PENNSYLVANIA ASSOCIATION FORJUSTICE (formerly PaTLA) UNINSURED AND UNDERINSURED MOTORIST UPDATE SPRING 2010[1]

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JURISDICTION

Friel v. State Farm Mut. Auto. Ins. Co., 2009 U.S. Dist. LEXIS 102536 (McVerry, J. W.D. Pa. Nov. 4, 2009) (Plaintiff's Motion To Remand Denied When Diversity Claim Is Not Limited To Damages Not In Excess Of $75,000).

Joseph Friel ("Friel") filed a claim for uninsured motorist benefits ("UM") with his insurance company State Farm. The claim could not be resolved and the policy did not allow for arbitration so he filed a complaint in state court seeking damages under the policy in excess of $30,000 and also asserted a claim for bad faith. The case was removed by State Farm to federal court based upon it claim of diversity jurisdiction. Friel sought to remand the case to state court by arguing that the amount in controversy was not met since State Farm could not establish the claim was worth in excess of $75,000 to meet the diversity statute.

The District Court denies the Motion to Remand because Friel did not agree to cap the damages. The District Court relies upon the Third Circuit case of Samuel-Bassett v. Kia Motors, 357 F.3d (3d Cir. 2004) where the Court of Appeals for the Third Circuit adopted the "legal certainty" test such that "it must be evident to a legal certainty that the Plaintiff cannot recover an amount greater than $75,000 required for diversity jurisdiction" before a case such as this would be remanded.

In this case Friel did not stipulate to the cap and the Complaint had not been amended to cap the damages. Thus, the District Court finds that it

[1] Materials and any powerpoint presentation will also be posted on Schmidt Kramer P.C. web site at www.schmidtkramer.com.

cannot say "to a legal certainty, based upon the face of the Complaint, that Friel will not be able to recover more than $75,000 in this case." Therefore, the Motion to Remand is denied.

Willett v. Allstate insurance Company, 2009 U.S. App. LEXIS 28711 (3d Cir. Dec. 31, 2009) (Not Precedential) (Court of Appeal for the Third Circuit Affirms District Court Holding That Estate's Underinsured Motorist Claim Is Barred Due To Other State Damages Cap).

David Willett (Willett) was killed in the car accident in Maine. At the time of the accident he resided in Pennsylvania with his mother and was insured under her Allstate policy which provided for $100,000 in unstacked underinsured motorist (UIM) benefits. The third party had a total amount of coverage (liability and umbrella) of $1,250,000. Pursuant to Maine law limitations on damages 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 the UIM claim in Pennsylvania against Allstate and agreed to provide a full credit for the full $1,250,000.

On December 31, 2009, the United States Court of Appeals affirmed the District Court of Pennsylvania decision in Judge O'Neill in the Eastern District of Pennsylvania initially granted Allstate Insurance Company's Motion for Summary Judgment in Willett and the Estate appealed.

The Third Circuit holds that Allstate is not required to make any UIM payment because the application of the statutory cap in Maine precludes the UIM claim. Therefore, the Estate is not "legally entitled" to UIM coverage under Pennsylvania law. The court follows the reasoning of the District Court and finds that the Pennsylvania Supreme Court decision in Cipolla v. Shaposka, 267 A.2d 854 (Pa. 1970) is controlling. The court distinguishes 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 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.

Thus, the Estate NOT "legally entitled" to recover UIM benefits and thus, no UIM monies are to be paid.

QUALIFICATIONS FOR COVERAGE

Erie Ins. Exch. v. Tlumach, 83 Lancaster L.R. 296 (Cullen J. 2008) (Trial Court Holds That Minor Daughter Is Not Insured On Company Insurance Policy When the Company Is the Only Listed Named Insured).

On February 9, 2006 a 6 year old girl, while a pedestrian, was severely injured when she was struck by a car. After resolving the third party claim she sought underinsured motorist benefits on a Commercial Auto Policy issued to her parent's business Valley Home Improvement, LLC. She always lived with her parents and the business address was the same as her parents address. The insurance company denied coverage for the 6 years old girls because she was not considered an "insured" under the "others we protect" portion of the policy. A Declaratory Judgment Action was filed and Erie filed a Motion for Judgment on the Pleadings.

In this case, the only named insured on the policy declaration sheet was Valley Home Improvement, LLC. The policy defined "you" and the subscriber which would be the company and anyone else listed in item 1 of the policy which was no one else. Since neither the parents or daughter were listed in item 1 as named insured and the girl was injured as a pedestrian she did not meet the definition of insured or "others we protect" on the policy. Therefore, the trial court grants Erie its Judgment.

The importance of this decision is making sure that you counsel clients if you can to have them listed on commercial policies as named insured in addition to the corporation. Also, agents may be exposed to negligence claims if the insured can show that they requested and wanted this type of situation covered.

Erie Ins. Exchange v. Weryha, 931 A.2d 739 (Pa. Super. 2007) (Pennsylvania Supreme Court Case Discontinued So Superior Court Decision Will Stand For Now).

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). This is a tragic case where a child was killed in front of his mother's home. After the Estate recovered the third party coverage and the underinsured motorist (UIM) coverage on his mother's policy there was a second UIM claim made under the deceased minor's father's policy. 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 that 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 decision agreed with Erie and held that the Estate was not entitled to coverage because the language in the policy used the phrase "physically living".

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.

SECTION 1731 REJECTION OF UNINSURED AND UNDERINSURED MOTORIST COVERAGE

Kelly v. MIC, 157 Pittsburgh L. J. 273 (Friedman, J. 2009) (Trial Court holds that where original policy holder dies and insurer enters into a new relationship with similar terms with the surviving spouse, that surviving spouse becomes a new policyholder and section 1731 applies).

In 1984 Frances Kelly's husband purchased a policy which listed him as the sole named insured and had uninsured and underinsured (UM/UIM) motorist coverage equal to the liability coverage. Subsequently, in 1992, he executed a written request for lower UM/UIM coverage to $15,000/$30,000. In 1999 he passed away and Mrs. Kelly informed the insurance company of his death and told the company to have her take over the policy.

The policy was re-issued with Frances as the new sole named insured. No new forms of any kind were signed. She was injured in a car accident

and sought uninsured and underinsured motorist benefits since she never executed any rejection form. She argued that since she did not execute any form rejecting UM/UIM coverage that she was entitled to the coverage. MIC argued that her husband's original sign down form was valid since it was the same policy.

The trial court holds that in this case where original policy holder died and insurer entered into a new relationship with similar terms with the surviving spouse, that the surviving spouse becomes a new policyholder. Therefore, as a new policyholder Mrs. Kelly should have received new forms to possibly reject and/or sign down UM/UIM coverage. In this case, it means that when her husband, the first-named insured and sole policyholder died, the surviving spouse Mrs. Kelly became a new policyholder and her husbands' prior rejections form were not binding on her case.

Since MIC failed to send her new forms after her husband's death and when she took over the policy, this violated section 1731(b) of the Pennsylvania Motor Vehicle Financial Responsibility Law. Therefore, her uninsured and underinsured motorist coverage limits for the accident are to equal the liability limits of the policy.

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

Erie Ins. Exch. V. Larrimore, 987 A.2d 732 (Pa. Super. 2009) (Pennsylvania Superior Court Holds That A Signed Application Is Not A Valid Written Request For Lower Underinsured Motorist Coverage Under Section 1734 Of The Pennsylvania Motor Vehicle Financial Responsibility Law).

This is an underinsured motorist case addressing the requirements of a written request of underinsured motorist coverage under Section 1734 of the Pennsylvania Motor Vehicle Financial Responsibility Law. Donna Larrimore ("Larrimore") had signed an application for coverage which had underinsured motorist coverage of $15,000 but liability coverage of $300,000. She was seriously injured in a car accident and sought the full UIM coverage of $300,000. Erie argued that the coverage was only $15,000. The trial judge denied Erie's Motion for Summary Judgment, granted Larrimore's Motion for Summary Judgment, and ordered that the UIM coverage limits were deemed equal to the bodily injury liability coverage limits, i.e., $600,000.00, representing an amount equal to her bodily injury limits of $300,000.00, stacked for two vehicles. Erie appealed.

Larrimore argued in the appeal that signing an insurance application is not sufficient to be a valid written request for lower limits. Erie argued that signing the application and a Section 1791 Important Notice made the sign down sufficient. Erie also argued that even if there is not a proper sign down there is no remedy.
The Superior Court holds that there was not a valid sign down and Larrimore is entitled to the full amount of coverage. The court writes, "If there is not a proper written request for lower limits in conformity with § 1734, then the UM and UIM coverages are deemed equal to the bodily injury liability limits. Nationwide Mutual Insurance Company v. Heintz, 804 A.2d 1209, 1216 n.7 (Pa. Super. 2002), citing Emig, 664 A.2d at 569. No relief is warranted." Thus, Larrimore will receive the coverage.

<u>United Financial Casualty Company v. Fornataro</u>, No. 11791 of 2008 C.A. (Mott, J. Lawrence Co.) (Trial Court Holds That Signing Application Is Not A Written Request For Lower Limits Under Section 1734 Of The Pennsylvania Motor Vehicle Financial Responsibility Law And Is Only Acceptance of Coverage).

Judge Motto from Lawrence County holds that a written request for lower uninsured and underinsured limits (UM/UIM) which does not include the specific amount of coverage purchased is not valid even where the Insured signs the application for insurance which includes the amount of UM /UIM purchased. The insured is entitled to UM /UIM coverage in an amount equal to the liability limits. In this case the insured executed a form "UM/UIM Increase Limits Rejection Form" which did not identify the specific amounts of UM/UIM coverage. The bodily injury coverage was $300,000 and the application for coverage indicates that UM/UIM is $35,000. But the specific amounts of UM and UIM were not filled in on the "UM/UIM Increase Limits Rejection" form.

Judge Mott holds that the application for coverage is really only an acceptance of coverage. The Motor Vehicle Financial Responsibility Law succinctly requires the liability coverage to equal the UM/UIM coverage unless the insured rejects the coverage outright or makes a written "express" request in writing for lower coverage under Section 1734. In this case the insured failed to make an "express designation" of the lower coverage. Thus, the written request is not valid. He also holds that the statute then obligates and mandates the UM/UIM coverage equal the liability coverage.

Orsag v. Farmers New Century Insurance, 986 A.2d 128 (Pa. 2009) (Pennsylvania Supreme Court Accept Petition For Allowance of Appeal in Case Where Sufficient of Sign Down Is Challenged).

The Pennsylvania Supreme Court has accepted the insureds' Petition for Allowance of Appeal in an underinsured motorist case where the sufficient of a written request for lower limits was challenged. The allegation by the insured is that the request for lower limits is not valid since it is not a "writing" and is only the signature at the end of an insurance application. The question certified by the Court is:

> If an insured signs an insurance application that contains lowered uninsured/underinsured motorist coverage limits, is that signature alone sufficient to meet the requirements of Section 1734 of Pennsylvania's Motor Vehicle Financial Responsibility Law?

Briefs have been filed but no argument date has been set as of March 22, 2010.

SECTION 1738 STACKING OF UNINSURED AND UNDERINSURED MOTORIST BENEFITS

State Auto v. Pro Design, 566 F.3d 86 (3d Cir. May 12, 2009) (Third Circuit Predicts That Pennsylvania Supreme Court Would Apply Sackett Decision To Single Car Policies).

This is an underinsured motorist case where the District Court for the Middle District of Pennsylvania originally held that under Sackett I (See below for discussion) an insured was required to obtain a new rejection of stacking waiver when he added another vehicle (and then a third) to a single car policy. The insurance company appealed and argued that since the 2 subsequent vehicles were added under the "newly acquired vehicle clauses" in the policies that new rejection forms were not required.

The Third Circuit reverses and predicts that the Pennsylvania Supreme Court would follow its ruling in Sackett II (See below for discussion) and holds that since the second and third cars were added under the "after acquired vehicle clause" in the policy a new rejection of stacking form was not needed.

The important holding is that the Third Circuit predicts that a new rejection of stacking form is required when a vehicle is added under the "newly acquired" or "after acquired" vehicle clause of an existing policy.

However, bear in mind that under the Pennsylvania Supreme Court precedent if the vehicles are not added pursuant to the clauses then the new rejection form is required.

Sackett v. Nationwide Mutual Insurance Company, No. 5057 of 2002 (Westmoreland Co. Dec. 15, 2008) (Trial Court Holds On Remand That Vehicles Were Not Added Under Newly Acquired Vehicle Clauses And Insureds Are Then Entitled To Stacking).

After the Supreme Court remanded this case to the trial court there was a nonjury trial held in the case on October 15, 2008. Victor Sackett ("Sackett") was seriously injured in a car accident while a passenger in another car. He obtained the third party liability limits and the underinsured motorist ("UIM") limits on the vehicle he was occupying at the time of the accident. He then sought additional UIM coverage on his own personal policy with Nationwide.

Sackett purchased coverage initially in 1998 with two (2) vehicles and no stacking on the policy. Prior to the accident he added a third vehicle to the policy and no new forms were signed regarding UM or UIM coverage or stacking. Sackett argued that he had stacking since a new rejection of stacking form was not executed when the third car was added.

The trial court notes in its decision that in Sackett v. Nationwide Mut. Ins. Co., 919 A.2d 194 (Pa. 2007) (Sackett I) the Supreme Court mandated that a new rejection form is required when a new vehicle is added to a policy. However, that holding was modified in Sackett v. Nationwide Mut. Ins. Co., 940 A.2d 329 (Pa. 2007) (Sackett II), and states the first Sackett requirement does not apply if a vehicle is added under a newly acquired vehicle clause and such a clause is present under the facts of the case.

The trial court found there was no after-acquired vehicle clause in the endorsement contained in the insurance policy when any vehicles were added to the policy. Additional non-stacking forms were required, and were not signed. Thus, the Sacketts were entitled to stacking under Sackett I.

Post trial motions by Nationwide were denied and Nationwide has appealed to the Pennsylvania Superior Court.

Webb v. Discover Prop and Cas. Ins. Co, 2009 U.S. Dist. LEXIS 86609 (Munley, J. M.D.Pa. Sept. 22, 2009) (mem.) (District Court Holds That Non-

fleet Commercial Policies Must Comply With Pennsylvania Motor Vehicle Financial Responsibility Law).

In this underinsured motorist claim, the District Court for the Middle District of Pennsylvania denies the Defendant's Motion to Dismiss where the injured victims are claiming that they are entitled to underinsured motorist (UIM) benefits because the insurance company utilized a form which was not in compliance with Section 1731 when underinsured motorist coverage was allegedly rejected.

Suit was filed and the Defendants argued that the Plaintiffs could not recover because the Pennsylvania Motor Vehicle Financial Responsibility Law (MVFRL) does not apply to commercial vehicles. They relied upon Everhart v. PMA, 938 A.2d 301 (Pa. 2007) where the Pennsylvania Supreme Court held that Section 1738 of the MVFRL does not apply to a corporate fleet policy. Also, they alleged that the Pennsylvania Workers Compensation laws bar an employee from seeking any UIM recovery from an employer's insurance policy. The District Court denies these Motions to Dismiss.

On the first issue, Judge Munley writes that "[initially, we note that the plaintiff's complaint does not assert that the policies are "commercial fleet policies." Thus, as we must rule on the motion based upon the allegations of the complaint, the motion will be denied." The decision further states: "Moreover, a reading of the statute at issue [Section 1731] reveals that it does not on its face limit its protection to personal policies. Additionally, defendants rely upon Everhart in support of its position. Everhart dealt with the issue of whether stacking is required in commercial fleet policies. The court concluded that mandatory stacking provisions of the Pennsylvania Motor Vehicle Financial Responsibility Law (hereinafter "MVFRL") did not apply to commercial fleet policies. Defendants argue that the reasoning of this case should be extended to apply to the UM/UIM provisions of the MVFRL. The Everhart court examined several factors that led to this conclusion. Not all of these factors are applicable to the issue present in our case. For example, the court indicated that fleet policies cover a multitude of vehicles; therefore, stacking might very well be cost prohibitive and not the reasonable expectation of the contracting parties. The increased cost of stacking multiple vehicles is not present when the issue is merely UM/UIM coverage."

Further, "the Everhart court noted that at the time that the stacking provisions were added to the MVFRL, a body of case law had developed holding that stacking did not apply to commercial fleet policies. Statutes are not presumed to make changes to existing law beyond what the

statute expressly provides. Therefore, this factor weighed in favor of finding that stacking did not fall under the MVFRL's stacking provisions. The defendants have cited no case law to indicate that the UM/UIM provisions of the MVFRL should not be applicable in the employee/employer situation. Although these factors appear to make Everhart inapplicable to the instant case, we will defer making a complete analysis of this issue to a more appropriate time after discovery has been completed and the nature of the policy is clear."

On the second issue, the decision states: "Defendants argue that the sole remedy an employee has against an employee for an injury sustained during the course and scope of his employment is provided under the Workers Compensation Act. Defendants concede, however, that an employer may purchase UM or UIM insurance coverage for its employees, and if they do, the Workers Compensation Act does not bar a claim for benefits by the employee against the employer's insurer. Regardless, the defendants argue that if the employer chooses NOT to purchase UM or UIM protection as a benefit to its employees, the employee cannot then sue to reform the policy because that would violate the exclusivity provision of the Workers Compensation Act. We are unconvinced by the defendants' arguments. The Third Circuit Court of Appeals has explained that Pennsylvania law allows for the recovery of both Workers Compensation benefits as well as UIM benefits. Travelers Indem. Co. of Illinois v. DiBartolo, 131 F.3d 343 (3d Cir. 1997). We discern no difference at this time between plaintiffs seeking UIM coverage properly provided for in their employer's insurance policy and seeking to void a provision of that policy as in violation of the law and thus obtaining benefits in that manner." Elaborating further, "Defendants argue that section 1731 should be narrowly construed and employees should not be allowed to try to "reform" an employer's insurance contract, which would only serve to increase premiums. We are not convinced. First, we note that defendants have not presented any evidence as to an increase in premiums if the insurance policies are reformed. In fact, at this stage of the litigation such evidence would be premature.

Furthermore, **the employer will not have to pay for the insurance coverage if they sign appropriate forms**." (Emphasis added). "Moreover, defendants seem to argue that even if the forms used were inappropriate under the statute, the employee should not be able to void them under the statute. As set forth above, however, employees are entitled to receive benefits under their employer's automobile insurance policies. In the instant case, the plaintiffs assert that they are entitled to benefits because the forms used to waive UIM benefits are void under the law. It would not be appropriate for plaintiff to be entitled to benefits under the

law and not able to assert the right to enforce those benefits. Accordingly, this portion of the defendants' motion to dismiss will be denied.

This appears to be the first case which has recognized the limitations of the Supreme Court decision in Everhart which was solely focusing on Section 1738 and a fleet policy. Thus, these two important distinctions must be kept in mind when a carrier seeks to extend the holding of Everhart beyond the issue addressed.

EXCLUSIONS

Household/Family Car

Erie Insurance Exchange v. Baker, 972 A.2d 507 (Pa. 2009) (Plurality Decision Of Pennsylvania Supreme Court Upholds Household Exclusion In Case Where Different Insurance Companies Insure Household Vehicles).

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 on the single issue:

> 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?

On June 22, 2009 the Pennsylvania Supreme Court, in a Plurality opinion, held that under the "circumstances of this case" the household exclusion is valid and enforceable.

The lead, three-Justice opinion, authored by Justice Greenspan (and joined by C.J. Castille and Justice Eakin) mainly relies upon the Pennsylvania Supreme Court decisions in Prudential Prop & Cas. Ins. Co. v. Colbert, 813 A.2d 747 (Pa. 2002) and Eichelman v. Nationwide Ins. Co., 711 A.2d 1006 (Pa. 1998). They believe that this is not a stacking case but really an issue that the insured has not gotten coverage to begin with so

there is nothing to stack. Thus, the exclusion prevents any coverage and is valid under the facts of the case.

Justice Saylor joins the other three Justices to uphold the exclusion but concurs in the result only and writes that the Baker argument is stronger than the lead opinion portrays. He notes that the issue may not be one of stacking but seems to imply or indicate that under some circumstances and sets of facts the exclusion would be invalidated. The lead opinion and concurrence both repeatedly mention the fact that Erie never knew of the risk of a motorcycle placed on a different company's policy.

A three-Justice dissent authored by Justice Baer (and joined by Justices Todd and McCaffery) says that the exclusion is a violation of one's right to stack and the policyholder is not getting what coverage for which they paid. They would find this is a stacking case under Section 1738 and strike down the exclusion.

On July 28, 2009, a PAJ telephone seminar was conducted on this case and its implications. To purchase a copy of the tape of the seminar please call Lisa Ginsburg at the PAJ office at 215-546-6451 ext 101.

Regular-Use

Williams v. GEICO, 986 A.2d 45 (Pa. 2009) (Pennsylvania Supreme Court Accepts Allowance Of Appeal In Regular Use Exclusion Case).

The Pennsylvania Supreme Court granted the Petition for Allowance of Appeal in this case where a police officer was injured in the course and scope of his employment. He sought underinsured motorist coverage on his personal policy and the Superior Court in a memorandum decision held that he was not entitled to coverage due to a "regular use" exclusion in his policy. In the Petition for Allowance of Appeal the argument was made that the police officer has no control over the employer provided vehicle insurance and it violates public policy to enforce the exclusion against a first responder.

The Court has certified the following question for appeal:

> Whether, under the MVFRL and our decision in Burstein v. Prudential Property & Cas. Ins. Co., 809 A.2d 204 (Pa.2002), the "regular-use" exclusion to underinsured motorist coverage in an automobile insurance policy is valid where the insured is

> a police officer, who has sustained bodily injury in the course of performing his duties while driving a police vehicle, for which vehicle he could not have obtained underinsured motorist coverage.

Argument has been scheduled for April 2010.

Workers Compensation

<u>Heller v. Pennsylvania League of Cities</u>, 975 A.2d 1080 (Pa. July 7, 2009) (Pennsylvania Supreme Court Grants Petition For Allowance Of Appeal To Determine Whether To Strike Down Insurance Policy Provision Which Excludes Uninsured And Underinsured Motorist Coverage For Injured Police Officer Injured In The Course And Scope Of His Employment).

In a divided opinion the Commonwealth Court upheld an exclusion in an insurance policy which resulted in a police officer not being allowed to recover uninsured or underinsured motorist benefits from his employer's own insurance policy when he was injured in the course and scope of his employment while occupying the employer's vehicle. At trial court level the exclusion was set aside but in 2008 the Commonwealth Court in a 2-1 opinion reversed. <u>See</u> <u>Heller v.</u> <u>Pennsylvania League of Cities</u>, 950 A.2d 362 (Pa. Commw. 2008).

Heller filed a Petition for Allowance of Appeal and the Pennsylvania Supreme Court granted the Petition on the following issue:

> Whether or not the Honorable Court should strike down an exclusion in [Respondents'] policy providing that any person receiving worker's compensation benefits was ineligible for UM/UIM benefits?

Thus, the validity of the Commonwealth Court decision is now in doubt. The argument of this case is schedule for April 2010.

*Co-**Employee***

<u>Kulik v. Mash</u>, 982 A.2d 85 (Pa. Super. Sept 16, 2009) (Superior Court holds that Injured person cannot sue co-employee for car accident even though he is sleeping in his car at the time of the accident).

Robert Kulik ("Kulik") was employed at Sears. He arrived 30 minutes early one day for work and decided to take a nap in his car. While sleeping he was injured when his car was hit by a vehicle which backed into his car. The vehicle which struck Kulik's car was being driven by a co-employee of his at Sears. He name is Rose Mash. Kulik filed a civil suit against mash for the injuries and the case was appealed to the Superior Court on the issue of whether Kulik could maintain a civil suit under the facts of the case when he was injured by a co-employee in the parking lot while sleeping.

The Superior Court panel opinion by Judge Klein holds that Kulik was "at work" even though he was sleeping in the car at the time the accident occurred. Since he was "at work" then he was injured in the course and scope of his employment. At the same time, mash was also "at work" and thus would be in the course and scope of her employment with Sears when the accident occurred. Under the Pennsylvania Workers Compensation law Mash is entitled to immunity form suit under the facts of the case and the court holds that Kulik's claim is barred because he cannot sue his co-employee.

<u>Shaw v. State Farm Ins. Co.</u>, 331 Fed. Appx. 946 (3rd. Cir May 28, 2009) (Not Precedential) (Court Of Appeals For The Third Circuit Court Holds That Under Facts Of Case Car Driven By Co-employee Is Not Uninsured Or Underinsured Vehicle).

David Shaw (Shaw) was injured when a co-employee caused a car accident and he sustained injuries. The liability limit for the car being operated by the co-employee was $5 million. Shaw recovered workers compensation benefits, and under Pennsylvania law, could not make a negligence claim against his co-employee.

He then filed a claim for uninsured or underinsured motorist benefits with his own insurance company State Farm Insurance. The company denied the coverage arguing that Shaw was not allowed the coverage because he was not entitled to coverage by law. Shaw appealed and the Third Circuit affirms the District Court but on different grounds.

Instead of addressing the issue of whether Shaw is entitled to coverage by law the Circuit Court finds that he is not entitled to either uninsured or underinsured coverage because the vehicle driven by the negligent employee was not uninsured (it had a $5 million liability limit) nor underinsured (the parties stipulated that the injuries were not worth more than $5 million). Thus, the District Court decision is affirmed.

SETOFFS/OFFSETS/BINDING CLAIMS

Pusl v. Means, 982 A.2d 550 (Pa. Super. Sept 23, 2009) (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 issued 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.

A Petition for Allowance of Appeal is Pending. 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: ________________________________

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BY: ________________________________

------------ ------------ Insurance Company

George v. CIGNA Group Ins. Co., 2009 U.S. Dist. LEXIS 18586 (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.

OTHER BENEFITS "PAID OR PAYABLE"

Harnick v. State Farm Mutual Ins. Co., 08-5752 (McLaughlin, J., E.D. Pa. March 9, 2009) (Insurance Company Allowed To Pro-rate Physical Damage Deductibles It Will Reimburse Insured).

On March 5, 2009, the District Court for the Eastern District of Pennsylvania dismissed this case dealing with the pro-rating of deductibles based upon the insured's comparative negligence. Jennifer Harnick (Harnick) initially filed a class action against her insurance company State Farm after it pro-rated the repayment of her deductible when it received subrogation from a third party arising from an accident in which she was involved.

Harnick was involved in the accident and paid her $500 deductible to State Farm which then pursued a subrogation claim against the other driver involved in the accident. In pursuing the subrogation claim, State Farm and the third party driver determined, and agreed, that each driver was equally at fault for the accident. State Farm recovered in excess of $500 through the subrogation claim, yet it reduced the repayment of the deductible to $250, the pro-rated share of the deductible.

State Farm filed a motion to Dismiss arguing that the practice of pro-rating is valid under the Pennsylvania State Insurance Regulations relating to the prompt payment of settlements under the Insurance Code Section 146.8(c). The District Court decision agrees with State Farm's position that the regulation grants the insurance company the right to pro-rate the deductible. The Court found the authority to issue the regulation is valid since the Insurance Department is allowed to issue regulations to prevent unfair practices. It concluded this regulation helps to accomplish that task. The Motion to Dismiss was Granted.

EVIDENTIARY ISSUES

Gaudio v Ford Motor Company, 976 A.2d 524 (Pa. Super. June 1, 2009), appeal denied, 2010 Pa. LEXIS 273 (Feb. 24, 2010) (Superior Court Holds That Trial Court Committed Reversible Error By Admitting Evidence That Plaintiff Was Not Wearing Seatbelt When Accident Occurred).

In this product defect case arising from a car accident, the Pennsylvania Superior Court grants a new trial from a defense verdict. The primary issue in this appeal is the trial court's denial of Plaintiff's Motion in Limine to preclude evidence that the Plaintiff was not wearing his seat belt when the accident giving rise to the cause of action occurred. The trial court admitted evidence of seatbelt non-use on the issue of causation.

On appeal, the Superior Court reverses the trial judge's ruling and holds that the *clear and unambiguous language of 75 Pa.C.S.A §4581* precludes the admission of non-use of seatbelts into evidence for any purpose. The Superior Court also reverses the trial court's ruling that allowed Ford's experts to testify that the F-150 complied with Federal Motor Vehicle Safety Standards. In reversing, Superior Court reaffirmed that evidence of compliance with FMVSS standards is inadmissible in products liability actions.

UNINSURED AND UNDERINSURED MOTORIST ARBITRATION/KOKEN AND CIVIL PROCEDURE

Calestini v. Progressive Casualty Insurance Company, 2009 U.S. Dist. LEXIS 117138 (M.D. Pa. Dec. 16, 2009) (District Court Denies Insurance Company Attempt To Bifurcate And Stay Underinsured Motorist and Bad Faith Claims Which Were Filed Under Post-Koken Clause).

On December 16, 2009 the District Court for the Middle District of Pennsylvania denied Progressive Casualty Insurance Company's Motion to bifurcate and stay where the insured filed breach of contract and bad faith claims against his insurance company after it failed to pay underinsured motorist benefits. Mark Calestini ("Castelini") was injured in two separate accidents and filed underinsured motorist (UIM) claims for both. When the claims were not resolved he filed breach of contract and bad faith lawsuits in state court which were removed to the Middle District of Pennsylvania. Progressive filed a motion to bifurcate the UIM and bad faith claims and then stay the bad faith claims.

Progressive argued for bifurcation and the stay citing a concern of prejudice that (1) the evidence of the claims are different; (2) privileged material may be disclosed in the bad faith claims but not the contract claims; (3) Progressive may be deprived of the use of privileged materials in the defense of the bad faith claim and (4) counsel may be witnesses in the bad faith claim. Judge Caputo in the Middle District notes the Defendant has a burden to show bifurcation is appropriate and that the reasons offered do not support the bifurcation and stay. He writes that the different evidence is "of no moment" and it is more economical to reveal all the evidence at once. He decides that the concern over privilege can be addresses by filing appropriate motions for protective orders and motions can be filed to keep the evidence and information limited when the cases are heard. Also, he says the attorney being a witness is simply a risk of litigation and if it arises can be handled in a customary fashion.

He finds in his discretion no prejudice and denies the motion to bifurcate and stay. Thus, the case will proceed.

O'Hara v. Liberty Mutual, 984 A.2d 938 (Pa. Super. 2009) (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.

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 and a Petition for Allowance of Appeal is pending.

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.

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 their 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.

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 an 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 polices 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.

<u>Six v. Phillips and Nationwide</u>, 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 ***<u>might be</u>*** 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 at 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.

Bad Faith

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. 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*.

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.