it and what we're trying to do. But I'm not sure what impact it would have on parties that -- or individuals that might not be party to an action where the parties to that action have agreed to arbitration and as a result it might change the defenses that third parties might be able to assert by having not been part of that -- you know the original claim. And so I do have some reservations of what the real life implications might be on this -- with this particular bill. Thank you, Madam Speaker.

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Thank you, Sir. Will you care to remark further?  
Will you care to remark further? Representative Fox,  
I see you smiling up there. You have the floor, Sir.

REP. CARTER (2nd):

Thank you very much, Madam Speaker. A few  
questions through you to the proponent of the bill.

DEPUTY SPEAKER ORANGE:

I'm sorry if I called you Representative Fox,  
Representative Carter.

REP. CARTER (2nd):

That's okay because I was smiling and we had eye  
contact. That's okay.

DEPUTY SPEAKER ORANGE:

Please proceed, Sir.

REP. CARTER (2nd):

Thank you very much. You know it's been a little  
confusing not being an attorney so I just want to make  
sure I clarified a few things. Through you, Madam  
Speaker, the way I understand this it's the intent was  
to apply to an uninsured motorist but it applies to  
more than an uninsured motorists. Like for instance  
if somebody brings a suit upon me and I'm certainly  
insured does it -- does this affect me as well? Can I

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go to a binding arbitration? Through you, Madam  
Speaker.

DEPUTY SPEAKER ORANGE:

Representative Fox.

REP. G. FOX (146th):

I'm sorry, Madam Speaker. I think I got the  
question. The question is if somebody brings a suit  
against the Representative or an individual actually  
I'm -- maybe it would be best if Representative Carter  
can repeat his question.

DEPUTY SPEAKER ORANGE:

Representative Carter, would you please repeat  
your question.

REP. CARTER (2nd):

Thank you, Madam Speaker. I'm just trying to  
understand. I'm an insured motorist. If I'm hit by  
an insured motorist or I hit them can they bring suit  
against me and it go to -- and this new law would  
apply with respect to going to arbitration? Through  
you, Madam Speaker.

DEPUTY SPEAKER ORANGE:

Representative Fox.

REP. G. FOX (146th):

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Through you, Madam Speaker. It could potentially apply if -- if the circumstances warranted. However I think it was set out pretty clearly by the Ranking Member of the committee that you don't have to do this if you don't want to. So your lawyers -- the lawyers and parties would have to agree to it before -- before it would be done.

DEPUTY SPEAKER ORANGE:

Representative Carter.

REP. CARTER (2nd):

If -- if I agree to do this and I am the defendant in this case once -- once the arbitrator sets the -- the damage award and we go through this it says at the end of the legislation the damage award if any of the arbitrators shall not be used in a future subsequent civil action proceeding of any one of those parties.

So I guess my question is can I be sued again and then you know once I've had one civil action done let's say they gave out you know \$30,000, can they come back again and try to sue me under another part of the civil action and that original \$30,000 is not included -- or not considered by the court? Through you, Madam Speaker.

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DEPUTY SPEAKER ORANGE:

Representative Fox.

REP. G. FOX (146th):

Through you, Madam Speaker, no.

DEPUTY SPEAKER ORANGE:

Representative Carter.

REP. CARTER (2nd):

So I understand then this does not -- so once somebody goes into binding arbitration with this and the decision is made there's no way for someone to come back again and level -- leverage a different suit once that first one is done? Through you, Madam Speaker.

DEPUTY SPEAKER ORANGE:

Representative Fox.

REP. FOX (146th):

Through you, Madam Speaker. The -- the parties to the arbitration would not be able to bring claims against each other again if they were part of the arbitration.

DEPUTY SPEAKER ORANGE:

Representative Carter.

REP. CARTER (2nd):

So -- so it seems a lot of the answers are -- are about as part of the arbitration or parties to the arbitration. So does it -- does it open up me to any other liability from somebody else should I choose this process and the fact that my damage award cannot be used against any party or for any party in arbitration future? Does that open me up to any liability as you know Joe Q. Public? Through you, Madam Speaker.

DEPUTY SPEAKER ORANGE:

Representative Fox.

REP. G. FOX (146th):

Through you, Madam Speaker. Actually the -- I think it would very much help the person who's the defendant in this action because the reason for the defendant and their insurance carrier to agree voluntarily to arbitration is because the high of the potential award would be in the parameters of their insurance policy.

So the -- the goal would be to -- the objective here is to protect the defendant because the award would be something that is within the limits of their -- or at the limits of their insurance policy and it would not exceed it. So many times -- I mean

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arbitration exists today so this is not -- the high low arbitration is not something that is new as you heard from some of the representatives who have commented. And the reason you engage in it from -- from a defendant's side is you want to -- you want to make sure that you don't go beyond the limits of your policy because you don't want the defendant to potentially be individually responsible for paying any of the damages.

The reason for a plaintiff to do it is to make sure that at least they would recover something so they avoid the risk of getting -- getting a zero even though sometimes that could be the low end of an arbitration award. So it really -- when attorneys agree to this and when insurance companies agree to it they are really doing it to protect their insurer.

DEPUTY SPEAKER ORANGE:

Representative Carter.

REP. CARTER (2nd):

Thank you very much, Madam Speaker. And I really do appreciate the -- the Chairman's answers to my questions. You know it's kind of difficult in this Chamber not being an attorney and trying to learn as much as we can. There were a lot of concerns brought

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up to me about this bill that in some way it was making it easy for second attempts to you know leverage lawsuits against people or something like that.

It sure sounds good. It sounds like something that's protective. I'll enjoy listening to more of the debate if there any. Thank you, Madam Speaker.

DEPUTY SPEAKER ORANGE:

Thank you, Sir. Will you care to remark further on the bill before us? Will you care to remark further on the bill before us? Will you care to remark? If not, staff and guests please come to the well of the House. Members take your seats. The machine will be opened.

THE CLERK:

The House of Representatives is voting by roll.

Members to the Chamber please. The House of Representatives is voting by roll. Members to the Chamber please.

DEPUTY SPEAKER ORANGE:

Have all members voted? Have all members voted? If all the members have voted please check the machine to determine if your vote has been properly cast. If so the machine will be locked and the Clerk will take

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a tally please. And will the Clerk please announce  
the tally.

THE CLERK:

Madam Speaker, House Bill 5450.

Total Number Voting 147

Necessary for Passage 74

Those voting Yea 124

Those voting Nay 23

Those absent and not voting 3

DEPUTY SPEAKER ORANGE:

The bill passes. Will the Clerk please call  
Calendar Number 261.

THE CLERK:

The bill passes. Will the Clerk please call  
Calendar Number 261.

THE CLERK:

On page 31, Calendar Number 261, favorable report  
of the joint standing committee on commerce,  
substitute House Bill number 5516, AN ACT CONCERNING A  
STUDY OF KITCHEN INCUBATORS.

DEPUTY SPEAKER ORANGE:

Representative Perone.

REP. PERONE (137th):

Thank you, Madam Speaker. I move acceptance of

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CONNECTICUT  
GENERAL ASSEMBLY  
SENATE**

**PROCEEDINGS  
2014**

**VETO  
SESSION**

**VOL. 57  
PART 11  
3246 – 3508**

pat/gbr  
SENATE

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Necessary for passage	19
Those voting Yea	35
Those voting Nay	1
Those absent and not voting	0

THE CHAIR:

The bill passes. Mr. Clerk.

THE CLERK:

On Page 15, Calendar 468, Substitute for House Bill Number 5450 AN ACT CONCERNING ARBITRATION IN MOTOR VEHICLE ACCIDENT CASES. Favorable Report of the Committee on Judiciary.

THE CHAIR:

Good evening, Senator Coleman.

SENATOR COLEMAN:

Good evening, Madam President. I move acceptance of the Joint Committee's Favorable Report and passage of the bill in concurrence with the House.

THE CHAIR:

Motion is on acceptance and passage in concurrence. Will you remark, sir?

SENATOR COLEMAN:

Thank you, Madam President. This bill applies to limited arbitration in motor vehicle cases and specifically in cases where there is under insurance by an alleged tort feisor and under those circumstances the parties can agree to have the matter referred to arbitration and set high/lows for the arbitration and the award of damages.

The high in the under-insured case would be the limits, the upper limit of the policy and I think the bill is important because it facilitates the resolution of the case and in many cases a settlement of the case and consequently, I would urge the

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colleagues here in the Senate to support the bill.  
Thank you, Madam President.

THE CHAIR:

Senator Kissel.

SENATOR KISSEL:

Thank you very much, Madam President. I stand in support of this legislation, which I think is important. It addresses a concern that has arisen due to a recent Supreme Court decision.

We're not stating that the bases for the Supreme Court decision was incorrect, but we're stating that we need to put into law explicit and clear authority to move forward with these arbitration proceedings.

It makes a tremendous amount of sense from a juris prudential point of view. It utilizes our precious Judicial resources in an economical way. It makes no sense to put plaintiffs or plaintiffs' attorneys through the cost and time and effort to put on a full trial when there's only limited possibility of gaining compensation and then in effect, make them go through it a second time.

What the arbitration also will allow is, in an expeditious manner, to get some initial funding to the plaintiff, assuming that maybe there's some medical bills that need to be taken care of, maybe car repairs, things like that, and then the plaintiff can begin negotiating with the insurance company for the uninsured, under-insured, given the fact that all other proceeds have been exhausted, put on the case in chief or negotiate some kind of settlement, but put the effort where the effort is most needed.

And so this makes a tremendous amount of sense and I'm happy to support the bill. Thank you, Madam President.

THE CHAIR:

Will you remark? Will you remark? Senator Meyer.

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SENATOR MEYER:

A question to the proponent of the bill, if I might, Madam President.

THE CHAIR:

Please proceed, sir. Please proceed, sir.

SENATOR MEYER:

Madam President, Senator Coleman and I have talked about this bill and I've raised an issue and I want to throw out a hypothetical to him and have him answer it if he could.

I'm concerned that this bill conceals a prior award and that that concealment makes absolutely no sense, so let me give you a hypothetical.

Supposing I'm in a traffic accident and this bill relates to motor vehicle accidents and I'm hit by a drunken driver, and I go to arbitration as this bill contemplates against the drunken driver and the drunken driver's insurance company, and it turns out that the drunken driver's insurance, amount of insurance is very low. He's got just a \$20,000 policy and I go to arbitration. I get an arbitration award of \$20,000.

And then, that doesn't, I've been really hurt. I've been out of work for several months. I've been in the hospital. I've had some pain and suffering. My damages are actually \$100,000, and I have an insurance policy that provides for under insurance and the guy who hit me is under insured, and so I sue my own company on the under insurance and what this bill says, as I read it, is that there can be no disclosure of the \$20,000 that I recovered in my first suit.

The bill says that any arbitration award, Line 10, shall not be used by or against any party to the arbitration in any subsequent civil action.

The regulations in Connecticut cover that. They say, the regulations are good. They say you have to have credit for whatever you recovered in the first action.

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This bill in my opinion, and I'm asking Senator Coleman, this bill in my opinion, overrules the regulation and would conceal the first recovery of \$20,000. I think it's bad policy on its face, but I think Senator Coleman has a different viewpoint and I'd like to hear him. Thank you.

THE CHAIR:

Senator Coleman.

SENATOR COLEMAN:

Thank you, Madam President. I do have a different viewpoint, and a close reading of the language in Line 10 and afterwards, would indicate that the arbitration award would be binding only upon the parties to the arbitration. If there were an arbitration award and a subsequent civil proceeding against the injured party's, the provisions of the injured party's uninsured motorist coverage of the insurance company of the injured party would not be considered a party to the arbitration and therefore, there would be no bar against using the result of the arbitration in that subsequent civil proceeding. Through you, Madam President.

THE CHAIR:

Senator Meyer, do you have any other questions? Seeing none, will you remark? Will you remark? If not, I'll call for a Roll Call Vote. The machine will be opened.

THE CLERK:

Immediate Roll Call has been ordered in the Senate.  
Immediate Roll Call in the Senate.

THE CHAIR:

Senator Duff. If all members have voted, all members have voted, the machine will be closed. Mr. Clerk, will you please call the tally.

THE CLERK:

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House Bill Number 5450.

Total number voting	36
Necessary for passage	19
Those voting Yea	29
Those voting Nay	7
Those absent and not voting	0

THE CHAIR:

The bill passes. Mr. Clerk.

THE CLERK:

On Page 12, Calendar 430 --

SENATOR LOONEY:

Madam President.

THE CHAIR:

Senator Looney.

SENATOR LOONEY:

Yes, thank you, Madam President. Madam President, I believe the Clerk is in possession of Senate Agenda Number 2 for today's Session.

THE CHAIR:

Mr. Clerk.

THE CLERK:

Is in possession of Senate Agenda Number 2 dated Wednesday, May 7, 2014. It has been copied and distributed.

THE CHAIR:

Senator Looney.

SENATOR LOONEY:

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Calendar 334, House Bill 5339.

Calendar 336, House Bill 5056.

On Page 7, Calendar 345, House Bill 5443.

On Page 9, Calendar 417, House Bill 5410.

On Page 10, Calendar 420, House Bill 5258.

Calendar 421, House Bill 5263.

Calendar 424, House Bill 5439.

On Page 11, Calendar 429, House Bill 5581.

On Page 12, Calendar 445, House Bill 5418.

Calendar 438, House Bill 5336.

On Page 13, Calendar 453, House Bill 5133.

Calendar 446, House Bill 5150.

Calendar 452, House Bill 5531.

On Page 14, Calendar 457, House Bill 5516.

Calendar 455, House Bill 5325.

Calendar 456, House Bill 5440.

Calendar 459, House Bill 5321.

Calendar 461, House Bill 5140.

On Page 15, Calendar 468, House Bill 5450.

Calendar 465, House Bill 5341.

On Page 16, Calendar 474, House Bill 5337.

Calendar 469, 5538.

Calendar 473, House Bill 5328.

On Page 17, Calendar 496, House Bill 5115.

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SENATOR LOONEY:

If we might pause for just a moment to verify a couple of additional items.

Madam President, to verify an additional item, I believe it was placed on the Consent Calendar and Calendar Page 30, on Calendar Page 30, Calendar 592, Substitute for House Bill 5476.

THE CHAIR:

It is, sir.

SENATOR LOONEY:

It is on? Okay. Thank you. Thank you, Madam President. If the Clerk would now, finally, Agenda Number 4, Madam President, Agenda Number 4 one additional item ask for suspension to place up on Agenda Number 4 and that is, ask for suspension to place on the Consent Calendar an item from Agenda Number 4.

THE CHAIR:

Seeing no objection, so ordered, sir.

SENATOR LOONEY:

Thank you, Madam President, and that item is Substitute House Bill Number 5566 from Senate Agenda Number 4.

Thank you, Madam President. If the Clerk would now, if we might call for a vote on the Consent Calendar.

THE CHAIR:

Mr. Clerk. Will you please call for a Roll Call Vote on the Consent Calendar. The machine will be opened.

THE CLERK:

An immediate Roll Call has been ordered in the Senate.

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An immediate Roll Call on Consent Calendar Number 2 has been ordered in the Senate.

THE CHAIR:

If all members have voted, all members have voted, the machine will be closed. Mr. Clerk will you please call the tally.

THE CLERK:

Consent Calendar Number 2.

Total number voting	36
Necessary for adoption	19
Those voting Yea	36
Those voting Nay	0
Those absent and not voting	0

THE CHAIR:

The Consent Calendar passes. Senator Looney.

SENATOR LOONEY:

Thank you, Madam President. Two additional items to take up before the, our final vote on the implementer. If we might stand for just, for just a moment.

The first item to mark Go is, Calendar, to remove from the Consent Calendar, Calendar Page 22, Calendar 536, House Bill 5546. If that item might be marked Go.

And one additional item, Madam President, and that was from Calendar, or rather from Agenda Number 4, ask for suspension to take it up for purposes of marking it Go, that is House Bill, Substitute for House Bill 5417. Thank you, Madam President.

THE CHAIR:

Seeing no objection, so ordered, sir.

SENATOR LOONEY:

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disposal, asking for every shred of paper, hard copy or electronic, that are very invasive and intrusive and, essentially, cover the whole gamut of a client's business. I just think that that's wrong. I think that that's an abuse of the process, and I would imagine that, you know, the requesting party would always retain the argument, as well, to go in and say that what they're doing is reasonable and necessary and that there would be a negotiation on the other side about the extent of their reimbursement and what's reasonable to be reimbursed. But what I'm asking for is a hand, thumb -- maybe more than a thumb -- on the scale in favor of the people that we represent and the people that live in this state and the people that are asked to do these things in service of disputes out of state that have nothing to do with them. Thank you.

SENATOR COLEMAN: Any others with questions or comments?

Seeing none, thank you very much for your testimony.

JIM BUDINEZ: Thank you, Mr. Chair.

SENATOR COLEMAN: Doug Mahoney is next.

DOUG MAHONEY: Good morning, members of the committee, Representative Fox, Senator Coleman, I'm Doug Mahoney. I'm president of the Connecticut Trial Lawyers Association. I practice in Bridgeport, and I live in Newtown. And I'm here to testify on behalf of a few different bills. First is House Bill 5338. You may recall that two years ago we had -- we addressed the issue of the admissibility of medical bills, and we passed Public Act 12-142. And when we passed 12-142, two years ago, and the bill went down to the LCO, the language was

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changed so that it changed the language of the statute, so now out-of-state medical records and out-of-state medical bills are no longer admissible in Connecticut automatically under the business records exception. It was, I think, a technical error that no one intended. For decades out-of-state medical records and medical bills have been admissible in Connecticut and when the language went to LCO, apparently, we didn't catch it. I'm not sure anyone caught it, but it was certainly never the intention of it. So this bill seeks to correct that error.

And what it also does is it adds the definition of healthcare providers, social workers, and mental health workers. The idea being that these are the folks with some of the lowest paid healthcare providers we have in Connecticut, and rather than pulling them away from their patients and their care for a few hours to answer business records exception questions -- three questions, let's just let their records go in automatically like we do podiatrists and osteopaths and optometrists, et cetera. So that's what the bill seeks to do. We hope it's not controversial. We hope it makes sense, so we support that bill.

The second bill that we support is Raised Bill 5450. If -- anyone who does car accident cases in Connecticut knows that if you cannot resolve the car accident case down at the courthouse, every PJ will say to the lawyers involved, Look, can you folks get rid of this through a binding arbitration. And you make the high, the policy limits; and you make the low, zero; and you resolve the case through binding arbitration.

Whenever that happens, it's with the agreement of the plaintiff's lawyer and the insurance

company lawyer because it's voluntary, so insurance companies use this process as much as plaintiff's lawyers use this process. It's got to be in agreement; everyone's got to agree to it. And it's a quick and easy way to get rid of these cases because you put on the arbitration and in less than an hour, you put in the doctor's records, you put in the plaintiff's testimony, and that's the end of it. If you collect the policy at the high, you then go UIM. It's been done like that for years.

Last year, a case came out called Marques versus Allstate, which is an Appellate Court case, and what the Appellate Court said is that, Look, because you litigated your damages at the arbitration, the plaintiff is stuck with the damage award when they go to the underinsured motorist carrier. And -- that doesn't understand the reality, the reality is didn't litigate your damages, what you did is you put on enough evidence to get the high.

And so what this bill simply says is that if you decide to go the arbitration route, again, something insurance companies like, plaintiff's lawyers like and the judges like, no one can use that award. The plaintiff can't use the award, the underinsured motorist carrier can't use that award, and it just puts it back to the way it was.

I found it interesting that the insurance company industry filed some opposition to it because, again, the insurance company has to agree to it in the first place. Insurance companies use it as much as the plaintiff's lawyers use it, and they use it to protect their insurers because the high is always the policy, so the insurer has no exposure. So when the insurance company has a duty to protect its insured, it makes sense to do it.

So it's just interesting when it comes to a direct action against the insured now, in that context, they object. So the objection was surprising.

And the last bill we oppose is Raised Bill 5340, which is the maple-sugar bill that there's been some testimony about. You know, we can always come up with a good reason to afford someone additional immunity, but it's just unclear why it's necessary in this particular case. I've never heard of a case against a maple sugar farm. I don't know if anyone else has. But I just think that we can always come up with reasons to extend immunity, and I'm not sure there's been any showing as to why it's necessary in this case. So those are the three bills I'm here to testify on, if anyone has the questions.

SENATOR COLEMAN: Thank you very much.

Are there questions?

Chairman Fox.

REP. G. FOX: Thank you, Mr. Chairman.

And thank you, Attorney Mahoney, for being here today.

HB 5450

With respect to the arbitration bill, it's best if you could just walk us through it somewhat in terms of how the process works, and I know I'm familiar with it, I know Attorney O'Dea and Attorney Carpino and I'm sure Attorney Rebimbas, as well, Senator Kissel and Senator Coleman -- I know a lot of people are familiar with it, but I want to make sure -- I don't want to leave anybody out and then I start naming people so but --

DOUG MAHONEY: The typical scenario, and you're all going to nod your head as I tell you the story, is the following: You've got a car accident case and the person who caused the accident has a \$20,000 policy. And you go down to see the presiding judge -- whoever your presiding judge is -- and the presiding judge says to the defense attorney, the insurance company lawyer, "You know, why can't you pay the 20 policy?"

And the insurance company lawyer says, "I'd love to pay the 20 policy but I just can't get my adjuster to pay the 20 policy."

So then the judge says to you, "Look, I got an idea -- like it's the first time we've ever heard of this -- "why don't you folks resolve this case through a binding arbitration. You do it voluntarily. You each agree on who the arbitrator is going to be, and you put on the case in an hour."

What you do is you put in plaintiff's medical records, you have the plaintiff testify. You put in the police report, and then the arbitrator issues a decision based upon the finding.

You don't bring in the doctor because to bring the doctor it's going to cost you 4,000, 5,000, 6,000 dollars to come in on a case that maximum recovery is \$20,000. So plaintiffs like it because it allows us to push the case through quickly and collect the policy. The insurance company lawyers like it because they've got a duty to protect their insured, so they like it because their insured has no exposure above the policy. And a lot of times the insurance company lawyers are in-house lawyers and they like it because they've got enough work to do and they like to resolve the case this way

rather than doing it through a trial. So it works.

REP. G. FOX: So just I can -- I don't mean to -- just to walk you through it. So the arbitrator comes back, let's say there's a \$20,000 policy with 100,000 underinsured motorist, which is a fairly common pattern.

DOUG MAHONEY: Right.

REP. G. FOX: The arbitrator comes back and says 30,000.

DOUG MAHONEY: Right.

REP. G. FOX: Is that -- okay.

DOUG MAHONEY: Exactly. So it has --

REP. G. FOX: The most you can get is 20.

DOUG MAHONEY: The most you can get is 20. So what -- and the -- and the insurance company likes that that their insurer is now protected because otherwise their insurer would have had to pay the 10 out of their own pocket, the difference, so --

REP. G. FOX: And the plaintiff would then take the next step and go after their underinsured carrier --

DOUG MAHONEY: Correct.

REP. G. FOX: -- and the problem is that the Appellate Court had decided you can't do that?

DOUG MAHONEY: Well, they said you've litigated your damages in the -- in arbitration so you're stuck with the 30. You know, even though your case is actually worth 100 because you didn't

bring in your neurosurgeon, you didn't bring in your orthopedic surgeon, you didn't bring in everyone that would show you what the true damages are, you put on enough evidence to -- to exhaust the high, the Appellate Court says you're stuck.

REP. G. FOX: And even if the underinsured carrier is not a part of the litigation?

DOUG MAHONEY: Even if they're not a party. So they can -- under the Marques decision, they can use the award. Let's say I got a really big award. Let's say the arbitrator gave me \$1 million. I can't use that against the underinsured motorists carrier. That's not fair. They weren't a party to the action. So it's a little inconsistent. They can use it when they want to, but they don't have to use it when they don't want to.

REP. G. FOX: And what's the difference between arbitration and trial, if you had to go to trial on a \$20,000 trial?

DOUG MAHONEY: Sure. First of all, it's time. Second of all, it's cost, because you'd have to bring in the doctors and you have to bring in all your full testimony. And also the difference with trial is there's no cap, so the defendant, who's an insurer who's a Connecticut resident has personal exposure above their policy, so it's not good for that person either, because they've got personal exposure above their policy that goes to a verdict. There's no highs in a verdict.

REP. G. FOX: So if the fact pattern was the same and you brought a claim against a tortfeasor and the policy is 20,000 and you come out with a verdict of 30,000, what's the obligation of the UIM carrier at that point?

DOUG MAHONEY: There is no obligation to the UIM carrier, but what happens is I can collect my 20 from the insurance company and now I can go after the individual for the 10,000 overage, I can go after their house, I can go after their wages, I can go after their -- because I've got a judgment against him, there's no high in a trial. So it's not good for insurers, I mean, it's not good -- if insurance companies are interested in protecting their insureds that's not a good situation.

REP. G. FOX: Okay. Well, thank you for the explanation and --

SENATOR COLEMAN: Representative O'Dea.

REP. O'DEA: Thank you, Mr. Chairman.

DOUG MAHONEY: Good morning, Representative O'Dea.

HB 5338  
REP. O'DEA: Just a follow-up on the admitting social workers' and mental health workers' records into evidence beyond subpoena. As a defense lawyer, I can tell you that causes me to a pause, because I've had cases where a social worker will write in a report, clear brain injury caused by the motor vehicle accident that was a rear-ender and they didn't claim any injuries at the time of the accident. I think, virtually, every defense lawyer has seen those records, and so -- so in order for those to come in, you got to dispose the social worker, and I can then elicit testimony that social worker has never diagnosed a brain injury or been allowed to diagnose a brain injury. So, in fact, I just had that happen recently. So in this -- in your proposal, would those records be allowed to come in in that scenario?

protection. They already have the right to go to a judge and say, I shouldn't have to respond to this unless I get my costs. Now what happens, though, is what happens if this is not a burdensome request. This is a routine request that would not be subject to a protective order. What this bill says is in order for, say, an insurance company to respond to this, you, litigant, you have to pay their costs, all of them, you have to pay their attorneys' fees, simply for them to respond to a subpoena. That is a significant deterrent for an individual trying to bring a lawsuit, in say, for example, an insurance dispute. So you may have an out-of-state consumer who is looking to get discovery, for example, from an insurance company, and just the cost of getting that discovery alone, having to pay the costs and the attorney's fees of that witness, is enough to deter a consumer from pursuing their rights. And it's on that basis that our section and the Connecticut Bar Association is opposed to this bill.

REP. G. FOX: Thank you. Thanks for your testimony.

Are there questions?

Okay. Well, thanks, I don't see any.

ROBERT CLARK: No questions?

REP. G. FOX: No.

ROBERT CLARK: Thank you.

REP. G. FOX: Next is Susan Giacalone

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SUSAN GIACALONE: Good morning, Representative Fox, Senator Coleman -- I'm actually not used to saying that in this committee, it's usually

late in the afternoon that I get to testify -- and the members of the Judiciary Committee.

For the record, my name is Susan Giacalone. I'm here on behalf of the Insurance Association of Connecticut. I have submitted written testimony in opposition to House Bill 5450. So I'm going to try to summarize my comments and try to respond to some of the testimony earlier.

What this bill does -- it's based upon, as Representative, based upon an erroneous, arguably erroneous decision in the Marques versus Allstate case. What the Marques-Allstate case upheld and was upheld by the Appellate Court is the use of defensive estoppel. Collateral estoppel can be used offensively as the plaintiff is trying to say, okay, this -- against parties in litigation. Defensive estoppel is used by a subsequent proceeding by a nonparty against a party who is subject to the prior litigation who actually had their opportunity to litigate.

In the Marques case, and in any case, the plaintiff has the opportunities to present as much evidence, as you heard. They put in all their medical bills -- and it's ironic that they are saying, well, we didn't get to really litigate it in arbitration, when they have the bill before you expanding a bill they got two years ago to make it easier to allow medical bills to just be submitted without having to call the doctors. So the -- the plaintiff -- the parties have voluntarily agreed arbitration -- knowing it's binding, they have the ability to litigate the cases, which the court found in the Marques case, they had the ability litigate, they were bound by the arbiter's award.

Look at what this case does, if this is looking just to, as they're claiming, regain status quo, restore it. Why is it limited just to the award and just to a particular type of claim? What this is trying to preclude is the incidents when an arbitrator has to determine an award that precludes the ability to pursue, basically, a UIM claim, because the award doesn't trigger the UIM coverage. And that's the case in Marques case and that was -- is how it would -- go on forward, and how the UIM carrier who can use the arbitrator's award or (inaudible) is now precluded under the provisions of this law, eroding the use of defensive collateral estoppel and process, a rule that's been accepted, permissive by the court in multiple cases across any type of case, and limit it just to certain cases. For that reason, the insurance industry adamantly oppose the contents contained in the bill. I'll answer any questions you have.

REP. G. FOX: Well, thank you for your testimony.

I have a question. So, you heard my example that I gave Attorney Mahoney where if you go to arbitration and get an award of 30,000 with a \$20,000 policy, the most you can get is 20 at the arbitration, and then you would then go ahead and proceed against the underinsured carrier, so, in that scenario, it would be your position that the most they can go after would be 10,000?

SUSAN GIACALONE: No. Because -- because the uninsured motorist carrier wasn't party to it. The plaintiff might -- again, that would be if the plaintiff tried to use it, it would be offensive collateral estoppel, but because the UIM carrier wasn't party to it, they can't say, Well, look, this court said it was worth 30, you owe me 10.

The defense can say, Well, you litigated it, you're right. It's only worth 30. You're only going to get 10 more.

They can use it to that advantage, because the plaintiff might say, Well, they said 30, but I really think it's worth 40 or 50.

Or take the example where you have a -- multiple parties who have a -- gone to arbitration and the arbiter says, Well, either you're worth 10, you're worth 20 minimal policy, you're worth 10 -- each person is worth 10 or you're worth 10 and someone else is worth a little bit more. You know, they could have awarded him more, but they only said 10. The policy is exhausted triggering the UIM coverage, but the arbiters decided your claim, being a final determination, the value of their claim, and now if this went forward, the UIM carrier can't say, well, you litigated it and the value of your claim was assessed now I can't look at that any longer.

So now you're actually requiring someone to relitigate -- okay, two bites at the apple to litigate the value of their claims.

A VOICE: (Inaudible.)

SUSAN GIACALONE: Complaints, correct.

REP. G. FOX: So what if, for example, the plaintiff -- what if the arbitrator is somebody who awards \$250,000 on a \$20,000 policy? What rights does a plaintiff have in that instance?

SUSAN GIACALONE: As far as the --

REP. G. FOX: UIM carrier.

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SUSAN GIACALONE: -- then pursuing UIM? They can't use it. They can't use the arbiter award because the UIM carrier is not a party to the arbitration proceeding.

REP. G. FOX: But can they pursue a UIM claim?

SUSAN GIACALONE: If they -- underlying policy was 20 and they had more coverage, yeah. Because they would then say, well, you know, my -- my claim is worth a lot more, and I can pursue it.

REP. G. FOX: Even if they went to arbitration.

SUSAN GIACALONE: Even though, yeah, because it's not precluding, it's -- what this does -- it's not precluding them from pursuing a UIM case, it's precluding the UIM carrier from using something that they voluntarily went into and maybe they got an assessment of what their value of their case is and using it going forward. It's eliminating the defensive collateral estoppel, which has been used -- and is used by -- in a multitude of cases because it's only being precluded in this matter.

REP. G. FOX: And as a general policy, does the Insurance Association of Connecticut encourage parties to go into arbitration?

SUSAN GIACALONE: The Insurance Association of Connecticut doesn't get involved in litigation.

REP. G. FOX: Okay.

SUSAN GIACALONE: Carriers, again, you're talking two different carriers here. You're talking the carrier who has the tortfeasor --

REP. G. FOX: I know.

SUSAN GIACALONE: -- and then you're talking about the carrier of the UIM thing. As far as the day-to-day operations of what's encouraging, obviously, we want to resolve cases; we want to resolve them for what's fair and just. And if arbitration is a way of doing it and less the fact -- less costly and more effective, then, obviously, I think, the carriers would pursue that. This doesn't preclude that in any way.

REP. G. FOX: Senator Kissel.

SENATOR KISSEL: Yeah. Along the lines of what Chairman Fox was saying, what I can't get by -- and I always feel bad because you always come here and testify year after year and it's hard for me to be on the same page with you -- is that if the award is to the benefit of the uninsured, underinsured carrier then, oh, tough luck, plaintiff you're stuck with it under the guise of you had every ability to get in as much evidence regarding damages that you could.

Now that's sort of belies the whole point of the expeditious arbitration process, which when the judge says, Do you guys want to agree to go arbitration? Everybody sort of -- what I'm hearing, and back in the day when I did personal injury, they didn't do this. Pretty much everything was litigated, so this is new - - shows how old I'm getting in the field.

But I don't understand that if it's Chairman Fox's second example that it's a very large award that they're not bound. See what's good for the goose is good for the gander. You can't have it both ways. And what you're telling me is you want it both ways. If it's a low award, tough luck, plaintiff, you're stuck with it. If it's a high award, oh, we're not a party, we don't have to live by it, we get our own little trial.

And tell me how that's fair?

SUSAN GIACALONE: Well, the difference there -- it's twofold. The difference there is that the UIM carrier, if the high award wasn't party there, they weren't able to put on any of their evidence to say why maybe it wasn't worth what the arbiter is deciding. If the arbiter put the value on it and the plaintiff voluntarily is going into it and now they want to say, well, see now this -- we -- you know, it -- very -- remember the plaintiff is using the number to say, well, look if this exhausts the policy, then the carrier -- the carrier has the option -- they might say, yeah, okay, we think that's a fair value, we're going to take it. But if it's not, they still have their right to -- case in chief, my guess, the bigger question I have -- and I can see your point, yeah, you know, it -- but, again, they're not a party, but, again, they're not a party but the person chose to litigate. They voluntarily went into arbitration knowing it was going to be binding on them, knowing what the rules, long precedented rules, have been, if it truly is returning things to status quo, why is it limited only to the award? Because what if the arbiter says you're 50 percent contributory to it? That can be used by anyone going forward, -- just the award, just the value and just in these incidences. If it's status quo, if this case screwed up status quo, it's screwing it up for all cases, all aspects, not this very narrow perspective.

SENATOR KISSEL: Well, all I know if the way it stands right now as it reminds me of this joke my dad used to play on me -- and my dad is still alive -- but it was heads, I win; tails, you lose. And that's the way it seems right now. Thank you.

SUSAN GIACALONE: And just to that point, I mean this has been the long -- it's not a new decision. It's codifying -- it codified the practices. It affirmed the lower court. It's affirmed by numerous courts about confirming the concept of defensive collateral estoppel.

REP. G. FOX: Thank you.

Are there other questions?

Representative Rebinbas.

REP. REBINBAS: Thank you, Mr. Chairman.

And good morning.

SUSAN GIACALONE: Good morning.

REP. REBINBAS: I guess I'm trying to wrap my head around all of this, and I guess I just -- it's not clear to me in the sense of when you represent that this is relitigating after an arbitration, I think you would even concede that arbitration is not litigation. It's very different in that regard. And then when you also indicate that the UIM was not present during that so-called, as you described, "litigation," which is the arbitration that we're talking about, because they're not triggered yet, so that's an impossibility.

So -- and, again, if the insurance company has the ability to say, no, we don't want to participate in arbitration, then all they need to say is no. But, quite frankly, they're agreeing to it because it works for all parties involved, including the insurance company, because if you can settle something, then you're not spending additional money and resources for the true litigation before a

judge in an open court or with witnesses and not an arbitration. So, I guess, I'm going to have to agree with some of the, you know, points that have been made. You can't have two bites at the apple and that's what it kind of seems like. It seems -- again, my understanding is the current system has worked; the insurance company has the option to say, no, we don't want to arbitrate. But I don't see where then, you know, all the other points makes any sense.

SUSAN GIACALONE: Well, and I agree. Arbitration is not litigation, but the courts have said, look, the rules are binding, you know, there's case law that says, you know, we're going to treat the estoppel process --

REP. REBIMBAS: Sure. Rules for arbitration.

SUSAN GIACALONE: Correct. I agree that it's beneficial to the insurance company handling the tortfeasor. If it's beneficial to settle the case, they'll go arbitration.

You have two different carriers here. The UIM carrier is not the same carrier as a tortfeasor carrier. So the tortfeasor carrier who agrees to arbitrate does not bind the other UIM carrier, two different carriers, so those are two different concepts that I think are trying to get melded together.

REP. REBIMBAS: No, I completely understand they're two different ones, and sometimes the companies could be the same, but they're different policies, of course.

SUSAN GIACALONE: They're different policies. So those are two -- so they're not bound. So that -- so -- for -- your statement was where the insurance companies, they don't want it -- want

it to go to arbitration. That's right. The insurance company doesn't have to. The UIM carrier, as you very correctly pointed out, is not a party; therefore, they're not triggered yet, so they're not part of that arbitration. They have no say whether it goes to arbitration or not.

REP. REBIMBAS: And, legally, they can't.

SUSAN GIACALONE: Right. They have no -- they can't. So they can't get into that -- they can't -- that's why they're not bound by the value -- if it's a high value set by the arbiter because they're not party to it. However, the --

REP. REBIMBAS: And just for clarification of, but you do understand in arbitration, the value that's being requested is hardly ever, if never, higher than the policy. So if you have someone with a small policy, let's say, \$20,000, no one in their right mind is going to walk into an arbitration and ask for a higher value even though, legitimately, that attorney for the plaintiff, the injured party, may believe there are catastrophic injuries and well deserved beyond 20,000.

SUSAN GIACALONE: Oh, and, again, I haven't done this in a long time, but I'm going based on the fact pattern of the case that they've cited. And if I recall correctly in that fact pattern, it said the arbiter was unaware of the high-low value placed. And the arbiter made the decision based upon the evidence presented -- presented to them on the value of the claim. So the arbiter didn't have the knowledge of, well, the policy limit is 20 and that's all, you know, that's the high, and the low is somewhere over here. They were given the case -- the evidence in the case, which was the

medical bills -- it was said earlier was the medical bills, and again, very -- other bill that they have pending on here, there's -- they can do across the board -- and they made the determination based on that information.

Now they held back something? Well, they held back something -- again, the plaintiff doesn't have to agree to go to arbitration. They can say, no, I don't want to, I don't want be bound by it because that number could be used against me. Again, a principle -- we're not -- I'm not arguing the validity of the principle because it's law. I mean, it is the law, it has been the law, and that's all that the court held in Marques, is it upheld the principle of defense of estoppel, collateral estoppel. So it was the plaintiff who went in and put on their case, which if they hold back, and in my understanding the arbiter didn't know they were holding back because they had a cap -- they said, okay, these are what are value is, come up with a value. They agreed separately to what the high would be and the low would be, so if the arbiter came in between that or below that, well, all right, if the arbiter says it's only worth 5, I agreed to give you 10, I'm going to give you 10. But if the arbiter came back and said it's worth 40, I've only -- I have agreed to take only the 20.

It's been -- and it's going to be in limited circumstances that, especially, particularly in this case where it was the trigger, the actual trigger, and it didn't trigger the UIM coverage, but to say now across the board, you cannot use that in future proceedings, it's taken away a technique or a tool, a rule, that's been used for decades and only in a certain number of cases. Again, I know I'm talking in circles, but it's -- it's limited to the award in one particular case.

REP. REBIMBAS: Thank you for your testimony.

REP. G. FOX: Thank you.

Are there other questions?

Well, I have some -- oh, sorry -- Senator Musto.

SENATOR MUSTO: Thank you. I'm sorry I missed your testimony. I was out of the room for little bit. But your position is you don't -- that the bill, as it stands, is not good and should not be passed. Correct?

SUSAN GIACALONE: Correct.

SENATOR MUSTO: And it's your position that the case we're talking about, Marques, I believe is the pronunciation, I'm not sure is --

SUSAN GIACALONE: I'm guessing.

SENATOR MUSTO: Okay. We'll just call it Marques -- that that is, essentially, just a reiteration of current law or prior law to the case, that it's just a reiteration of law. It's been the law for decades?

SUSAN GIACALONE: Correct.

SENATOR MUSTO: Okay. So, in such a case, if I'm understanding this correctly, then the insurance company, the UI insurance company -- UIM insurance company, at a later date can come and assert that this was the award of the arbitrator, that's -- that's all we're liable for. Correct?

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lgg/cd JUDICIARY COMMITTEE

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10:00 A.M.

SUSAN GIACALONE: Liable for or does -- in this case, it didn't trigger the UIM coverage because the award was below the UIM limits.

SENATOR MUSTO: Okay. But the plaintiff, the injured party cannot use that in the same way. It can't.

SUSAN GIACALONE: Correct. Because the UIM carrier is not party to that arbitration decision --

SENATOR MUSTO: I understand.

SUSAN GIACALONE: -- because the case law and the way collateral estoppel is defined is if the party has an opportunity to litigate.

SENATOR MUSTO: Right. So, in a trial, if it weren't an arbitration, if it were a trial, would the rule be the same?

SUSAN GIACALONE: Yes.

SENATOR MUSTO: Okay. So the UIM -- I'm sorry?

SUSAN GIACALONE: My understanding, yes.

SENATOR MUSTO: So if it -- if it were after a trial, the UIM coverage -- insurance company would be able to say, you got \$50,000 at trial, we're responsible for whatever is the uninsured part of that is, but the plaintiff would not be able to assert, you owe me this much money because that's what I got at trial and it's -- any amount that's above the coverage from the defendant, I'm entitled to that. The plaintiff can't do that; is that correct?

SUSAN GIACALONE: Right. Because they -- they weren't party to the underlying case.

SENATOR MUSTO: Okay.

SUSAN GIACALONE: So -- but, likewise, if the -- say the jury came back and said, oh, you're only worth 20 and that's -- it's the same effect. If a jury comes back and says, well, we found the value of your case to be \$20,000, well, it doesn't trigger the UIM coverage, you don't have the right -- you can defensively estop it. Using that (inaudible) --

SENATOR MUSTO: So the defendant's coverage was a standard 20, 40, you know, minimum policy and so they get -- but they get awarded at trial, 40, for example --

SUSAN GIACALONE: Right.

SENATOR MUSTO: -- then UIM cover -- carrier would not be responsible for anything at that point because it's after a trial, but the plaintiff is prohibited from asserting an automatic \$20,000 claim against the UIM coverage; is that correct?

SUSAN GIACALONE: Correct.

SENATOR MUSTO: Okay. So my first question is should the law be or should we make some rule that the UIM coverage carrier has to come in is going to be given notice of the trial and has the opportunity, or the arbitration for that matter, and has the opportunity to come and defend, because it seems a bit one-sided. Right? I mean, I think it's -- it's clear that it's one-sided, whether -- whether there is a valid purpose for it or not. I understand that you've got collateral estoppel issues or res judicata issues, whatever the appropriate theory would be, but it seems like the plaintiff is being prohibited from using a judicial determination in its favor, when

you're going to have the same case put on, essentially.

And the other point -- that's my first question.

My second question is, if not, or, perhaps, even if so, do you understand or do you -- what response do you have I should say, I'm sure you understand -- what response do you have to say that when we know there is a high-low, there's only, say, a \$20,000 limit that no one's going to bring in the neurologist, and the cardiologist and the optometrist, the ophthalmologist, they're not going to bring in all these people at a cost when the most they can get is \$20,000 in the arbitration, or if the defendant is judgment proof in the -- in the trial. They're not going to spend all that money on experts and doctors, et cetera, but they might do that if the uninsured motorist carrier is there because the uninsured motorist carrier may be able to pay that. So if you can answer those two questions for me I'd appreciate it.

SUSAN GIACALONE: I don't know -- I can't answer, I'd have to say, in fact, if we want to be forced into it in this case because, technically, we don't have exposure so we're not a party, and to, I mean, arguably say that we have to go into a case or -- and incur costs, because now we have to incur costs in defense that maybe we never end up being in -- depending how that decision goes, now you're forcing us into a situation and incurring costs that we never may be involved in to begin with.

The idea of making them litigate a second time is kind of ironic, because this is actually kind of what they're trying to accomplish with what they're putting forth in this bill. They

litigated the value once, per arbitration, and they're agreeing to being bound it now, now they're saying, okay, now we want another bite at the apple, we didn't get what we wanted here, so now we want another bite and another opportunity to relitigate the same issue a second time and see if we can come up a different outcome.

Now the whole idea --

SENATOR MUSTO: If you don't mind, let me stop you right there, because where I significantly disagree with you on that. I mean, I really -- that is not my point at all. My point is that if you're going to litigate a case where the most you can get is \$20,000, you're going to handle that case very differently than a case where you could possibly get 3, 4, 500,000 dollars depending on the injuries. It's going to be a -- you're not going to do the same things. You're not going to spend the money on the experts, you're not going to spend the time preparing for the case, you're going to go in and say, my client's medical bills are \$30,000, the policy -- the arbitrator may not know the policy limit is 20, they may not be aware of the high-low, and frankly, that's probably appropriate because you don't want to prejudice them on that, but you're going to come in and say, hey, my -- my client's medical bills alone were \$30,000, he had two surgeries on his foot, he was out of work for a month and, you know, we want as much as you'll give us. The arbitrator may say, you know, fine, your medical bills alone are worth more than that, I'll give you \$100,000 -- whatever it is.

You're not going to push the case the same way. You're not going to bring in the same experts. You're not going to do the same work.

But if you're litigating with the UIM coverage -- carrier, because they're denying the claim for whatever reason, you're going to do that when there's liability exposure. And what I hear the insurance companies saying is we want to have it both ways, we want to be able to say, if the award is low enough forget it, you know, we'll -- we'll pay it, maybe we'll pay it maybe we won't, but we're not going to be bound by it. Plaintiff is bound by it. The injured party is bound by it. Their insured is bound by it, right, because in UIM coverage the injured party is their insured. It's not the other person. So what they're trying to do is say, our insured is bound by this but we're not. And that's the question I want you to answer. I understand they may not want to get involved from the start, but if they're not going to get involved from the start, why should we bind the injured party who's their insured, who they have a contract with, right, and they have a duty to, they have obligations to, why should we bind them only one way? And if we're going to bind them only one way, maybe we should get them involved in the beginning, or just say it's completely nonbinding under all circumstances. Make it fair to both parties.

I see a significant amount of simple unfairness here, and I'm very concerned about it. It's not come up in my practice. I've not heard of this issue before, but the more I sit here and listen to the testimony of my colleagues and the people who are testifying about it, it seems to me this is very one-sided in favor of the insurance company, and they're trying to have it both ways, and it really is -- is not sitting well with me. And so if you could address that issue I'd really appreciate it.

SUSAN GIACALONE: And again, as I was going to say -  
- I alluded to, as far as the amount of  
testimony put in it at arbitration that's --  
again, if the plaintiff thinks their case is  
worth a lot and they don't want to put in the  
case and chief, they don't have to agree to go  
to binding arbitration, first and foremost.  
They are sitting here before you with a bill to  
expand, a bill that they put forth just a  
couple of years ago to allow just the medical  
evidence to go in, so they don't have to call  
doctors in certain cases. If they have a case  
that's worth that much money and it is  
difference between doctors testifying and the  
amount of the bill comes in to play, I  
seriously doubt -- and I'm not practicing so I  
can't say and I'm not casting aspersions --  
that's going to be one of these type of cases  
we're talking about here.

We're talking about the cases that are kind of  
iffy on the value and close to the policy  
limit. But, again, I don't -- and I'm not  
saying that -- but the -- I guess the broader  
thing is if you have an issue with the outcome  
of how it's being used -- and, again, this is  
limited to the UIM case. This bill -- type of  
claims -- this -- the defensive estoppel, the  
ability for a nonparty to use something  
determined in arbitration against that party in  
a subsequent proceeding, but that party not use  
it against this nonparty in a subsequent  
proceeding, that's used for all cases, across  
the board, all types of claims, all types of  
cases. That's what that case, the appellant  
case, upheld was that process, the defensive  
estoppel process. So it's -- this is just  
limited to a UIM claim, but it can be used in  
any other case out there that involves a  
subsequent proceeding where it's been  
arbitrated, gone through binding arbitration,  
and the award might have gone against the

plaintiff, and now they're trying to bring a subsequent action and that -- against somebody else, based on the same facts that party can use that against the plaintiff, but the plaintiff can't use it against them.

So I guess if you're restoring status quo and, again, why is it just the award? Why isn't it other things the arbitrator can decide in that case? So, if it's status quo, then it should be status quo for everybody and not limited to a very finite claim and type of case.

SENATOR MUSTO: In what other types of cases does the third-party have a contractual obligation to the plaintiff that you can think of?

SUSAN GIACALONE: In contract cases. You can have a contract case where you may have a subsequent contract and -- again, I don't do this. I'm basing it upon information I'm getting from my guys -- but contract cases you can have two separate contracts. And you can have a contractual obligation, and you can have it -- the same contract with two different parties -- I don't know and I'm trying to draw at straws, but it is --

SENATOR MUSTO: No. I know, you're trying to do this on the fly --

SUSAN GIACALONE: Right, but it is a contract --

SENATOR MUSTO: But I'd be very interested to hear if you can get -- get back with your folks and find out if there's a similar type, because this is somewhat -- it seems to me to be somewhat of a unique situation. And I'm extremely concerned about it. It seems that it's not appropriate in this case, and maybe it's because of the uniqueness of the case, or

maybe I'm not understanding it. That's entirely possible.

So I'll keep thinking about it, but it seems to me that because of the relationship between the insurance company and the insured in the UIM coverage, in the UM coverage, that this particular situation warrants a different rule. And when you say they don't have the requirement to go to arbitration, we just established if they go to trial, it's the same rule. So I'm not sure that that helps.

SUSAN GIACALONE: But they're not party to the underlying case.

SENATOR MUSTO: I understand that. And in both cases, whether you're in arbitration or in trial, it's the same rule.

SUSAN GIACALONE: Right.

SENATOR MUSTO: And you're -- so arbitration is just another fact-finding. I'm not -- I'm not sure it matters.

SUSAN GIACALONE: I guess I'm not following the -- I'm sorry. I guess I've lost the connection there. I apologize.

SENATOR MUSTO: It's probably my fault, but -- okay. Thank you very much.

REP. G. FOX: Representative O'Dea.

REP. O'DEA: Thank you, Mr. Chairman.

Thank you for your testimony. I'm sorry, I was going in and out with various things, but I have the distinction of being the defense lawyer who lost a case and changed the law in Connecticut whereby, in a small claims action,

there is no res judicata on a property damage claim for personal injuries. The restatement of torts, Connecticut used to follow that that you would be precluded from claiming personal injuries if you went forward on a -- in a small claims case and got property damage, you would then be precluded from seeking damages for personal injuries at a later date. That was the state of the law in -- the law in the state of Connecticut until I came along on the Supreme Court and changed it, so, you can blame me for that one.

But, in this case, I do go to arbitration often and, I don't know if you heard Attorney Mahoney's testimony about how the process practically works, and so what I understand is that you're opposed to that because you want to be able to use that -- there was an analogy of a \$30,000 award and a \$20,000 policy limit. And the insurance companies want to be able to say your award is only that \$10,000 on a UM case?

SUSAN GIACALONE: It could be used that way, you know, it could be. I'm not sure that this case more is the question whether about -- because the value was below --

REP. O'DEA: Right.

SUSAN GIACALONE: -- and not triggering the coverage, I mean, so I think it was more, and now you're only worth 10 but it's not even worth it so --

REP. O'DEA: I got you. So I will say from a practical standpoint, it does -- the docket does go much quicker, and would you concede that point that that would necessarily, if you had your druthers, that it would slow down the

arbitration process, because plaintiffs would have to put on all their case?

SUSAN GIACALONE: I guess I would have to disagree with that because my argument is that the case that they're trying to overturn codified current practices. So if it's codifying current practices and current practices are keeping things flowing, I don't see how that's a detriment to the process.

REP. O'DEA: Okay. Thank you very much for your testimony.

Thank you, Mr. Chairman.

REP. G. FOX: Thank you.

Are there other questions?

Thank you, Susan, I have just one more question, and I -- you've done a good job and I appreciate your taking all the questions.

One of the things -- sometimes these arbitrations can be fairly informal, and I'm wondering if it's possible to put in to an agreement, an arbitration agreement, that, you know, irrespective of the arbitrator's award, this will be treated as a settlement for underinsured motorist coverage, and if they did that or if we could maybe -- maybe can write something that would allow them to do that. I don't know if anyone has seen that since this decision came out.

SUSAN GIACALONE: I haven't seen it. The only concern I have there, and again, this is me speaking and I've got no basis on it, is binding a nonparty to an agreement that they are not privy to, because, you know, an uninsured motorist carrier is not privy to that

arbitration proceeding, is that what you're saying, it's binding on them?

REP. G. FOX: No, no, but what I'm saying -- like, for example, if -- if the tortfeasor's carrier, if it's a \$20,000 policy and they just say we'll write a check and settle it without the arbitration, then there's no question as to what you're able to go after. So I think in an arbitration agreement, you can almost put in whatever the parties agree to put in, and if the parties wanted to say, even though we're going to have a, you know, somebody make a decision for us for purposes -- for the future purposes, we want this to be considered as a settlement and not a decision and we can just go forward with underinsured motorists coverage.

SUSAN GIACALONE: I'll have to get back to you --

REP. G. FOX: Okay. No, I'm just wondering --

SUSAN GIACALONE: I guess -- I guess what I -- my hang-up is that they're asking the arbiter to set a value of the claim. So maybe that's where you change it. You're not asking that arbiter to put a value on the claim, because then -- that's -- that's, I think, what happened on the Marques case is because they already set a value on the claim, the value of the injury. That's what they were -- they were bound by. If -- so now they're saying, Well, we don't want to be bound by it because it wasn't to our advantage. I guess it's the -- the opposite argument of, you know, we don't want -- we don't want us as a, you know, two bites of the apple or use it negatively but you're allowing the plaintiffs to do it. So maybe don't ask the arbiter to put a value on the injury but put a value on the case? I don't know. I mean, that's --

REP. G. FOX: Okay.

SUSAN GIACALONE: -- a distinction with (inaudible).

REP. G. FOX: Well, it's just a thought. Obviously, it's generated some discussion. So -- and thank you for your answers today.

SUSAN GIACALONE: Thank you.

REP. G. FOX: Next -- we passed this name earlier. Is Daniela Giordano here?

Good afternoon.

DANIELA GIORDANO: Good afternoon, everybody. Thank you very much for taking me at the end. My name is Daniela Giordano, Senator Coleman, Representative Fox and members of the Judiciary Committee. And I'm the public policy director for the National Alliance for Mental Illness, NAMI Connecticut. And we're the state affiliate of NAMI, which is the nation's largest grassroots mental health organization dedicated to building better lives for all those who are affected by mental health challenges.

And I'm writing to you today on behalf of NAMI Connecticut to support HB 5367, AN ACT CONCERNING IMPLEMENTATION OF ENHANCED PROTECTIONS AGAINST DISCRIMINATION.

And I think, as you have heard earlier, with this bill, people with a mental disability would now be covered against discrimination as a protected class. This proposal would finally afford the same protections enjoyed by people based on other characteristics, such as color, race, sex or physical disability, to people living with mental health challenges.



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Raised Bill 5450  
Public Hearing: 3-5-14

TO: MEMBERS OF THE JUDICIARY COMMITTEE  
FROM: CONNECTICUT TRIAL LAWYERS ASSOCIATION (CTLA)  
DATE: MARCH 5, 2014

RE: **SUPPORT OF HB5450, AAC ARBITRATION IN MOTOR VEHICLE ACCIDENT CASES**

The CTLA strongly supports HB5450 an Act Concerning Arbitration in Motor Vehicle Accident Cases and urges its passage.

Arbitration is a tool that has been used for many years by the courts to resolve claims for personal injury sustained in a motor vehicle accident. In the typical situation where arbitration is being used, the person who caused the accident only has a minimal policy of \$20,000.00. Rather than having the parties go through the time and expense of a full jury trial, the court will frequently encourage both parties to voluntarily submit the case to a binding arbitration in order to resolve the claim.

In order to make the arbitration process more appealing to the defense, the court will encourage the parties to agree to a "high". When the parties agree to a "high", that means that the arbitrator cannot award more than whatever the "high" is. In cases where the person only has a \$20,000 policy, the high is frequently the \$20,000.00. This is a benefit to the defendant as his/her exposure is capped within the policy limits. The arbitrator is not told what the "high" is.

At the arbitration hearing, the plaintiff's attorney will make a judgment call as to how much testimony and evidence to provide the arbitrator. Typically the parties will testify and the plaintiff's attorney will submit the medical bills and records for treatment. In cases where the "high" is \$20,000.00 the physicians will not be brought in to testify due to cost constraints. Orthopedic Surgeons and Neurosurgeons, for example frequently charge in excess of \$4,000 for coming to the arbitration to testify. So, the plaintiff attorney will rely just on the records and bills.

If the plaintiff is able to collect the full policy from the defendant, the plaintiff is now in a position to pursue an underinsured motorist claim against their own policy for the balance of the compensation for their injuries. However, if they had received a high damage award from the arbitrator, that number cannot be used against the underinsured motorist carrier as the underinsured motorist carrier did not participate in the arbitration. It would not be fair.

This process has been used for years. However, Marques v. Allstate, 140 Conn. App. 335 (2013) changes everything. In Marques, the court found that because the plaintiff litigates their damages in the arbitration, they are prohibited from litigating damages again in the underinsured motorist action. The plaintiff is tied to the arbitration award. So, although, the plaintiff did not bring in the doctors to testify and did just what was necessary to achieve the "high" their damages have been determined, if the underinsured motorist carrier wants. Or, the underinsured motorist carrier can require the plaintiff to litigate their damages again in the subsequent proceeding.

As a result, it makes no sense for a plaintiff with underinsured motorist coverage to arbitrate their case against the person who caused the accident as they now have to put on their entire damage case. The courts have lost an easy and effective tool for quickly moving business.

HB5450 simply restores things to where they were before the Marques decision. It is limited to only car accident cases. It says that if the parties agree to arbitrate the case, nobody can use the arbitration finding in a subsequent underinsured motorist proceeding.

**WE STRONGLY URGE YOU TO SUPPORT HB5450. Thank you.**

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LINE 18**Statement****Insurance Association of Connecticut**

Judiciary Committee

March 5, 2014

**HB 5450, An Act Concerning Arbitration  
In Motor Vehicle Accident Cases**

The Insurance Association of Connecticut, IAC, is strongly opposed to HB 5450, An Act Concerning Arbitration In Motor Vehicle Cases as it unfairly seeks to abolish the use of the collateral estoppel rule, only as it applies in certain cases.

As written HB 5450 would eliminate the use of the collateral estoppel rule as it applies to personal injuries cases arising from motor vehicle accidents in which the parties have voluntarily chosen to use binding arbitration. The proponents claim HB 5450 restores status quo, but then why limit it to certain types of cases, and just to the award? Arbitrators render decisions on a whole host of cases and on matters more than just the awards. HB 5450 does not "restore status quo" but destroys it.

HB 5450's stated purpose is "to permit parties to a civil action to elect to have a matter referred to an arbitrator" however, parties in any civil action, including those involving personal injuries sustained in a motor vehicle accident, are currently able to agree to have a matter referred to an arbitrator. The crux of HB 5450 lies in the last sentence of the proposal: "The award of the arbitrator, if any, shall not be used by or against any party to the arbitration in any subsequent civil action or proceeding." (HB 5450 Lines 8-10) The effect of that language is to eliminate the collateral estoppel rule as

it relates to awards entered in binding arbitration in motor vehicle personal injury actions; mainly underinsured motorist (UIM) insurance coverage claims.

Collateral estoppel prohibits the relitigation of an issue when that issue is actually litigated and necessarily determined in a prior action. Marques v. Allstate, 140 Conn. App. 335, 339, 58 A.3d 393, 396 (Jan. 22, 2013) citing Connecticut Natural Gas Corp. v. Miller, 239 Conn. 313, 324, 684 A.2d 428 (2006). The doctrine may be invoked offensively, in support of a party's affirmative claim against another party, or defensively when a defendant in a subsequent action seeks to prevent a plaintiff from relitigating an issue that the plaintiff has previously litigated in another action. See Gionfriddo v. Gartenhouse Café, 15 Conn. App. 393, 404, 545 A.2d 284 (1988) aff'd 211 Conn. 67, 557 A.2d 540 (1989). The collateral estoppel rule applies to binding arbitration proceedings. LaSalla v. Doctors' Assocs., 278 Conn. 578 (2006). HB 5450 seeks to change the status quo by eliminating the use of collateral estoppel as it relates to an arbitrator's award.

For a party to be bound by the prior adjudication, or estopped, the party had to have a full and fair opportunity to litigate. Marques supra. Parties participating in binding arbitration do so voluntarily. The level of participation is fully within the party's control knowing they are bound by the decisions rendered by the arbitrator. Should a party decide to "hold back" and present only part of their claim, they assume the risk. That is status quo.

In the Marques matter the parties agreed to arbitrate the case. The parties submitted the case to binding arbitration and presented their case to an arbitrator to decide the value of the plaintiff's claim. The parties put forth their evidence and the arbitrator made a determination as to the full value of the plaintiff's claim. The plaintiff

then sought to pursue a UIM claim, however, based on the full value of the plaintiff's claim as determined by the arbitrator, the claim did not trigger the UIM coverage. Because the plaintiff had an opportunity to litigate the value of the claim before the arbitrator, the UIM carrier used collateral estoppel defensively against the plaintiff as is permitted by law. The courts in the Marques matter simply explained current practices, thus maintaining the status quo, upholding the insurer's use of collateral estoppel.

To eliminate the use of collateral estoppel will permit a party an opportunity to relitigate the same issue twice, with potentially different and conflicting results. There is no compelling reason to erode well-established doctrines to permit a party to retry the same issue multiple times – further burdening the justice system

To preserve fairness and maintain the status quo, the IAC urges your rejection of

HB 5450.



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Raised Bill 5450  
 Public Hearing: 3-5-14

TO: MEMBERS OF THE JUDICIARY COMMITTEE  
 FROM: CONNECTICUT TRIAL LAWYERS ASSOCIATION (CTLA)  
 DATE: MARCH 5, 2014

RE: **SUPPORT OF HB5450, AAC ARBITRATION IN MOTOR VEHICLE ACCIDENT CASES**

The CTLA strongly supports HB5450 an Act Concerning Arbitration in Motor Vehicle Accident Cases and urges its passage.

Arbitration is a tool that has been used for many years by the courts to resolve claims for personal injury sustained in a motor vehicle accident. In the typical situation where arbitration is being used, the person who caused the accident only has a minimal policy of \$20,000.00. Rather than having the parties go through the time and expense of a full jury trial, the court will frequently encourage both parties to voluntarily submit the case to a binding arbitration in order to resolve the claim.

In order to make the arbitration process more appealing to the defense, the court will encourage the parties to agree to a "high". When the parties agree to a "high", that means that the arbitrator cannot award more than whatever the "high" is. In cases where the person only has a \$20,000 policy, the high is frequently the \$20,000.00. This is a benefit to the defendant as his/her exposure is capped within the policy limits. The arbitrator is not told what the "high" is.

At the arbitration hearing, the plaintiff's attorney will make a judgment call as to how much testimony and evidence to provide the arbitrator. Typically the parties will testify and the plaintiff's attorney will submit the medical bills and records for treatment. In cases where the "high" is \$20,000.00 the physicians will not be brought in to testify due to cost constraints. Orthopedic Surgeons and Neurosurgeons, for example frequently charge in excess of \$4,000 for coming to the arbitration to testify. So, the plaintiff attorney will rely just on the records and bills.

If the plaintiff is able to collect the full policy from the defendant, the plaintiff is now in a position to pursue an underinsured motorist claim against their own policy for the balance of the compensation for their injuries. However, if they had received a high damage award from the arbitrator, that number cannot be used against the underinsured motorist carrier as the underinsured motorist carrier did not participate in the arbitration. It would not be fair.

This process has been used for years. However, Marques v. Allstate, 140 Conn. App. 335 (2013) changes everything. In Marques, the court found that because the plaintiff litigates their damages in the arbitration, they are prohibited from litigating damages again in the underinsured motorist action. The plaintiff is tied to the arbitration award. So, although, the plaintiff did not bring in the doctors to testify and did just what was necessary to achieve the "high" their damages have been determined, if the underinsured motorist carrier wants. Or, the underinsured motorist carrier can require the plaintiff to litigate their damages again in the subsequent proceeding.

As a result, it makes no sense for a plaintiff with underinsured motorist coverage to arbitrate their case against the person who caused the accident as they now have to put on their entire damage case. The courts have lost an easy and effective tool for quickly moving business.

HB5450 simply restores things to where they were before the Marques decision. It is limited to only car accident cases. It says that if the parties agree to arbitrate the case, nobody can use the arbitration finding in a subsequent underinsured motorist proceeding.

**WE STRONGLY URGE YOU TO SUPPORT HB5450. Thank you.**