

**PENNSYLVANIA ASSOCIATION FOR  
JUSTICE (formerly PaTLA)  
UNINSURED AND UNDERINSURED MOTORIST UPDATE  
SPRING 2009<sup>1</sup>**

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**JURISDICTION**

**Progressive Northwestern Ins. Co. v. Sczyrek, 2008 U.S. Dist. LEXIS 3836 (M.D. Pa. 2008) (Middle District of Pennsylvania Exercises Discretionary Jurisdiction Power to Dismiss Declaratory Judgment Action).**

Immediately upon the filing of a Declaratory Judgment Action the District Court for the Middle District of Pennsylvania issued a Memorandum Order *sua sponte* declining to exercise jurisdiction. The central issue presented in the case was an exclusionary clause in the Progressive policy and whether it absolved the company from liability in relation to a motor vehicle accident.

The Court writes that, even though diversity jurisdiction applies, the case is in the form of a declaratory judgment action and these actions in federal court are procedural rather than substantive. Thus, the District Court is allowed to decline to exercise jurisdiction. It finds the, "matter before this court is one of contract interpretation under Pennsylvania law. In addition, we would be required to determine whether tort claims of individual liability against an insured that was not operating a motor vehicle can provide liability and a duty to defend outside of exclusions in the insurance policy." Since all are questions of state law and no unique question of federal law exists the case was dismissed.

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<sup>1</sup> Materials and any powerpoint presentation will also be posted on Schmidt Kramer P.C. web site at [www.schmidtkramer.com](http://www.schmidtkramer.com).

**Miller v. Progressive Cas. Ins. Co., 2008 U.S. Dist. LEXIS 32074 (Munley, J., M.D. Pa. April 17, 2008) (Court denies Motion to Remand in Breach of Contract and bad faith case arising out of underinsured motorist claim where policy does not include arbitration provision).**

Kenneth and Catherine Miller (“Miller”) initially filed a breach of contract and bad faith complaint in the Court of Common Pleas of Lackawanna County. Their insurer, Progressive, made no offer in response to a demand of \$200,000 for underinsured motorist coverage. Progressive immediately removed the case to federal court based upon diversity and then Miller filed a Motion for Remand.

On April 17, 2008, the District Court in the Middle District of Pennsylvania denied the plaintiffs'/insured's Motion for Remand. They had argued the jurisdictional amount was not met. The District Court denied the Motion because it found the jurisdictional amount had been met for two reasons. First, the plaintiffs raised two claims (breach of contract and bad faith) which could be aggregated over the jurisdictional amount for diversity. Second, the plaintiffs had sought a demand of \$200,000 to resolve the dispute. Thus, it found Progressive had a reasonable basis and argument to say the jurisdictional amount for diversity was met.

**AIG Premier Ins. Co. v. Teeple, 3: CV-07-0911 (Vanaskie, J., M.D. Pa. March 7, 2008) (Middle District court exercises discretionary jurisdiction and remands Declaratory Judgment Action).**

AIG Premier filed a Declaratory Judgment action in federal court against its insured relating to a dispute over uninsured and/or underinsured motorist coverage. Approximately three (3) weeks later the insureds filed their own action against AIG in state court. The insureds then filed a motion to dismiss, arguing the federal court should decline to exercise its jurisdiction over the case.

The District Court for the Middle District of Pennsylvania observed it was not required to exercise jurisdiction over a Declaratory Judgment action. Wilton v. Seven Falls Co., 515 U.S. 277 (1995); State Auto Ins. Co. v. Summy, 234 F.3d 131 (3d Cir. 2000). The court also noted a parallel state court action was pending. Given the pending state court action and the court's interest in judicial economy, Motion to Dismiss was granted as the court declined to exercise jurisdiction.

**Marchky v. Motorists Mutual Ins. Co., 2008 U.S. Dist. LEXIS 63364 (Schwab, J. W.D. Pa. Aug. 18, 2008) (District Court Denies Motion To Remand Underinsured Motorist Claim To State Court).**

Michael Marchky (“Marchky”) filed a breach of contract and bad faith case against Motorists Mutual Insurance Company (“Motorists Mutual”) arising out of its failure to pay underinsured motorist benefits after he was injured in a car accident. The initial pleading was filed in state court and then removed to federal court by Motorists Mutual, based upon diversity. Marchky filed a Motion to Remand arguing jurisdiction should be declined (based on abstention) in these cases which were no longer disposed of through arbitration, as was traditionally required. The insured argued the number of cases on the federal docket could increase exponentially if companies continued not to pay claims and suits were filed. Marchky further argued that under the ‘exceptional circumstances’ of the cases, the court should abstain from jurisdiction.

The District Court denied the Motion to Remand and noted one of the main reasons to decline and abstain from jurisdiction is to avoid piecemeal litigation. The court noted that no other action was currently pending in state court and there was no need to avoid piecemeal litigation, so it retained jurisdiction.

**Roth v. Progressive Ins. Co, 2008 U.S. Dist. LEXIS 56400 (Lancaster, J. M.D. Pa. July 23, 2008) (Federal District Court Remands Underinsured Motorist Declaratory Judgment Action *sua sponte*).**

Doreen Roth (“Roth”) filed a Declaratory Judgment action in the Allegheny County Court of Common Pleas, against Progressive Insurance Company (“Progressive”). The dispute arose after Roth was denied Underinsured Motorist (“UIM”) coverage, and focused on the validity of a written request for reduced UIM limits on an insurance policy. The case was removed to federal court by Progressive, on July 8, 2008.

Progressive attempted to remove the case based on diversity. Within two (2) weeks, the court remanded the case to Allegheny County declining to exercise its discretionary jurisdiction, *sua sponte*. see State Auto Ins. Co. v. Summy, 234 F.3d 131 (3d Cir. 2000); Wilton v. Seven Falls Co., 515 U.S. 277 (1995).

Importantly, the court also noted that a parallel state action was not a prerequisite to the court declining jurisdiction. The main reason for remand was that well settled state law controlled the legal issue and federal interests were not stirred.

**Medvid v. Nationwide Mutual Ins., NO. 3:08-CV-01031 (Conaboy, J. M.D. Pa. June 26, 2008) (Federal District Court Remands Declaratory Judgment Action Relating To Stacking).**

Linda Medvid (“Medvid”) filed a Declaratory Judgment action in the Court of Common Pleas of Franklin County. The dispute concerned Nationwide Mutual Insurance Company’s (“Nationwide”) failure to pay stacked underinsured motorist (“UIM”) coverage. The central legal issue focused on whether or not Nationwide had to pay stacked limits of coverage. On May 27, 2008, Nationwide removed the case to federal court based on diversity. On June 6, 2008, Medvid filed a Motion to Remand.

On June 26, 2008, the District Court for the Middle District of Pennsylvania granted Medvid’s Motion to Remand. Medvid alleged Nationwide should have provided a new stacking waiver when a third car was added to a two car policy. Medvid argued a third vehicle was not added to her policy under the newly acquired vehicle clause policy language. Thus, under the Pennsylvania Supreme Court decisions in Sackett v. Nationwide, stacking applied.

The District Court declined to exercise its discretionary jurisdiction. Medvid’s Motion to Remand was granted and the court noted the legal issue should be decided under well settled state law, and lacks federal interest. *see State Auto Ins. Co. v. Summy*, 234 F.3d 131 (3d Cir. 2000); Wilton v. Seven Falls Co., 515 U.S. 277 (1995).

### ***QUALIFICATIONS FOR COVERAGE***

**Kalinoski v. Erie Ins. Exchange, No. C-0048-CV2005-03993 (Northampton Co. Feb. 14, 2008) (Trial Court holds that person listed as a “driver” on motor vehicle insurance policy is entitled to stack underinsured motorist benefits, even if not a resident relative).**

On August 21, 2001, Richard Kalinoski Jr. (“Kalinoski”) was seriously injured in a car accident with an underinsured motorist. At the time of the accident, Kalinoski was a twenty-six (26) year old resident of Florida who was operating a 1994 Jeep Wrangler owned by his father and insured under a policy with Erie Insurance Exchange (“Erie”). There were six (6) vehicles insured on the policy which all had \$100,000 in underinsured motorist coverage (“UIM”) and stacking. Kalinoski was listed in the Declarations as a “Driver,” and his driver’s license number and date of birth were included. He made a claim for UIM benefits and Erie paid \$100,000. Kalinoski claimed he was entitled to an additional \$500,000, because he was listed as a “driver.” Erie denied the stacking claim and a declaratory judgment action was filed.

After extensive discovery and cross-motions for Summary Judgment, on February 14, 2008, Judge Roscioli, in the Court of Common Pleas of Northampton County held that where a person, such as Kalinoski, was listed as a "driver" on a policy, he or she is entitled to stacking of UIM (or one would also assume uninsured) benefits. The trial court rejected Erie's reliance on Utica Mutual v. Constrictiane, 473 A.2d 1005 (Pa. 1984); Caron v. Reliance Ins. Co., 703 A.2d 63 (Pa. Super. 1997), as well as decisions from another common pleas court and a federal Eastern District court. Erie attempted to argue that those cases stood for the proposition that being listed as a "driver" does not mandate stacking.

Instead the trial court followed Marchese v. Aetna Casualty and Surety Co., 426 A.2d 646 (Pa. Super. 1981), and noted the passage of the Financial Responsibility Law in 1984 does not undercut the Marchese decision. Kalinoski was entitled to stack UIM benefits the case was sent to arbitration.

**St. Paul Fire & Marine Ins. Co. v. Rhein, 2008 U.S. Dist. LEXIS 57536 (Joyner, J. M.D. Pa. July 29, 2008) (District Court Holds That Police Officer Injured In Course And Scope Of Employment While Outside His Cruiser Is A "Protected Person" Under Insurance Policy).**

James Rhein ("Rhein") was injured in a car accident while acting in the course and scope of his employment as a Falls Township police officer. Rhein was injured on November 3, 2001, when he stopped a speeding vehicle operated by Alexander Agye ("Agye"). The officer stopped behind the car with his emergency lights on, and exited his cruiser. At some point during the exchange of information, Agye's car began to roll backward and Rhein's hand became wedged inside the car door causing his injuries. Rhein made a claim against Agye. Rhein settled with Agye for his liability limits and then made a claim under the Township's insurance policy for underinsured motorist ("UIM") coverage. St. Paul, the Township's insurer, denied the claim. It argued Rhein was not entitled to coverage, because he was not a "protected person" under the policy and was not "occupying" the cruiser at the time of the accident.

Judge Joyner in the United States District Court for the Middle District of Pennsylvania held that Rhein was occupying the police vehicle at the time he was injured. In order to determine he was occupying the vehicle, Judge Joyner applied the four (4) part "occupancy" test from the Pennsylvania Supreme Court decision in, Utica Mutual Ins. Co. v. Contrisciane, 473 A.3d 1005 (Pa. 1984). Judge Joyner found Rhein was a "protected person" under the policy, because he was legally considered to be "occupying" the cruiser at the time of injury.

The central issue for the Court was whether Rhein was "vehicle oriented." The court relied on a federal case from the Eastern District in which another officer was injured in a similar manner. Property and Casualty Ins. Co. of Hartford v. Caperilla, 2004 WL 1551739 (E.D. Pa. July 9, 2004). The Court found the Caperilla case to be well reasoned and applied the rationale to hold that Rhein was vehicle oriented when he was injured during the stop. The Court also relied on a Third Circuit case where it noted the professional duties of a driver provide reasonable notice for how the insured vehicle will be used and how a person may be injured. Lynn v. Westport Ins. Corp., 2007 WL 4351428 (3d Cir. Dec. 12, 2007).

Thus, Rhein was a "protected person" and entitled to UIM coverage.

**Erie Ins. Exch. v. Weryha, 958 A.2d 493 (Pa. 2008), appeal discontinued, 931 A.2d 739 (Pa. Super. 2007) (Pennsylvania Supreme Court Case Discontinued So Superior Court Decision Will Stand For Now).**

Timothy Weryha was tragically killed outside his mother's home in Erie, Pennsylvania. After recovering the third party coverage and underinsured motorist ("UIM") coverage from his mother's policy, a UIM claim was made under his father's policy with Erie. Unfortunately, his parents were separated at the time of the accident and his father was living about 60 miles away. Erie denied the claim arguing the child was not "physically living" with his father at the time of the accident and was thus not an "insured" or "resident relative." The Superior Court held there was no UIM coverage, since Timothy was not considered an "insured" under his father's policy when he was not "physically living" with his father, even though a joint custody order was in force. Erie Ins. Exch. v. Weryha, 931 A.2d 739 (Pa. Super. 2007).

The Pennsylvania Supreme Court granted a petition for allowance of appeal in this case back on October 1, 2008. Erie Ins. Exchange v. Weryha, 958 A.2d 493 (Pa. 2008). The Supreme Court granted the Petition for Allowance of Appeal on two issues:

1. Where divorced or separated parents have joint custody of a child pursuant to an order of court, is that child PER SE a legal resident of both parents' households for purposes of receipt of underinsured motorist benefits pursuant to the Motor Vehicle Financial Responsibility Law?
2. Considering the totality of the circumstances, was decedent Timothy Weryha a legal resident of Father's household for purposes of receipt of underinsured motorist benefits pursuant to the Motor Vehicle Financial Responsibility Law?

Argument was scheduled in front of the Court for its March 2009 session in Pittsburgh. The week before the argument the insurance company offered a

settlement and the case was discontinued. Thus, this issue and policy language will now need to be re-litigated.

**Corbin v. Kholsa, NO. 07-05124 (Chomsky, J. E.D. Pa. Dec. 15, 2008)  
(District Court Allows Uninsured Driver To Fully Recovery When Collecting Against Negligent Third Party).**

Corbin was the owner of an uninsured vehicle and was injured by a negligent driver. Corbin filed a third party claim against the other driver Kholsa. The other driver filed a Motion seeking to restrict Corbin from recovering any economic damages since Corbin was uninsured at the time of the accident. Kholsa relied upon Bryant v. Reddy, 793 A.2d 926 (Pa. Super. 2002) and McClung v. Breneman, 700 A.2d 495 (Pa. Super. 1997).

The District Court denied the motion and noted that although the Pennsylvania Motor Vehicle Financial Responsibility Law specifically prohibits an uninsured motorist from recovering first-party benefits in a suit against an insurer, the law includes no such bar for suits against alleged third-party tortfeasors. The Court also noted, the cases relied upon by Kholsa were decided before the Pennsylvania Supreme Court decision in Swords v. Harleysville Ins. Co., 883 A.2d 562 (Pa. 2005), where the Supreme Court noted the injured victim still maintained the right to sue a third party for economic damages. Also, under the previous case law the economic damages could not have been recovered from an insurance company as opposed to a third party. The Court wrote, "[t]he bar on recovery in Section 1714 only addresses recovery from insurance companies," and held that even though Corbin was bound by limited tort she could still recover economic damages from the defendant. Thus, the Motion was denied.

***SECTION 1731 REJECTION OF UNINSURED AND UNDERINSURED MOTORIST COVERAGE***

**Toth v. Donegal Companies, 964 A.2d 413 (Pa. Super. Jan. 14, 2009)  
(Superior Court Rules Insured Bears Burden Of Proving Uninsured or Underinsured Motorist Rejection Form Is Forgery).**

Darla Toth ("Toth") was injured in a car accident and subsequently filed a claim for underinsured motorist ("UIM") benefits. Donegal, her company, denied the claim since Toth had signed a form rejecting the coverage. Toth denied it was her signature on the form and the trial court held she was entitled to coverage because she denied signing the form and thus the statutory requirements were not followed. Therefore, it was void.

Donegal appealed. The Superior Court reversed the trial court and relied upon Jackson v. Allstate Ins. Co., 441 F. Supp. 2d 728 (E.D. Pa. 2006), where the District Court found the insured failed to prove her signature on a rejection form was a forgery. The Superior Court held, "where a signature appears on the UIM rejection form purporting to be that of the first named insured, the insurer has complied with the statute resulting in a facially valid rejection form. The burden would then shift to the insured to prove that his or her signature was affixed to the rejection form without knowledge or authorization." Toth needed to show that her signature was a forgery, placed there without her knowledge or consent, and that she did not willingly waive UIM coverage or the rejection form remains valid. The trial court was reversed.

### ***SECTION 1734 "WRITTEN REQUEST" FOR LOWER UNINSURED AND UNDERINSURED MOTORIST LIMITS***

***The Travelers Indem. Co. v. Pauline, 2008 U.S. Dist. LEXIS 30970 (Rambo, J., M.D. Pa. April 15, 2008) (Introductory text of insurance form does not invalidate written request for lower underinsured motorist coverage).***

John Pauline Jr. ("Pauline") was seriously injured in a car accident. Leichtmann Ice Cream, a corporation that formerly employed the injured victim Pauline, executed a valid written request for a reduction of underinsured motorist benefits (UIM) from \$1 million to \$35,000. There was no dispute that the employer Leichtmann (the named insured) made a written request for lower coverage under Section 1734 of the MVFRL.

Pauline pointed to the introductory text on the form, on which the written request for lower coverage was made. It stated the UIM coverage was equal to the BI limit unless there was a written request. Further, the introductory text read, the coverage would not be "less than the minimum limits required by statute." Here, Pauline argued: (1) there are no required "minimum limits" for UIM coverage in Pennsylvania, so the form is void, and (2) the form was ambiguous, because there are no statutory minimum limits as shown by three cases to which Pauline directed the court's attention. See Fire & Cas. Ins. Co of Conn. v Ligon, 86 Fed. Appx. 517 (3d Cir. 2004); Fire & Cas. Ins. Co. of Conn. v. Cook, 2004 U.S. Dist. LEXIS 15407 (E.D. Pa. July 20, 2004) and Peele v. Alt. Express Transp. Group, Inc., 840 A.2d 1008 (Pa. Super. 2003).

The Court found Pauline cited no case to support the first point, thereby waiving the first argument. Addressing the second argument, the District Court found the three cases relied upon by Pauline were distinguishable, since in those cases there was no specific dollar amount filled in on the reduction form. All three of those cases dealt, in some fashion, with forms that indicated the limits were the minimums or statutory minimums, but there were no dollar

amounts completed on any of the forms. Thus, those cases held that no actual written request for lower limits was made.

In Pauline's case the dollar amount of \$35,000 was completed on the selection form. The Court compared the request in Pauline as similar to the one made in Hartford Ins. Co. v. O'Mara, 907 A.2d 602 (Pa. Super. 2006). Since there was no indication of any ambiguity on the form, and a request for the amount was made in the sum of \$35,000, the Court granted Travelers' Motion for Summary Judgment and held there was \$35,000 in UIM coverage.

**The Brethren Mutual Ins. Co. v. Triboski-Gray, 584 F. Supp. 2d 687 (M.D. Pa. 2008) (Federal District Court Nullifies Alleged 1734 Sign Down Of Underinsured Motorist Coverage).**

In 2002, the former boyfriend of Anne Triboski-Gray ("Gray") transferred a 1996 GMC Jimmy to her name. At that time her boyfriend's Jimmy was insured with National Grange Mutual Insurance Company ("National Grange"). The National Grange policy had insurance coverage of bodily injury for \$500,000 single limit and uninsured and underinsured benefits of \$35,000.

Gray then purchased motor vehicle insurance for the Jimmy with another company, Brethren Mutual Insurance Company ("Brethren Mutual"), through an insurance agent. She orally indicated to the agent that she wanted the coverage to mirror her boyfriend's policy. Brethren Mutual did not write single limit policies but could write the bodily injury coverage as a split limit to mirror \$500,000. Thus, the agent wrote a policy for \$250,000/\$500,000, bodily injury and \$35,000, UM/UIM.

Then forms and applications were signed but the specific form identifying a request for lower UM and UIM coverage was not signed. The only document, that arguably was a request for lower limits, was a two (2) page application where Gray signed on the second page. The boxes for UM and UIM were on the first page, and contained the number "35."

The policy was issued and Gray was involved in an accident. She claimed the UM and UIM coverage was \$250,000, because she did not sign a written request for lower limits. (Importantly, several months after the policy was issued the insurer changed its forms and a request for lower limits required checking a specific box not available when Gray purchased her policy.) Brethren Mutual argued there was an effective sign down, because Gray signed the end of the two (2) page application. Gray argued otherwise and both sides filed Motions for Summary Judgment.

Relying upon the Pennsylvania Supreme Court decision in Lewis v. Erie, 793 A.2d 143 (Pa. 2002) and Pennsylvania Superior Court decision in Motorists v.

Emig, 664 A.2d 559 (Pa. Super. 1995), the District Court held the insured's "signature on an application completed by the insurance company's agent does not constitute a written request for UM/UIM coverage limits below the coverage requested for bodily injury." In this case, the insured's initials were not next to the UM/UIM coverage designations on the application, as had been the factual scenario in other cases. Thus, there was no "written request," according to the court. The Court enforced the insurance policy and nullified the lower UM/UIM coverage limits, thus deeming the UM/UIM coverage equal to the bodily injury limits. The coverage for UM/UIM was determined to be \$250,000.

**Erie Ins. Exchange v. Larrimore, No. 07-1991 (Nanovic, J. Carbon Co. January 13, 2009) (Carbon County Trial Court Holds Signing Insurance Policy Application And Receiving Important Notice Not Enough To Satisfy A Written Request For Lower Uninsured Or Underinsured Motorist Coverage).**

Donna Larrimore ("Larrimore") had a phone conversation with an insurance agent six (6) years before the car accident for which she is now seeking coverage. The agent filled out an insurance application and had Ms. Larrimore sign it. He could not specifically state that she requested lower limits as he did not speak to her. Further, he did not know which secretary or subordinate agent may have filled out the application. The insurance application was for \$300,000 bodily injury limits and \$15,000 uninsured and underinsured motorist limits.

At the time the application was filled out, Erie had special forms UF 2044 and UF 2047 for lower limits in effect which were titled "request for lower UM or UIM limits." These forms had signature lines and areas to designate the specific amount of reduced limits; however, there was no evidence that Ms. Larrimore ever signed the forms and Erie could not produce signed forms. Ms. Larrimore also received a Section 1791 Important Notice.

She was seriously injured in a car accident and sought stacked underinsured motorist coverage based on two cars insured by her policy with coverage of \$300,000 for each car. Erie countered that she was only entitled to receive \$15,000 for each car due to the application.

Judge Nanovic observed there was no written request for lower limits, which was a pre-requisite to a valid selection. The compliance with Section 1791 ensured that a request to reduce the amount of uninsured and underinsured motorist coverage was knowing and voluntary. However, the request for specific limits of coverage required not only the signature of the insured, but also an express designation of the amount of coverage requested, which was not made in this case.

Thus, Larrimore was entitled to coverage in the amount of \$600,000 and not the lower limits (\$30,000) as suggested by Erie.

## ***SECTION 1738 STACKING OF UNINSURED AND UNDERINSURED MOTORIST BENEFITS***

**Everhart v. PMA, 938 A.2d 301 (Pa. 2007) (Section 1738 of the Pennsylvania Motor Vehicle Financial Responsibility Law does not apply to a fleet policy).**

In a decision with a very limited issue being addressed, but with significant implications, the Pennsylvania Supreme Court held in Everhart that Section 1738 of Pennsylvania's Motor Vehicle Financial Responsibility Law ("MVFRL") does not apply to a fleet policy. The Court found Section 1738 did not mandate the section of the MVFRL apply to a fleet policy. There, it assumed the legislature knew the existing case law, which did not allow for stacking on a fleet policy at the time the law was written. The court presumed the legislature would have made a specific provision in the law, stating Section 1738 applies to a fleet policy when the MVFRL was drafted in 1990.

**State Auto Property & Casualty Ins. Co. v. Pro Design, P.C., 559 F. Supp. 2d 540 (M.D. Pa. 2008) (Federal District Court Holds Sackett Does Not Apply To A Single Vehicle Policy).**

This case addresses one of the unresolved issues left after the Pennsylvania Supreme Court announced its modified decision in Sackett v. Nationwide Ins. Co., 940 A.2d 329 (Pa. 2007) ("Sackett"). In this case, a corporation validly waived stacking on a single vehicle policy. Then it subsequently added two vehicles to the policy and never signed a new waiver of stacking for those additional vehicles.

The District Court finds Sackett does not apply to a single car policy as in footnote 5 of the Sackett decision. The District Court also writes that under Sackett, "the degree that coverage under an after-acquired vehicle provision continues in effect throughout the existing period. Once that policy period comes to an end, the insurer must obtain a new waiver if an additional vehicle was added during that period." The fact is, when the single vehicle policy became a multiple vehicle policy the insured was supposed to be given a chance to "purchase" intra-policy stacking, and it did not get a chance to do so. Thus, the three (3) car policy provides stacking.

The District Court held there is expanded coverage for stacking. An appeal was filed and the United States Court of Appeals is scheduled to hear the case on April 17, 2009.

**Reeser v. Donegal Mutual Ins. Co., NO. 04 CV 3664, 3665 (Lackawanna Co. May 14, 2008) (Trial Court Holds That Employees Whom Are Class Two Insureds Are Not Allowed to Stack).**

The injured victims were insureds under a policy issued to a corporation, by Donegal Mutual Insurance Company (“Donegal”). The insureds were also employees of the corporation insuring vehicles with Donegal. The policy insured four cars and had only \$35,000 of uninsured motorists (UM) and \$35,000 of underinsured motorists (UIM) coverage. The declarations showed the policy did not provide stacked UM/UIM coverage. However, Donegal could not produce any forms requesting lower limits or rejecting stacking, so the trial court held as a matter of law there was \$500,000 in UM/UIM coverage with stacking. This would be the amount equal to the bodily injury coverage meeting the mandates of Pennsylvania law.

However, the trial court also held, since there was no policy language entitling the employees, who were class two (2) insureds, the right to stack UIM coverage was only available to class one insureds. Thus, only the individual employer, and those family members who resided with the employer, could stack as class one (1) insureds. The employees who were injured as occupants of the insured vehicles could not stack.

The class two (2) insureds attempted to argue, since Section 1738 does not distinguish between classes, there was no longer a distinction to be made. The trial court relied upon Section 1702 of the MVFRL and the line of precedent-setting appellate cases to hold there remains class one and class two distinctions, absent a policy provision. Thus, the employees could not stack.

**Generette v. Donegal Mutual Ins. Co., 957 A.2d 1180 (Pa. 2008) (Pennsylvania Supreme Court Invalidates “Other Insurance” Clause In Underinsured Motorist Endorsement, When It Would Create ‘Gap’ UIM Coverage).**

Josephine Generette (“Generette”) was injured in a motor vehicle accident while a passenger in a friend’s vehicle. She collected the third party limits from the tortfeasor's insurer in the amount of \$25,000. She then collected \$50,000 in UIM benefits from Nationwide which insured the vehicle she occupied. She followed the priority of coverage under Section 1733 of the Pennsylvania Motor Vehicle Financial Responsibility Law (“MVFRL”) and submitted a UIM claim to collect \$35,000, of coverage she had purchased from Donegal.

Donegal denied the claim pursuant to its "other insurance" clause, which Judge Joyce said was consistent with Section 1733 of the MVFRL. Generette waived stacking on her single vehicle policy. The "other insurance" clause in Donegal's policy created a first and second priority of coverage where the insured must first collect from the insurer of the vehicle occupied at the time of the accident.

Donegal's policy restricted the recovery in the second priority to only that which exceeds the amount awarded from the first priority insurer. Since Generette received \$50,000 from the first priority insurer, there were no excess funds remaining in her \$35,000 UIM benefits to be awarded. However, if her UIM coverage had been in excess of \$50,000 (i.e. \$100,000), she could have collected the gap.

In a deeply divided 5-4 Superior Court *en banc* decision, Judge Joyce wrote that an insured may waive stacking of uninsured and underinsured motorist benefits ("UM" and "UIM" respectively) on a single vehicle policy and when that occurs the "other insurance" clause is implicated to eliminate stacking. The majority held a person can waive inter-policy stacking on a single vehicle policy and if so the waiver is implemented by the "other insurance" clause.

Now Superior Court President Judge Ford-Elliott strenuously dissented and wrote the Legislature clearly intended the ability to stack and the ability to waive stacking to be granted only to those known as a class-one insured. She wrote that, "[n]othing in her policy or in the waiver of stacking form she or her husband signed informed her that by waiving stacking, she was waiving the UIM coverage for which she was, at the same time, paying a higher premium." Therefore, she would have invalidated the "other insurance" clause in this case. The Pennsylvania Supreme Court granted a Petition for Allowance of Appeal.

On October 23, 2008, the Pennsylvania Supreme Court in a majority decision by Justice Baer (joined by C.J. Castille, Todd and McCaffery), reversed the Superior Court 5-4 *en banc* decision. The Court held the Superior Court erred in concluding the Pennsylvania Motor Vehicle Financial Responsibility Law ("MVFRL") provision in Section 1738, relating to stacking and waiver, applied to Generette, who was not an "insured" as defined by the MVFRL. Since she was not an insured, under the MVFRL, of her friend's car, she was not stacking policies and was only following the statutory mandates in Section 1733. Therefore, the Court finds Section 1733 of the MVFRL and not Section 1738 applied.

Further, the Court held a portion of the "other insurance" clause in Donegal's policy was non-enforceable, because it conflicted with public policy concerns addressed by the MVFRL. The law intended to provide "excess" rather than "gap" underinsured motorist coverage. Therefore, Generette got excess coverage on her Donegal policy and was not subject to the "other insurance"

clause, because she was not stacking. The Court found Generette deserving of the full UIM coverage for which she had paid.

## ***EXCLUSIONS***

### ***Household/Family Car***

#### **Erie Ins. Exchange v. Baker, 952 A.2d 1163 (Pa. 2008) (Supreme Court of Pennsylvania Hears Household Exclusion Case).**

On May 15, 2008, the Pennsylvania Supreme Court accepted this case on a petition for allowance of appeal. The appeal was limited to the specific issue of:

Whether Section 1738(a) of the MVFRL precludes the application of the so called "household exclusion" to prevent inter-policy UIM stacking when there has been no valid waiver of stacking by the insured?

Eugene Baker ("Baker") was injured in a motorcycle accident with an underinsured motorist. He collected the liability coverage from the third party and the initial underinsured motorist coverage from his motorcycle insurance policy, underwritten by Universal. He did not reject stacking on any policy, and sought underinsured motorist coverage on his household vehicle policy insured with Erie Insurance Exchange ("Erie"). Erie denied the claim based on the household exclusion. The Trial Court and Superior Court (Memorandum Decision) enforced the exclusion. Baker appealed to the Supreme Court, and the appeal was granted.

Briefs were filed by both parties, and Amicus Briefs were filed in support of Baker by PAAJ, ABATE, the Pennsylvania State Troopers Association, SEIU, and AFSCME.

The Supreme Court heard oral arguments on September 10, 2008.

### ***Regular-Use***

#### **Erie Ins. v. E.L., 941 A.2d 1270 (Pa. Super. 2008) (Reargument Denied 2008 Pa. Super. LEXIS 168 March 11, 2008) ("Regular Use" Exclusion Not Valid When Applied to a Passenger When the Policy Provision Does Not Include the Term "Occupy")**

The Superior Court (2-1, with Bowes, J., dissenting) set aside the "regular use" exclusion, when it found a minor was not subject to the regular use exclusion.

The minor was occupying a vehicle as a passenger when injured. The vehicle had been provided to her mother, by her mother's employer. The insured minor child was injured in a motor vehicle accident and a claim for underinsured motorist ("UIM) benefits was made. Erie denied the claim arguing that the regular use exclusion applied because the minor was injured while occupying the "regularly used" vehicle. The exclusion only refer to those being injured while "using" the vehicle and not occupying.

Erie argued that the terms "use" and "occupy" are really one in the same and the exclusion applies. The court finds that "use" does not mean the same as "occupy" and the minor was not "using" the vehicle at the time of the accident. Thus, she is entitled to UIM coverage and the exclusion does not apply.

**Nationwide Assurance Co. v. Easley, 960 A.2d 843 (Pa. Super. Oct. 10, 2008) (Reargument Denied 2008 Pa. Super. LEXIS 4345 December 15, 2008) (Superior Court Enforces the "For a Fee" and "Regular Use" Exclusions in Cab Driver Accident).**

On August 19, 2001, Calvin Easley ("Easley") was injured in a motor vehicle accident while operating a yellow cab. He sought underinsured motorist benefits ("UIM") from the cab insurer, but there were none. He then claimed coverage from his personal insurance carrier Nationwide Assurance Company ("Nationwide"). Nationwide denied the claim citing two exclusions.

First, there was an exclusion in the policy which did not provide coverage if Easley was injured while operating a vehicle which was available for his "regular use." Easley argued the exclusion did not apply, because he drove a different cab every day. The trial court observed, normally the issue of whether a vehicle is "regularly used" is a jury question, but since the facts are not in dispute it rendered a ruling as a matter of law. Relying upon Calhoun v. Prudential General Ins. Co., 2005 WL 1154599 (M.D. Pa. May 5, 2005), the trial court found the exclusion enforceable.

Second, there was an exclusion which voided any coverage if Easley was injured while carrying a person or property for a fee. Easley contended this exclusion did not apply, since he was injured while on his way home and not carrying a fare. The trial court noted the cab was a "lease" to Easley for twenty-four (24) hours and the exclusion does not mean, "only while carrying a person for a charge." The trial court also relied on Ratush v. Nationwide Mutual Ins. Co., 619 A.2d 922 (Pa. Super. 1992), where the appellate court upheld a similar policy exclusion. Therefore, the trial court found in favor of Nationwide and Easley appealed.

The Superior Court affirmed the trial court decision in Allegheny County, which upheld the two exclusions. The cab driver was disallowed UIM coverage on his

personal policy. The Superior Court decision by Judge Popovich found the fact Easley did not have a passenger with him at the time the accident occurred, did not render the "use for hire" exclusion invalid. Further the fact Easley operated different taxis did not render the "regular used" vehicle exclusion invalid. The Superior Court affirmed the trial court decision and upheld both exclusions and cited the precedent of its court.

### ***Workers Compensation***

#### **Burke v. Erie Insurance Exchange, 940 A.2d 472 (Pa. Super. 2007) (Under the Circumstances of the Case an Insured Who Settled a Worker's Compensation Claim Is Not Allowed to Recover Benefits Paid in an Underinsured Motorist Claim).**

James J. Burke ("Burke") was injured in a motor vehicle accident while in the course and scope of his employment with Erie Insurance. He filed claims for both workmen's compensation and underinsured motorist ("UIM") coverage. The worker's compensation carrier and UIM carrier were the same and he settled the worker's compensation claim with an agreement that the company would waive the lien in exchange for not having to pay it as part of the UIM claim. When the UIM case was arbitrated, he sought to plead, prove, and recover all of the worker's compensation benefits. He was not allowed to do so, and Burke appealed.

The Superior Court found, "under the circumstances of the case" the insured was not allowed to recover the amount of worker's compensation benefits in a UIM claim when the monies were being recovered from the personal policy. In this case, because the worker's compensation and the personal carrier were the same and an agreement was made to waive the lien, the Superior Court held that the insured could not recover the monies and its decision in Ricks v. Nationwide Ins. Co., 879 A.2d 796 (Pa. Super. 2005) is not disturbed.

#### **Bell v. Kater, 943 A.2d 293 (Pa. Super. Feb. 13, 2008) (Appeal Denied 2008 Pa. LEXIS 2003 October 28, 2008) (Superior Court Affirms Car Accident Award of \$2 Million, Where the Accident Is Caused by the Negligence of a Co-worker).**

Edward Bell ("Bell") was injured in a car accident with the Defendant Andrea Kater ("Kater") which occurred in the parking lot of their place of employment. Bell filed suit and was awarded \$2 million by a jury. Kater filed an appeal to the verdict arguing that she was immune from the suit, because she was a Bell's co-employee. She explained, under the worker's compensation laws Bell

was not allowed to file a lawsuit against a co-worker for negligence and the resulting injuries.

The issue was not raised until after the pleadings were closed and was never raised as a defense. The Superior Court decision by Judge Klein held: (1) the state trial court had jurisdiction over the case, and (2) any defense of immunity was waived, because it was not plead as an affirmative defense. Under the Pennsylvania Rules of Civil Procedure, immunity must be raised as a defense or it is waived. Where the mandates of Rule 1030 were not followed, the defense was waived.

The Superior Court affirmed the trial court verdict.

**Shaw v. State Farm Ins. Co., 2008 U.S. Dist. LEXIS 54881 (Lancaster, J. W.D. Pa. July 15, 2008) (District Court Holds Insured Not Allowed To Receive Uninsured/Underinsured Motorist Benefits After Accident Caused By Co-employee).**

David Shaw (“Shaw”) was seriously injured in a car accident which occurred in the course and scope of his employment. The accident and his resultant injuries were caused by Shaw’s co-worker, thus, under Pennsylvania law; he was barred from suing his employer and the co-employee. Since he is barred from any third party action, he sought uninsured (“UM”) and/or underinsured (“UIM”) motorist protection from his personal auto policy with State Farm Insurance Company (“State Farm”). Any claims for UM and UIM benefits were denied by State Farm, because it argued Shaw was not “legally entitled to collect” uninsured benefits under the terms and conditions of the policy.

The District Court for the Western District of Pennsylvania held Shaw was not allowed to recover UM/UIM benefits under his insurance policy with State Farm for injuries sustained during the course and scope of his employment, due to the negligence of a co-worker. The District Court relied mainly on a Non-Precedential decision of the United States Court of Appeals for the Third Circuit. Nationwide Mutual Ins. Co. v. Chiao, 186 Fed. Appx. 181 (3d Cir. 2006). The District Court granted State Farm's Motion for Summary Judgment on the issue. In Chiao, the court held an insured is not entitled to benefits on his own personal insurance policy, when an accident occurred in the course and scope of his employment and was caused by a co-worker.

However, notably absent, from this decision, was mention or reference to the Pennsylvania state trial court decision in Brumbaugh v. Erie Ins. Exchange, 2006-2211 (Franklin Co. Nov. 30, 2006), where Judge Walker in Franklin County held that an insured was entitled to UM/UIM coverage in almost the same factual situation.

### ***FOR USE/FOR HIRE***

**Brink v. Erie Ins. Group, 940 A.2d 528 (Pa. Super. 2008) (Superior Court Upholds “regular use” Exclusion by Finding a Person Does Not Need to Operate the Same Vehicle All of the Time to be Subject to the “regular use” exclusion).**

Donald Brink (“Brink”) was injured while working in the course and scope of his employment as a Pennsylvania State Trooper. He filed a claim for Underinsured Motorist (“UM”) coverage, with his personal auto insurance carrier, which was denied. In denying coverage, the company cited a provision in the policy which excluded coverage if Brink was injured while occupying or using a vehicle that was available for his “regular use.” The trial court held the exclusion was valid and Brink appealed.

Among several reasons the decision should be overturned, Brink argued the exclusion should not apply in his case, because he was not allowed to use the state vehicle other than for work, he never operated a specific vehicle, and the exclusion violated public policy. The Superior Court reviewed the various cases and found the term “regular use” means available for use and all of the vehicles were available to Brink. Also, the Court noted the exclusion was clear and unambiguous, so it was not found to violate the reasonable expectations of the insured and does not violate public policy.

The Superior Court affirmed the trial court’s decision and held: (1) "regular use" exclusion can apply to a case even if the person/insured does not regularly use the particular vehicle in question, (2) application of the “regular use” exclusion does not necessarily go against the reasonable expectations of the insured, and (3) the exclusion does not violate public policy.

### ***“MOTOR VEHICLE” UNDER THE MVFRL***

**Nationwide Mutual Ins. Co. v. Yungwirth, 940 A.2d 523 (Pa. Super. 2008) (en banc)(Appeal Denied 2008 Pa. LEXIS 1910 October 30, 2008) (Superior Court Holds a Person Injured While a Passenger on an ATV Is Not Injured by an Uninsured Motorist).**

On May 11, 2002, Anthony Yungwirth (“Yungwirth”) was injured while a passenger on an all terrain vehicle (“ATV”). The ATV was driven off road and the driver lost control causing Yungwirth to be ejected and injured. He filed an uninsured motorist (“UM”) claim with his insurance carrier, since the ATV did not carry insurance. His insurer denied the claim based on an exclusion, which removed from the definition of “uninsured motor vehicle” a “vehicle designed for use mainly off public roads except while on public roads.” The trial court held the exclusion was invalid as contrary to the provisions of the Pennsylvania Motor Vehicle Financial Responsibility Law (“MVFRL”) and Nationwide appealed.

The Superior Court in the *en banc* decision observed, in the MVFRL there is no specific definition of “motor vehicle.” The broader Motor Vehicle Code provides a definition, in Section 102, that arguably included an ATV. However, the court observed, there are special laws for the ATVs, such as the Snowmobile All-Terrain Vehicle Law, which do provide a specific definition of ATVs and basically take ATVs out of the definition of "motor vehicle" in Section 102. Thus, the *en banc* panel found ATVs are not within the scope of “motor vehicle” under the MVFRL and not an "uninsured vehicle" under the MVFRL.

The court wrote, “the provision of the Nationwide policy which excludes ATVs from the definition of ‘uninsured motor vehicle’ does not impermissibly narrow the MVFRL.” It concluded the trial court erred, when it found the exclusion invalid and reversed.

**Burdick v. Erie Ins. Group, 946 A.2d 1106 (Pa. Super. 2008) (en banc)**  
**(Superior Court Holds Injured Person Is Allowed to Recover Uninsured Motorist Coverage When Injured After Being Hit by a Dirt Bike).**

Helen and Ivan Burdick (“Burdick”) were injured, while driving their vehicle through Elk County. Their vehicle was insured with Erie Insurance Group (“Erie”). The accident was caused after they were hit by a dirt bike. The dirt bike was neither insured nor registered. Burdick sought uninsured motorist (UM) coverage from Erie under their own policy. Erie denied the claim, citing an exclusion to uninsured motorist coverage for collisions involving motor vehicles designed for use mainly off public roads. The trial court applied the exclusion and Burdick appealed.

The Superior Court’s *en banc* decision reviewed the statutory language of the Pennsylvania Motor Vehicle Code and the Pennsylvania Motor Vehicle Financial Responsibility Law (“MVFRL”). It noted Section 102 of the Code had a definition for “motor vehicle” into which a dirt bike fits. Then it observes, UM coverage was mandated, unless rejected, if a person was injured by the negligent operation of an uninsured motor vehicle. Here the uninsured, unregistered dirt bike fits within the mandate. Lastly, it noted Section 1711 of

the MVFRL had an exclusion for recreational vehicles but not dirt bikes. Therefore the court concluded that if the legislature wanted to make dirt bikes an exception from UM coverage it would have done so. Thus, the exclusion was found to violate the statute, and coverage was required even if the legislative goal of cost containment was not met. Following the rules of statutory construction, the law took precedence over any public policy.

The trial court decision was reversed.

### ***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.

### ***SETOFFS/OFFSETS/BINDING CLAIMS***

#### **Catroppa v. Carlton, 63 Beaver Co. L. J. 9 (Beaver Co. 2008) (Underinsured Motorist Decision Binding Third Party Case When Third Party Carrier Is the Same As Underinsured Motorist Carrier).**

The Beaver County trial court held the decision of a board of arbitrators in an underinsured motorist (UIM) proceeding was binding on the third party case when the third party and UIM carriers were the same and there was only an issue of damages.

In this case, the insured went through arbitration first with State Farm and was awarded \$100,000. The third party was insured for \$50,000, so the UIM award was reduced to \$50,000. The Plaintiff then filed a Motion for Summary Judgment arguing the third party (also insured by State Farm) was bound by the UIM award. The Court granted the motion and held under "offensive" collateral estoppel an insurance company is limited from re-litigating the damages issue when it insures both the defendant in the third party case and

the Plaintiff in the UIM case; this is so when the cause of action arises out of the same accident when liability is not an issue.

There is no indication that the decision was appealed

**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, No. 58-2004 CD (Foradora, P.J., Jefferson Co. Feb. 28, 2008) (Trial Court Holds Third Party Allowed to Take a Credit for Full Amount of Verdict).**

A jury found in favor of Amanda Pusl ("Pusl") and awarded her \$100,000, for injuries she sustained in a motor vehicle accident. Pusl had already settled an underinsured motorist claim ("UIM") with her own personal insurance carrier, State Farm, for its policy limits of \$75,000. After the jury verdict, Defendant Mean filed a Motion to Mold the Verdict seeking a credit or offset for the monies State Farm had already paid.

In support of the Motion to Mold the verdict, Mean relied upon the Court of Common Pleas decision in Shankweiler v. Regan, 60 Pa. D. & C. 4<sup>th</sup> 20 (Del. Co. 2002), where the court concluded the Defendants were entitled to a credit for the settlement monies Plaintiffs had received in UIM coverage from their

insurer. The trial court in Jefferson County followed the Delaware County decision and molded the verdict to \$25,000.

In support of its reasoning the trial court noted the Plaintiff Pusl still received the full amount of the verdict, which the “jury determined she should be compensated.” Also, the trial court noted, it will not extinguish the third party liability because by operation of law the UIM carrier can still subrogate against the third party for monies it has already paid. see Johnson v. Beane, 664 A.2d 96 (Pa. 1995).

Plaintiff Pusl filed an appeal to the Superior Court which is pending. The argument was held on November 19, 2008.

**George v. CIGNA Group Ins. Co., 3: CV-07-0659 (Vanaskie, J., M.D. Pa. March 5, 2009) (Policy Language Allows Long Term Disability Plan To Offset Disability Benefits Paid For Work Loss By First Party Carrier).**

The District Court reviewed the insurance policy of a disability plan which had language that allowed it to offset any payments it made to an insured by monies the same insured recovered from a first party motor vehicle insurance carrier for wage loss. Life Insurance Company of North America (LINA) sought to offset, from its monthly disability payments, the amount in wage loss benefits an insured was receiving under its plan after being injured in a non-work related car accident.

Joseph George (George) was injured in a car accident in January of 2006 and was covered under a long term disability policy which provided a maximum benefit of \$5,000 per month. He also had wage loss benefits with his personal auto insurance carrier Liberty Mutual with a monthly maximum of \$1,500 and a total maximum of \$25,000. He expected the long term disability policy to pay \$2,823, which was 60% of his monthly wage (\$4,705.5). He was also to receive \$1,500 in work loss benefits under the Liberty Mutual policy.

The disability plan sought to offset \$1,500 from the \$2,823 it was paying, because it alleged the disability plan language provided for an offset of "other income benefits" that an insured is entitled to receive as a result of the accident. The Court found the wage loss benefits were within the "other income benefits" identified by the plan and allowed the offset. Thus, George will now receive \$1,323 in long term disability benefits.

Of note, the decision in this case was mainly driven by the long term disability policy language. Different policy language may have led to a different result where the offset off of the maximum amount possible payable per month was based upon \$5,000 instead of the \$2,823. This is noted by the Court.

## **GOVERNMENTAL IMMUNITY**

### **Fagan v. PennDOT, 946 A.2d 1123 (Pa. Commw. 2008) (*en banc*) (Commonwealth Court Holds Commonwealth Has Immunity from Claims Arising Out of Failing to Design and Maintain a Guardrail).**

Fagan was tragically killed in a car accident when the vehicle in which he was a passenger left the road. The accident was a single vehicle accident during which the car left the side of the road without any explanation, even though there was a guardrail. His Estate filed a lawsuit against the driver of the vehicle and the Commonwealth. The claim against the driver was for negligence in operating the vehicle. The claim against the Commonwealth was for negligence arising from failing to maintain and design the guardrail on the side of the road properly. The Commonwealth sought summary judgment and dismissal from the lawsuit arguing it is immune from responsibility for failing to maintain and design guardrails.

The Commonwealth Court, in a sharply divided 4-3 decision, held the Estate does not have a claim against PennDOT, because there is immunity from suit for not only failing to install a guardrail but also failing to design the guardrail properly and failing to maintain it. In fact, the holding showed the Commonwealth would not be liable even if it was responsible, because there was no evidence as to why the vehicle left the roadway.

## **OTHER BENEFITS “PAID OR PAYABLE”**

### **Orzel v. Morgan, No. 03 CV 4929 (Lack. Co. Feb. 4, 2008) (Trial Court Holds in Case of First Impression that Jury Award for Future Medical Bills Should Be Molded to Reflect the Amount of Medical Bills Which May Still Be Paid by First Party Insurance Carrier).**

On December 24, 2001, the Plaintiff Deanna Orzel (“Orzel”) was injured in a car accident while a passenger. The vehicle was operated by her husband. She filed a lawsuit against the other driver Kenneth Morgan (“Morgan”) for her injuries sustained in the accident. At the time of the accident, Orzel was insured for \$100,000 in first party medical benefits, of which, at the time of trial, only \$14,577.61 had been paid. There was evidence presented at trial of future medical expenses, and the jury rendered a verdict which included an award of future medical expenses in the amount of \$125,000.

On post trial motions the Defendant sought to reduce the award for future medical bills to zero by arguing the future medical bills should be subject to

Act 6 reductions and then offset from the award since the Plaintiff had \$85,422.39, in benefits remaining. Further, the amount of future medical bills which exceeded the first party limit would be paid by health insurance resulting in future medical bills of zero. The Plaintiff sought to recover the full amount of the expected medical bills by arguing future bills were not "payable" under the Pennsylvania Motor Vehicle Financial Responsibility Law ("MVFRL").

The trial court denied the Defendant's attempt to reduce the award to zero and denied the Plaintiff's motion for the full amount of the award. The decision molded the future medical benefits, but only to reflect an offset for the available benefits from the auto policy.

The court first held the bills were "capable of being paid" under the remaining first party coverage. Thus, they may be "payable" and cannot be recovered since the first party carrier cannot subrogate. The court denied the Defendant's Motion to mold the verdict to zero by (1) finding the Pittsburgh Neurosurgery Associates, Inc. v Danner, 733 A.2d 1279 (Pa. Super. 1999), appeal denied, 751 A.2d 192 (Pa. 200) and Moorhead v. Crozer Chester Medical Center, 765 A.2d 786 (Pa. 2001), decisions were not directly on point, and (2) relying upon the Pennsylvania Suggested Standard Civil Jury Instruction 6.14 (Auto Negligence: Medical Expenses) to hold future medical expenses should not be adjusted under Section 1797 of the MVFRL.

The defense did not offer any evidence on the Act 6/cost contained figures for future medical bills and these amounts are not generally known in the community. Thus, it would be "pure conjecture" to reduce the bills by Section 1797. The Plaintiff presented testimony on the cost of future care and the defense never cross examined the expert physician on the statutory requirements of Section 1797. Thus, the remaining medical benefits of \$85,422.39 are offset against the full award rather than reduced under Section 1797. The award for future medical bills was molded to \$39,577.61. It was not reduced further, even if paid by health insurance, since the health insurance plan was an hmo/erisa plan and would pre-empt any state laws.

**Tannenbaum v. Nationwide Insurance Company, 919 A.2d 267 (Pa. Super. March 6, 2007) (Insurance carrier is not entitled to set-off self-paid disability benefits from monies recovered in underinsured motorist proceeding).**

Alan Tannenbaum ("Tannenbaum") was injured in a car accident in December 2000. He settled the bodily injury case and the sought underinsured motorist benefits from his personal motor vehicle insurance carrier Nationwide. Tannenbaum has purchased personal disability policies through UNUM and Nationwide sought to prohibit the introduction of evidence relating to amount paid or payable from the policies. The arbitrators granted the motion. After a

hearing the arbitrators credited and/or set off \$984,432.52 against their award of \$1,875,000.00 leaving a net amount of \$890,567.48. Tannenbaum filed a Motion to Vacate the award. The trial court vacated the decision and Nationwide appealed.

The Superior Court affirms and holds that benefits derived from self-paid disability coverage do not duplicate benefits payable under an underinsured motorist policy. The decision from Bucks County is affirmed. The insurance company argued that disability benefits paid by UNUM should be set-off from the underinsured motorist recovery because it would be considered a double recovery.

The court notes that the Motor Vehicle Financial Responsibility Law ("MVFRL") in Section 1722 only prohibits recovery of benefits that are by definition duplicative and that Nationwide confuses a double recovery with the recovery of excess benefits, for which under the law are allowed to be recovered. The decision notes that "personal policies resorted to are both separate from UIM, or UM, coverage, are paid for exclusively by the claimant either directly, or through payroll deductions which result in lower wages, payments received from these coverages do not duplicate benefits under the MVFRL as they are fundamentally different from those benefits."..."As Amicus points out 'Appellee is entitled to benefits for which he has paid.' The trial court decision is affirmed and the set off is not allowed.

*A petition for allowance of appeal was granted by the Supreme Court of Pennsylvania. The argument took place on April 17, 2008 and a decision was pending at the time these materials were written.*

## **STATUTE OF LIMITATIONS**

**Bowers v. Nationwide Ins. Co., 2008 U.S. Dist. LEXIS 4025 (M.D. Pa. Jan. 18, 2008) (Middle District Court of Pennsylvania Holds Statute of Limitations in a Bad Faith Case Arising Out of an Underinsured Motorist Claim Accrues at the Time of the Arbitration Proceedings Which Give Rise to the Award).**

On January 18, 2008, the District Court for the Middle District of Pennsylvania denied Nationwide Insurance Company's Motion to Dismiss a bad faith claim based on the insurer's allegation the statute of limitations expired. The insured filed the bad faith action in February 2008, less than two (2) years after an underinsured motorist (UIM) arbitration took place in March 2005 where he was awarded over \$550,000. Before the arbitration there was mediation in

2004, at which time \$35,000 was offered by the insurance company, and then in January 2005 a letter was sent to Nationwide threatening bad faith.

The company argued under Ash v. Continental, 932 A.2d 877 (Pa. 2007) the statute of limitations expired before the suit was filed in February 2007, because the statute started in either 2004 at the mediation or in January 2005 when the letter was sent. The court found neither the mediation nor letter would be considered a "denial of coverage" by Nationwide to start the SOL and that it started the day of the arbitration. Also, the Court found, independently, the SOL started on a new theory of bad faith in March 2005 when the company participated in the UIM arbitration but offered "no serious defense of its position."

### ***SUBROGATION***

***City of Wilkes-Barre v. Sheils, 2008 U.S. Dist. LEXIS 5550 (M.D. Pa. Jan. 25, 2008) (Middle District of Pennsylvania Court Holds City Is Not Allowed to Subrogate Heart and Lung Benefits Paid as a Result of a Motor Vehicle Accident).***

This case arises out of a motor vehicle accident where a police officer was injured in the course and scope of his employment with the City of Wilkes-Barre. The injuries made him unable to work and he received Heart and Lung benefits through the City of Wilkes-Barre. After he returned to work and the City had provided \$425,945.69, in benefits, the City sought subrogation of proceeds from a third party case which had settled for approximately \$555,000.

The District Court held, the City has no right of subrogation for the funds paid by Heart and Lung from a tort settlement arising out of the injuries sustained by an employee in a motor vehicle accident. The Court mainly relied on the Commonwealth Court decision in Fulmer v. Pa. State Police, 647 A.2d 616 (Pa. Commw. Ct. 1994), where the Court held the State Police did not have a right to subrogate after a state trooper received a tort settlement. The Court noted, under Section 1722 the employee was not able to plead these benefits so there would not be a double recovery.

## ***EVIDENTIARY ISSUES***

**Kopytin v. Aschinger, 947 A.2d 739 (Pa. Super. 2008) (Appeal Denied 2009 Pa. LEXIS 79 Jan. 9, 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.

**Wingate v. Roy, NO. 5075 CV 2004 CR (Cherry, J. Dauphin Co. July 9, 2008) (Trial Court Reconsiders Previous Ruling And Finds That Defense Medical Examiner Is A “Professional Expert Witness”).**

Jill Wingate (“Wingate”) was involved in a car accident with Michael Roy (“Roy”) in which she suffered injuries. She then filed a lawsuit in the Court of Common Pleas of Dauphin County for her personal injuries. During the case, the attorney for Defendant Roy sought a defense medical exam to be completed by an orthopedist, from Carlisle, Pennsylvania, named David Baker.

Pursuant to a Pennsylvania Supreme Court decision, Wingate served interrogatories to discover financial information of Dr. Baker. Cooper v. Shoffstall, 905 A.2d 482 (Pa. 2006). In response, Roy filed a motion for a Protective Order which was initially granted in February, 2008. Wingate filed a motion with the trial court asking it to reconsider its ruling.

On July 9, 2008, the trial court granted the Motion for Reconsideration and found, under the facts of the case and record presented at oral argument, “Dr. Baker is indeed a professional expert witness.” The trial court vacated its earlier rulings and ordered the discovery to be answered. Included in evidence the trial court reviewed to make its determination, were other depositions where Dr. Baker testified after performing examinations at the request of insurance company lawyers. The trial court observed the threshold of “a significant pattern of compensation that would support a reasonable inference that the witness might color, shade, or slant his testimony in light of the substantial financial incentives.” Cooper, 906 A.2d at 494-95.

## ***RELEASES***

**Ford Motor Co. v. Buseman, 954 A.2d 580 (Pa. Super. 2008) (Superior Court Holds That General Release Signed In Auto Accident Case Also Releases A Separate Product Liability Case Arising Out Of Same Motor Vehicle Accident).**

Maya Buseman (“Buseman”) was involved in a tragic car accident in June 2005, when the vehicle, in which she was a passenger, rolled over causing her death. A lawsuit was filed against the driver of the vehicle and settled after a general release was signed. A separate lawsuit alleging product liability for defective design was filed. Ford Motor Company (“Ford”), one of the product liability lawsuit Defendants and not a party to the other claim or release, filed a Motion for Summary Judgment arguing the product liability claim was released when the other lawsuit was settled with the signing of a blanket general release. The trial court denied the Motion and Ford appealed.

Ford argued the execution of the broad release in the other lawsuit which released "all other firms, person," etc., released the parties to the product liability suit. The Superior Court reversed the trial court and enforced the release so it applied to Ford. The court held, (at most) this is a unilateral mistake and the releases (without any limitations or indications anywhere that the other lawsuit parties were not released) were broad enough to effectively release the product liability suit defendants. Thus, the release was broad enough to release Ford.

### ***UNINSURED AND UNDERINSURED MOTORIST ARBITRATION/KOKEN AND CIVIL PROCEDURE***

**Willett v. Allstate Ins. Co., NO. 08-5411 (O'Neill, J., E.D. Pa. March 4, 2009) (Underinsured Motorist Claim Barred After Court Applies The State Of Maine Law In Pennsylvania Claim).**

On March 4, 2009, Judge O'Neill in the Eastern District of Pennsylvania granted Allstate's Motion for Summary Judgment. The Estate of an insured argued for a claim for underinsured motorist (UIM) benefits be allowed even though the law in the state of Maine, where the decedent's accident occurred, had a statutory cap on the amount of monies that can be recovered for non-economic damages in a wrongful death action.

David Willett (Willett) was killed in a car accident in Maine. At the time of the accident he resided in Pennsylvania with his mother, and was insured under her Allstate policy. The Allstate policy provided \$100,000 in UIM benefits. The third party's coverage totaled \$1,250,000 (liability and umbrella). Pursuant to the laws in Maine the Estate received only the statutory cap of \$400,000 for non-economic damages and the total award, with the additional expenses, was \$454,249.

The Estate pursued a UIM claim in Pennsylvania against Allstate and gave Allstate a credit for the full \$1,250,000. The District Court decision by Judge O'Neill held Allstate is not required to make any UIM payment because the application of the statutory cap in Maine precluded the UIM claim. He found the Pennsylvania Supreme Court decision in Cipolla v. Shaposka, 267 A.2d 854 (Pa. 1970), is controlling and on point. He distinguished the Willett situation from the Pennsylvania Supreme Court decision in Kmonk-Sullivan v. State Farm Mutual Auto. Ins. Co., 788 A.2d 955 (Pa. 2001), because the Kmonk case (1) involved Pennsylvania accidents and not one from another state, (2) no party argued another state's law was applicable, (3) there was no choice of law issue in Kmonk and (4) the Court in Kmonk did not cite, discuss, or overrule Cipolla.

He held the statutory cap under Maine law made the estate NOT "legally entitled" to recover UIM benefits and thus, no UIM monies were to be paid.

**Gunn v. The Automobile Ins. Co. of Hartford, Connecticut, NO. GD07-002888 (Wettick, J. Allegheny Co. July 25, 2008) (Bad Faith Claim And Underinsured Motorist Claims Can Be Litigated And Pursued At The Same Time).**

Barbara Gunn ("Gunn") filed a breach of contract and bad faith complaint 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 and present the same discovery twice.

Thus, the two claims can proceed at the same time. If the insurance company wanted to object to discovery in the bad faith portion of the case, based on privilege, Judge Wettick noted the insurer can file a specific motion for a protective order.

**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.

**O'Hara v. The First Liberty Insurance Corporation, NO. 3032 August term 2008 (Phila. Co. Dec. 17, 2008) (Trial Court Recommends Affirming Its Decision And Order To Transfer Case to Delaware County).**

This is probably the first post-Koken case dealing with venue and a venue selection clause in an insurance policy which is working its way through the courts. It was originated in Philadelphia County arising out of a claim for underinsured motorist benefits. Liberty Mutual objected to the venue attempting to enforce a venue selection clause in the insurance policy to determine venue of the litigation. The trial court in Philadelphia granted the insurance company objection to venue and transferred the case. The insured has appealed.

The central issue on appeal is whether the policy language can supersede the Rules of Civil Procedure. In the case, the policy language required a litigation to be filed in Delaware County where the insured lived but under the Pennsylvania Rules of Civil Procedure Philadelphia County is also proper venue. The most likely argument is that in post-Koken policies in a non-arbitration situation, the Pennsylvania Rules of Civil Procedure cannot be trumped by policy language. Briefs have been filed with Len Sloane and Mike Davey filing an Amicus Brief on behalf of PAAJ.

**Godfry v. State Farm Mutual Ins. Co., NO. 08-4813 (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.

**Williams v. Allstate Ins. Co., NO. 08-3031 (Buckwalter, J. E.D. Pa. Jan. 15, 2009) (District Court Holds Section 1796 Of The Pennsylvania Motor Vehicle Financial Responsibility Law Does Not Preclude Insurance Company Request For Independent Medical Examination As Condition Precedent For Coverage).**

The Court held an insurance policy provision, which required an insured to submit to "reasonable medical examinations" as a condition precedent to insurance coverage, was enforceable notwithstanding Section 1796 of the Pennsylvania Motor Vehicle Financial Responsibility Law ("MVFRL") which requires a company to seek a court order to conduct a first party exam. In this case, the insured was seeking coverage for first party medical benefits and his insurance company, Allstate, sought to send him to for a medical examination. Williams objected because he argued that Section 1796 of the MVFRL requires the company to seek a court order before an exam can be scheduled. Allstate, on the other hand, had a provision in its policy which allowed for such an exam, as long as it was "reasonable."

The District Court decision by Judge Buckwalter relied mainly upon the Pennsylvania Superior Court decision in Fleming v. CNA Ins. Co., 597 A.2d 1206 (Pa. Super. 1991), where the court enforced a similar policy provision which required an insured to submit to an exam. Thus, the Court held the insurance company can seek the exam without a court order. However, the company still was not allowed, at this time, to deny Williams coverage in the case because it failed to show the insured's refusal to go to the exam was unreasonable. Thus, the insured's claim was allowed to proceed until it would be shown the insured violated the terms of the policy.

## ***Bad Faith***

### **Amitia v. Nationwide Mut. Ins. Co., No. 3:08cv335 (Munley, J. M.D. Pa. Jan. 15, 2009) (District Court Allows Claim For Emotional Distress To Continue After Alleged Breach Of Contract And The Payment Of Underinsured Motorist Benefits).**

After settling an underinsured motorist claim Amitia filed an action against Nationwide Mutual Insurance Company ("Nationwide"), which alleged various allegations including bad faith, and sought losses for emotional distress. Nationwide filed Motions to Dismiss Claims of Violations of the Unfair Trade Practices and Consumer Protection Law (UTCPL) as well as for Breach of Contract.

First, the Court denied Nationwide's Motion for Dismiss the UTCPL count because it found Amitia alleged more than a mere breach of a contractual duty by alleging in the Complaint that Nationwide failed to evaluate the claim promptly, objectively and fairly. Also, Amitia's Complaint alleged Nationwide conducted an unfair, unreasonable and dilatory investigation. Therefore, Judge Munley found there were allegations in the Complaint which were more than the simple alleged refusal to pay. This could warrant recovery under the UTCPL.

Secondly, the Motion to Dismiss a claim for breach of contract was denied. Nationwide argued since the underinsured motorist claim was paid it could not be responsible for breach of contract. However, the Court found the damages sought in the case due to the breach were different than the damages for the underinsured motorist benefits. The claims alleged emotional distress because of Nationwide's breach of contract. Thus, this was not the same as damages for the breach of not paying UIM benefits. The District Court found, "it would be inappropriate at this time to dismiss the breach of contract cause of action as it seeks recovery for emotional distress, which may be recoverable."

Therefore, Motions to Dismiss were denied.