

**Comprehensive Update on UM and UIM Cases in the
Post-Koken World
Dauphin County Bar Association
July 27, 2010¹**

Scott B. Cooper, Esquire
SCHMIDT KRAMER P.C.
209 State Street
Harrisburg, PA 17101
scooper@schmidtkramer.com
717-232-6300 (t)
717-232-6467 (f)

SOME COMMON TYPES OF UM/UIM CLAUSES

1. Total silence
2. Traditional Arbitration
3. Mutual Consent
4. Venue Selection (ie. Resident at time of accident, at time of application, county v. state or federal)

VENUE SELECTION CLAUSE OF UM/UIM LITIGATION V. ARBITRATION

O'Hara v. Liberty Mutual, 984 A.2d 938 (Pa. Super. 2009), petition for allowance of appeal denied, 995 A.2d 353 (Pa. 2010) (Pennsylvania Superior Court Enforces Forum Selection Clause In Underinsured Motorist Claim).

The Superior Court affirms the trial court Order from Philadelphia County which enforced a forum selection clause in an underinsured motorist ("UIM") case where the insurance policy mandated the claim be filed in the county and state of where the insured was legally domiciled at the time of the accident. The insured initially filed the suit in Philadelphia County where the insurance company conducts business and the insurance company filed to move the case to Delaware County where the insured resided at the time of the accident.

¹ Materials will be posted on Schmidt Kramer P.C. website at www.schmidtkramer.com.

The Superior Court enforces the forum selection clause and holds that the case was properly transferred to Delaware County. A Motion for Reconsideration was denied as well as a Petition for Allowance of Appeal.

**JOINDER OF THIRD PARTY, UM/UIM AND/OR
BAD FAITH AT SAME TIME**

Gunn v. The Automobile Ins. Co. of Hartford, Connecticut, 971 A.2d 505 (Pa. Super. April 15, 2009) (Bad Faith Claim And Underinsured Motorist Claims Can Be Litigated And Pursued At The Same Time Since Appeal Of Court Order Requiring Them To Be Litigated Together Is Collateral).

Barbara Gunn ("Gunn") filed a Complaint containing breach of contract and bad faith causes of action against her insurance company, Hartford, arising out of an Underinsured Motorist ("UIM") claim. Hartford filed a motion to preclude discovery pertaining to the bad faith claim and to stay the bad faith claim until after the UIM claim was decided.

The Honorable Stanton Wettick, in the Court of Common Pleas of Allegheny County (and noting in the decision in footnote one (1) that it was also reviewed by the County Administrative Judge Strassburger), denied the motions. Judge Wettick indicated the cases can proceed at the same time with back to back trials and the same judge presiding. Procedurally, the jury would first hear the UIM claim, and then the bad faith claim would be heard immediately after in a non-jury trial. Judge Wettick noted the bad faith claim and UIM claim relied on much of the same evidence, so there was no reason for the parties to conduct discovery and present the same evidence twice.

Hartford appealed. Below is the link to the now published opinion in Gunn v. The Automobile Insurance Company of Hartford where a three (3) judge panel of the Superior Court in a 2-1 decision quashed Hartford's appeal of Judge Wettick's decision.

The opinion of the majority written by Judge Allen and joined by P.J. Ford-Elliott found the trial court decision was not an appealable order under Pennsylvania Rule of Appellate Procedure 313. Judge Lally-Green dissented and would have found the decision of the trial court was appealable and would reverse the trial court decision as abusing its discretion. Of note, the decision was originally a memorandum opinion and no motion to publish was filed. The court docket indicates that the decision to withdraw the memorandum opinion and publish was made "after recommendation" and was thus published *sua sponte*.

This case was followed by Judge Strassberger in the trial court in Allegheny County dealing with a similar issue on Vernon v. Erie Ins. Exch., 2009 Pa. Dist. & Cty. Lex 220 (Allegheny County Aug. 3, 2009).

Gingrich v Esurance Inc., NO. 08795 CV 2009 (Hoover, J. Dauphin County Nov. 2, 2009) (Trial Court Denies Insurance Company Preliminary Objection Which Sought To sever Underinsured Motorist Claim From Third Party Claim When Both claims Are Filed in The Same Action – post Koken related decision).

This case involves a car accident where the Plaintiff was injured and filed suit against not only the third party responsible for the accident but her insurance company for underinsured motorist benefits. The underinsured motorist provision of the policy stated that either party "may" make a written request for arbitration. In this case the insurance company preferred arbitration so it filed a Preliminary Objection to have the case with regards to the underinsured motorist claim referred to arbitration by arguing that "may" means mandatory.

Without discussion, Judge Hoover on Nov. 2, 2009 denied the preliminary objections. The Plaintiff in its opposition appears to have made two (2) arguments which were accepted by the trial court. First, that Esurance's waiting until after the complaint was filed to make its "written demand" for arbitration through filing a preliminary objection was untimely. Second, that since the tortfeasor case was not going to be severed from UIM case that it wasn't fair for plaintiff to have the expense of two litigations, the UIM arbitration and the tortfeasor trial.

Absent interlocutory appeal the case will proceed. Thanks to PaJ member Bob Claraval of Harrisburg for the great work for the Plaintiff.

Fuhrman v. Frye and State Farm, No. 2008 CV 17687 (Clark J., Dauphin Co. June 14, 2009) and Sellers v. Hindes and State Farm, No. 2009 CV 1989 (Clark, J., Dauphin Co. June 14, 2009) (Trial Court Denies Individual Defendant's Preliminary Objection Seeking To Sever Liability Claim From Underinsured Motorist Claim Where Insurance Carrier For Defendant Is the Same As the Underinsured Motorist Carrier).

These are two very similar cases which are filed in Dauphin County arising out of motor vehicle accidents. In both cases the Defendants, Norman Frye ("Frye") and Jill Hindes ("Hindes"), are insured by State Farm Mutual Automobile Insurance Company ("State Farm"). In both cases the Plaintiffs are also insured by State Farm and both have underinsured motorist coverage. Since neither the third party nor UIM claims could be

resolved, Plaintiffs filed suit against the third party and their own carrier. Of note, the State Farm policies in question did not provide for arbitration of underinsured motorist claims and the policies also mandated that State Farm be joined in any lawsuit against the third party.

The individual third parties, Frye and Hindes, filed Preliminary Objections to the Complaints seeking to sever the claims arguing that they should not be required to litigate the third party claims in the same proceeding as an insurance claim for underinsured motorist benefits. On June 14, 2009, Judge Clark, in his role as Civil Calendar Judge in Dauphin County, issued separate Orders denying the Preliminary Objections. Thus, the cases will continue as filed with both the third party and insurance company in the same action.

Six v. Phillips and Nationwide, No. 12227 of 2008 (Beaver Co. 2009) (Trial Court Denies Individual Defendant Preliminary Objection Seeking To Sever Third Party And Underinsured Motorist Claims).

This is a case where the Plaintiff Carlie Six ("Six") filed a third party and underinsured motorist case in the same proceeding arising out of a car accident which occurred on August 13, 2006, in Beaver County. Six filed suit against the Defendant Mark Phillips ("Phillips"), who was insured with Erie Insurance Group, as well as her underinsured motorist carrier Nationwide Mutual Insurance Company since the insurance policy did not allow for arbitration of her claim under the circumstances.

Phillips filed Preliminary Objections to the joinder alleging that it is impermissible to introduce evidence of insurance in the trial of the third party case.

The trial court relies upon Pennsylvania Rule of Civil Procedure 2229(b) which states that it is permissible to join actions involving the same transaction or occurrence and the same factual questions of liability and damages. In this case, the court finds the third party and underinsured motorist claims arise out of the same occurrence, which is the August 13, 2006 accident, and involves the same factual questions of liability and damages, the injuries to the plaintiff.

The trial court also notes that introducing evidence of insurance does not mandate that the cases be severed. Under the law, it writes that evidence of insurance is not barred where it ***might be*** prejudicial. The court notes that both Erie and Nationwide should have known and anticipated that the third party insurance policy would be relevant to the contract claim. Also, nationwide is still entitled to a credit in the amount

of the third party policy before nationwide would have to pay. Thus, the Preliminary Objections are denied.

Wutz v. Smith and State Farm Ins. Co., NO GD07-21766 (Wettick, J. Allegheny County Sept. 9, 2009) (Trial court established discovery timetable for claims file when underinsured motorist claim and bad faith claim proceed at same time).

Mark Wutz ("Wutz") filed a third party, underinsured ("UIM") motorist and bad faith claim in the Court of Common Pleas of Allegheny County. As part of his bad faith discovery into the underinsured motorist claim against his insurer State Farm he filed a motion to compel the insurance company to produce its file as to the evaluation ranges established for the underinsured motorist claim and all other redacted information in the claims file, including the factors considered by the company in making its evaluation of the UIM claim and strengths and weaknesses of the claim.

The trial court decision by Judge Wettick in Wutz first explains the trial court's decision in Gunn v. The Automobile Ins. Co. of Hartford, 156 P.L.J. 381 (2008), ruled as interlocutory appeal, 971 A.2d 505 (Pa. Super 2009) where the trial court allows both the UIM and bad faith claims to proceed at the same time and not stay discovery of the bad faith claim. Judge Wettick writes that his decision in Gunn specifically mentions that not all information in a UIM file would necessarily be discoverable right away and it is up to the trial court's discretion.

State Farm argues in Wutz that disclosing the UIM file information before the trial of the actual UIM case would be prejudicial for purposes of negotiation and, if it is required to try the case the actual trial. He agrees and establishes a procedure for the parties to use in order for the file to be disclosed. First, the information should not be furnished until after the UIM claim is submitted to the jury. Second, immediately after the case is submitted to the jury State Farm shall provide the discovery to the Plaintiff. Last, once the jury returns a verdict then the trial judge will begin the non-jury trial of the bad faith claim.

Noting that there may be situations where the plaintiff cannot try the bad faith claim immediately Judge Wettick states that the plaintiff should promptly file a motion under Rule 213 to stay the trial of the bad faith claim due to not having sufficient time or if the plaintiff offers a compelling explanation as to why the case cannot be tried immediately the trial court may postpone the non-jury trial of the case.

Accordingly, the trial court denies the motion based upon the procedure set forth above. Also, any it orders that documents protected by attorney client privilege are still protected from discovery provided that the insurance company is not raising advice of counsel as a defense to the bad faith claim.

Moyer v. Harrigan, No. 1684 – 2008 (Thomson, J., Lack. Co. Oct. 24, 2008) (Trial Court Denies Preliminary Objections And Rules That Third Party And Underinsured Motorist Claim Can Be Joined In Same Action).

Joseph Harrigan (“Harrigan”) was involved in a car accident with Kimberly Moyer (“Moyer”) on January 31, 2007. At the time of the accident Harrigan was under the influence of alcohol. Moyer was seriously injured and filed a third party claim and also an underinsured motorist claim (“UIM”) with her own insurance company, Erie Insurance Exchange (“Erie”). She was unable to amicably settle the claims, and, since the Erie policy did not allow for arbitration of UIM claims, she filed suit against both entities.

The claim against Harrigan was for negligence and requested punitive damages. The claim against Erie was based on breach of contract and bad faith. Harrigan filed preliminary Objections to sever the two cases and argued the cases were mis-joined.

Moyer opposed severing the cases and cited the court to Rule of Civil Procedure 2229 which allows for these claims to be joined. Also, Harrigan pointed out the practical results of severing the cases by noting that if “1 auto accident case split into 2 separate and divergent cases, the following would occur:

- 2 juries will need to be empanelled to hear two trials,
- A judge will have to preside over 2 almost exact trials regarding the same accident (or 2 judges would each have to preside over nearly identical trials)
 - the same Police officers would be required to attend 2 trials regarding this 1 accident
 - the same plaintiff’s medical care providers would be burdened with 2 proceedings;
 - the plaintiffs would be burdened with the costs of 2 proceeding which would reduce substantially their rightful recompense;
- each trial will present the same eyewitnesses
- each trial will present the same medical doctors,
- each trial will present the same expert testimony,

- each trial will involve the same injuries,
- each trial will involve the same causation issues,
- each trial will involve the same injured parties,
- each trial will have the same plaintiff's damages,
- each trial will have the same proofs of plaintiff's damages."

Thus, despite the same issues of operator liability, injuries, and testimony; the case would be tried two times in the same court.

On October 24, 2008 the trial court denied the Preliminary Objections and wrote, "the rights and responsibilities of the parties will be effectively and efficiently fixed by a single action." Further, the court notes, "to sever the actions would force two trials on the same issues and with the same proofs. This would be a significant waste of judicial resources for the court and would cause significant delay and expense to the parties." The Objections are denied. The two claims were allowed to proceed at one time.

KOKEN AND 1311.1

Dolan v. Fissell, 973 A.2d 1009 (Pa. Super. May 1, 2009), petition for allowance of appeal denied, 989 A.2d 917 (Pa. 2010) (Superior Court Holds That Plaintiff May Withdraw 1311.1 Filing And Also Use Defense Expert To Testify).

This deals with an appeal by the Defendant from an arbitration award in favor of the plaintiff for \$28,220. This is a case arising from a car accident and, after the appeal by the Defendant, the Plaintiff filed a stipulation under Rule 1311.1 to proceed by medical reports and limit the award of the jury trial to \$25,000.

Prior to trial the Defense exam was favorable to the Plaintiff. The Plaintiff withdrew the 1311.1 filing and presented the defense expert as Plaintiff's own expert at the trial. The jury awarded \$434,757.25. The Defendant appealed and the published decision by Judge Klein (joined by Judges Shogun and McEwen P.J.E.) held the trial court in Chester County did not commit error in allowing the Plaintiff to withdraw the stipulation to proceed on medical reports and limit her recovery to \$25,000, nor was it error to allow the expert initially retained by the Defense to testify for the Plaintiff.

Kopytin v. Aschinger, 947 A.2d 739 (Pa. Super. 2008), petition for allowance of appeal denied, 964 A.2d 2 (Pa. 2009) (Superior Court holds that Pennsylvania Rule of Civil Procedure 1311.1 Requires the Plaintiff Be Allowed to Read His or Her Expert Report to the Jury Before the Defendant Can Show a Videotaped Cross Examination of the Same Plaintiff's Expert).

This is a case arising out of a car accident where a trial took place under Pennsylvania Rule of Civil Procedure 1311.1. Prior to the trial and in accord with the rule, the Defendant subpoenaed the Plaintiff's expert for a video deposition. At the trial, the court allowed the expert's cross examination to be played for the jury before the plaintiff's expert's report was read to the jury. The jury returned a verdict for only medical bills and no monies for non-economic damages. The trial court denied post trial motions and the Plaintiff appealed.

The Superior Court reversed the trial court for several reasons. First, relying upon Womack v. Crowley, 877 A.2d 1279 (Pa. Super. 2005); Marsh v. Hanley, 856 A.2d 138 (Pa. Super. 2004); and Burnhauser v. Bumberger, 745 A.2d 1256 (Pa. Super. 2000); the Superior Court held, the jury verdict of finding factual cause, while awarding medical bills but no non-economic damages "bears no reasonable relation to the injuries suffered" and it awarded a new trial on damages only.

Secondly, the Superior Court also held, it was improper for the trial judge, in a trial under Rule 1311.1, not to allow the Plaintiff to read or show his expert report to the jury before the defense was allowed to play the cross-examination of the expert by video. In this case, the Defendant chose to cross examine the expert by video and then was allowed to play the video before the expert report was read into evidence under Rule 1311.1. The court noted, this was not allowed under the Rule nor was it the intention.

Lastly, the Superior Court finds, admitting surveillance video was improper, since it was not properly authenticated by the person who actually shot the video. Also, the jury was only shown small segments of the video and the entire video was not played.

The court ordered a new trial on damages only. Also, Judge Klein writes a separate concurring opinion where he raises for consideration possible issues that are raised under Rule 1311.1. He raises these issues for consideration and thought in hope of the Supreme Court Rules Committee possibly reviewing Rule 1311.1 and making revisions.

KOKEN AND EXHAUSTION OF COVERAGE

Nationwide Ins. Co. v. Schneider, 960 A.2d 442 (Pa. 2008) (Pennsylvania Supreme Court Invalidates Exhaustion Clause Contained In Underinsured Motorist Endorsement).

Paul Schneider ("Schneider") was in the course and scope of his employment as an Upper Darby Township police officer when he was involved in a work related motor vehicle accident. Schneider settled with the third party for her \$15,000 limits of her policy with American Independent. He then filed an underinsured motorist ("UIM") claim with Granite State Insurance Co., the insurer of Upper Darby's vehicles. The limit for UIM benefits under that policy was \$1 million, and Schneider eventually settled for \$750,000. Schneider did not inform Nationwide, the secondary insurer for his personal vehicles, about the settlement with the primary insurer. He had a personal auto insurance policy including UIM coverage.

Schneider sought to recover benefits from his personal insurer, Nationwide, under the policy that contained stacked coverage limits of \$200,000. He offered Nationwide a "credit" in the amount of \$1,015,000, which included the amount settled on with the third party insurer and the full policy limits of Granite's policy. Nationwide denied the claim citing the fact that Schneider had not exhausted the full first level of UIM on the Granite policy and also because it was not notified of the third party settlement so it never consented to settle and waived any subrogation rights. The trial court determined the denial was correct under the exhaustion and consent to settle clauses contained in the Nationwide policy. Schneider appealed and an *en banc* panel of the Superior Court reversed. The Supreme Court granted Nationwide's petition for allowance of appeal to address two (2) issues. They were:

1. Did the Superior Court properly apply the exhaustion rule of UIM litigation to the primary UIM-excess claim contest?
2. Did the Superior Court properly apply the consent to settle rule of UIM motorist litigation in the less than policy limits settlement context?

The Supreme Court decision affirmed the *en banc* decision to reverse the trial court. The Court wrote, the trial court erred when it required exhaustion of the first priority of UIM coverage, because the ruling would go against the Superior Court decision in Boyle v. Erie Ins., 656 A.2d 941 (Pa. Super. 1995). The Court further noted, there is no requirement in the Pennsylvania Motor Vehicle Financial Responsibility Law ("MVFRL"), and specifically absent from Section 1733, requiring exhaustion. Additionally,

the fact that Boyle dealt with a credit being given on a liability recovery as opposed to a UIM recovery was really a distinction without a difference. Also, the Court noted the Pennsylvania Insurance Commissioner did not opine the exhaustion clause was allowable under the law, so it could not defer to the Department. Therefore, Schneider was not required to fully exhaust the first level of UIM before pursuing the second level with Nationwide.

The Court also found under Nationwide Mutual Ins. Co. v. Lehman, 743 A.2d 933 (Pa. Super. 1999), in order to justify denying a claim for not obtaining consent, the insurer needs to demonstrate prejudice to its subrogation rights. The Court found Nationwide had not established it was prejudiced when Schneider failed to obtain consent to settle with the third party, and therefore, the consent to settle clause was not enforceable. The Court upheld the *en banc* decision and remanded the case.

COLLATERAL ESTOPPEL

Catroppa v. Carlton, --- A.2d --- (Pa. Super. May 14, 2010) (Pennsylvania Superior Court Holds Third Party Is Not Bound By Underinsured Motorist Proceeding Award).

In Catroppa v. Carlton (link below) the Superior Court decision by Judge Bender reverses the trial court and holds that a third party is not bound by an underinsured motorist ("UIM") arbitration award and not collaterally estopped from challenging the amount of the Plaintiff's damages when the plaintiff received a UIM arbitration award for the same accident and the insurance company in the UIM proceeding is the same as the one insuring the third party.

This case involves a motor vehicle accident which occurred on September 10, 2004. Carlton was injured and filed a third party case against Catroppa in the Court of Common Pleas of Beaver County. Catroppa had bodily injury liability coverage of \$50,000. Carlton had personal UIM coverage of \$50,000 and pursued the UIM claim at the same time as the third party claim in separate proceedings. The UIM arbitration took place before the trial of the third party case and resulted in an award for Carlton in the amount of \$100,000. Carlton then filed a Motion for Summary Judgment in the third party case and argued that since Catroppa had the same insurance company (State Farm) as the Defendant in the trial court case, she was collaterally estopped from relitigating the damages since the parties already stipulated to liability. Catroppa appealed.

The Superior Court reverses and finds that since the party against whom the claim of collateral estoppel is asserted (Catroppa) was not a party or in privity with a party in the prior case she cannot be bound by the UIM award. Catroppa was not a party to the UIM proceedings Carlton. Therefore, she is not able to impose the damage award by estoppel in the third party case even though the same insurance company State Farm insured both Carlton the defendant Catroppa in the third party case and the plaintiff Carlton in the UIM case. The case is remanded for the trial of the damages.

http://www.pacourts.us/OpPosting/Superior/out/A04013_10.pdf

SET-OFF/OFFSET

Travelers Personal Ins. Co. v. Monico, 2008 U.S. Dist. LEXIS 55422 (O'Neill, J. E.D. Pa. July 22, 2008) (Uninsured Motorist Carrier Not Entitled To Offset For Full Limit of Joint Tortfeasor Coverage When Limit Not Exhausted).

James Monico ("Monico") was injured in a car accident on December 8, 2004. The accident occurred when an unidentified vehicle cut in front of Monico who was then rear ended by a vehicle driven by Alejandro Rivera ("Rivera"). Monico sustained bodily injuries and made a third party claim against Rivera which settled for \$45,000, of an available \$250,000, bodily injury liability limit. Monico then sought uninsured motorist ("UM") coverage from his own insurer, Travelers, as the accident was also caused by an unidentified vehicle.

Travelers argued it was not required to pay until Monico's damages were over \$250,000. Further, it argued, if it did pay it would be from underinsured motorist ("UIM") coverage which would be triggered to provide the benefit. Monico argued Travelers could offset his damages by the \$45,000, already paid by the joint tortfeasor Rivera, but he was making a UM claim.

The District Court held, Monico was making a UM claim to Travelers under the terms of its policy, because the claim was the result of an unidentified vehicle. Monico was entitled to receive the coverage offset by the \$45,000, he already received.

Pusl v. Means, 982 A.2d 550 (Pa. Super. Sept 23, 2009), petition for allowance of appeal denied, 991 A.2d 313 (Pa. 2010) (Superior Court Allows Molding Of Jury Verdict To Reflect Previous Underinsured Motorist Recovery For Same Accident).

The Plaintiff Pusl was involved in a car accident with the Defendant Means and sustained injuries. As a result of the accident Pusl made a third party claim against Means but also an underinsured motorist (UIM) claim with State Farm. The policy limits of the UIM claim were \$75,000. In full accordance with Pennsylvania law, Pusl settled the UIM claim for the full \$75,000 before the resolution of the pending third party claim. The case against the third party Means continued and ultimately went to trial with a jury verdict of \$100,000.

After the verdict Means filed a Motion to Mold the verdict to \$25,000 to take into consideration the previous UIM recovery of \$75,000. Importantly, there was no record of whether the underinsured motorist carrier State Farm had waived subrogation or assigned its subrogation claim to Pusl. The trial court granted the motion and molded the verdict and Pusl appealed.

The Superior Court panel affirms the entry of the judgment in favor Pusl in the amount of \$25,000, even though the jury verdict was \$100,000. Even though not briefed or argued, the Superior Court first holds that under Section 1722 of Title 75 the legislature intended to prevent the recovery of first party benefits in a third party action which are paid for such as underinsured motorist benefits.

Second, with regards to the main issue raised, argued and briefed the Superior Court holds that under the Pennsylvania Supreme Court decision in Johnson v. Beane, 664 A.2d 96 (Pa. 1995) and the reasoning of the trial court in Delaware County in Shankweiler v. Regan, 60 Pa. D & C 4th (Del. Co. 2002), the third party is entitled to mold the verdict. The Superior Court does note that there was nothing in the record of the underinsured motorist carrier enforcing or assigning its subrogation rights. If the UIM carrier had not waived subrogation or assigned its subrogation rights then the third party Means would still need to pay the \$75,000 of the verdict under the subrogation claim.

The effects of this decision are enormous. First, any third party defendant may need to plead molding of the verdict as new matter if there is a potential UIM claim or even amend its new matter which was allowed in this case. Second, from the Plaintiff standpoint, the entire injury case needs to be thoroughly thought through from the outset because it may

be necessary to start discussions with the UIM carrier early about not waiving or assigning subrogation rights as part of settlement negotiations of the UIM claim.

For a Sample Assignment, see next page.

ASSIGNMENT OF RIGHTS AGREEMENT

----- and ----- (hereinafter "Claimants") and -----
- Insurance Company (hereinafter Defendant") each being represented
by an attorney of their choosing have engaged in arms length
negotiations and settlement discussions regarding the settlement of
Claimant's claim for UIM benefits under ----- policy #**12345678**, issued
to ----- and ----- arising out of a motor vehicle accident
which occurred on -----.

Now, therefore it is acknowledged by Claimants that Defendant has
previously paid the Claimants \$50,000, to settle their claim for
underinsured motorist's benefits arising out of said accident, receipt of
which is hereby acknowledged.

In addition, Claimants agree to pay Defendant \$1,000 for assignment of its
right of subrogation under said policy in connection with the Claimants'
pending third party action filed against ----- in the -----
County Court of Common Pleas No. ----- of 0000, regarding the injuries
which were sustained in the automobile accident of ----- and which
were the subject of the underinsured motorist claim. It is expressly
understood that this amount shall be immediately paid to the Defendant,
regardless of the outcome of any present or future litigation by Claimants
against -----.

Further it is understood that, by this agreement, Defendant does not
intend to release or discharge its subrogation claim, but rather to transfer
to Claimant its right of subrogation or reimbursement against any award
or settlement in favor of the Claimants in [complete caption of action].

BY: _____

BY: _____
Insurance Company

BAD FAITH

Bukofski v. USAA Casualty Insurance Company, 2009 U.S. Dist. LEXIS 48128 (Munley, J. M.D. Pa. June 9, 2009) (District Court Rules Statutory Bad Faith Under Section 8371 May Be Alleged Against Insurer For Removing Underinsured Motorist Arbitration Clause From Policy).

The insured filed suit against USAA after it failing to pay medical and underinsured motorist benefits. Among many allegations in the complaint were that USAA unilaterally removed the underinsured arbitration provision from the insured's policy despite the fact that arbitration was a material benefit under the policy which provided the insured with a cost effective and expedited means of resolving underinsured motorist disputes. Also alleged was that USAA failed to provide the insured with the ramifications of the change to the policy which ramifications include "significant increased expense for Plaintiff to pursue a UIM claim.....and increased delay for Plaintiff to adjudicate a UIM claim." It was also claimed that the insurance company took the action of removing arbitration to delay payment of benefits and attempt settlement leverage by necessitating protracted expensive litigation.

USAA filed several Motions to Dismiss, including the dismissal regarding the allegations of removing arbitration in bad faith. The District Court for the Middle District of Pennsylvania holds that an insurance company, in this case USAA, may be liable for bad faith under Section 8371 of Title 42 for removing an arbitration clause for underinsured or uninsured motorist coverage from the insured's insurance policy.

The Court denies the USAA Motion to Dismiss and writes that "the presence of an arbitration clause deals directly with the defendant's contractual obligations and clearly arises from the insurance policy. If, as the plaintiff asserts, the Defendant removed the clause without notification to the plaintiff in order to force favorable settlements of UIM claims, then a statutory bad faith claim might be established." The insured still will need to prove the claim but at this point it survives.

Godfry v. State Farm Mutual Ins. Co., 2009 U.S. Dist. LEXIS 19123 (Yohn, J., E.D. Pa. March 4, 2009) (Motion To Dismiss And Transfer Pennsylvania Bad Faith Case To Delaware Is Denied).

On March 4, 2009, Judge Yohn denied State Farm's Motions to Dismiss and Transfer venue of the case to Delaware. Jameson Godfry (Godfry) was involved in a car accident with an uninsured motorist which occurred in Delaware. Godfry had a State Farm policy which provided uninsured motorist coverage. The policy was written and issued in Delaware.

Unable to resolve the claim, he filed suit and pursued his uninsured motorist claim in the Court of Common Pleas of Philadelphia County. After two settlement conferences, the impartial assessment by two separate judges valued the case at \$35,000. State Farm offered \$7,500. A jury awarded a verdict of \$50,000 and Godfry filed a separate suit in Pennsylvania state court against State Farm for bad faith under Section 8371. The case was removed to federal court. State Farm then sought to dismiss the case and have it transferred to Delaware by arguing that Delaware law applied and appropriate venue was Delaware for the convenience of the parties.

Judge Yohn from the Eastern District of Pennsylvania denied both of State Farm's Motions. First, he found a true conflict existed between the laws of Pennsylvania and Delaware for bad faith, mainly because Delaware does not allow for attorney fees but Pennsylvania law does in Section 8371. Secondly, he undertook a contract analysis and found, even though the contract was issued and negotiated in Delaware, sufficient events (i.e. settlement conference, trial) occurred in Pennsylvania to show a "significant relationship" to the bad faith claim.

He also denied the Motion to Transfer Venue, noting the Plaintiff's choice of venue deserves deference. There were no special circumstances which required a federal court to transfer venue. Thus, the case remained in Pennsylvania Federal Court and was not dismissed and/or transferred to Delaware.

**SELECTED JURY INSTRUCTIONS
FROM OTHER STATES**