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Dauphin County Judge Allows Discovery of UIM Claim Evaluation

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An insured in an underinsured motorist case may obtain discovery into her insurance carrier's evaluation of her claim, a Dauphin County judge has ruled, but defense attorneys have called the order an "aberration," asserting such discovery is prohibited under state rules of civil procedure in post-Koken auto insurance litigation.

In *Welcomer v. Donegal Mutual Insurance Co.*, Judge Richard A. Lewis granted plaintiff Patricia Welcomer her request to discover Donegal Mutual Insurance Co.'s evaluation of her UIM claim as well as its basis. The order, which was filed without an opinion, led to a settlement last month, according to lawyers involved.

But Pete Speaker of Thomas Thomas & Hafer, who served as counsel for Donegal, said that Civil Procedure Rule 4003.3 precludes discovery of documents conveying the "mental impressions" of persons involved in evaluating the claim and, therefore, Lewis had incorrectly granted Welcomer's request.

"In this case, with all due respect, it would suggest that Judge Lewis mistakenly issued this order," Speaker said. "I have no doubt the order would have been vacated if it had been briefed and arguments had been heard."

Speaker said he contacted Welcomer's attorney, David L. Lutz, of Angino & Rovner, saying he was prepared to file briefs and, if needed, an appeal of the order. It was at this point, Speaker said, the plaintiff accepted a settlement that was a fraction of her total coverage.

Sources familiar with the case said it settled for \$20,000 out of \$100,000 in total coverage.

Both attorneys declined to comment on the settlement number.

Lutz confirmed a settlement had taken place and that Speaker said he was ready to appeal. However, the attorney disagreed that Lewis had erred in his ruling.

"It's the insurance industry that asked for these cases to be heard in court and now they're getting what they asked for," Lutz said.

Lutz said there was a distinction between cases with insurance-company defendants and those with third-party, tortfeasor defendants.

"I think 4003.3 refers to your traditional third-party claims," Lutz said.

But Speaker said the rule is clear in its policy, adding that discovery of lawyers' notes and memoranda is never allowed and, if such notes from a non-lawyer party constitute mental impressions, they too are barred from discovery.

"When it comes to someone other than a lawyer, his materials are discoverable, but not his opinions," Speaker said.

Scott Cooper, a Harrisburg-area attorney specializing in motor vehicle accident law, said there is plenty to be sorted out in the world of post-Koken auto insurance litigation.

But Cooper added the order in Welcomer was a correct one, adding that insurance companies are attempting to paint the rules of civil procedure with a "broad brush" to make it fit their interests.

The rule should apply to situations protecting attorney-client privilege as well as the direct "work product" of an attorney or an attorney's legal team, Cooper said.

Although the rule states discovery should not include the mental impressions of a representative party other than one's attorney, the explanatory notes say those notes or memoranda of an insurance investigator are not to be protected.

But those aren't mental impressions, according to Dan Cummins of Foley Coggins Comerford Cimini & Cummins, who specializes in post-Koken insurance law. Cummins said such materials are composed of statements and photographs. Cummins, who writes a column for the Law Weekly, said he agreed Lewis got it wrong.

Cummins added that neither party in Welcomer offered relevant case law in their pretrial letter briefs, but said there are persuasive post-Koken opinions to go off of. Cummins pointed to a pair of cases from Allegheny County that he said stand in contrast to Lewis' order - Gunn v. Automobile Insurance Co. of Hartford and Wutz v. Smith.

In Gunn, from 2008, Allegheny County Common Pleas Court Judge Stanton R. Wettick said the only materials protected stemming from nonlawyer representatives are those that constitute "mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics."

AIC Hartford appealed the Gunn ruling after Wettick had said the underlying bad faith and UIM claims should be consolidated, rather than presented in a "piecemeal" fashion. But, in a split decision, the Superior Court quashed the appeal, ruling that it was not a permissible collateral order.

Although the issue of consolidated claims was the most thoroughly examined issue in Gunn, Wettick made his opinion on discovery clear, and he reiterated this stance in Wutz in 2009.

"The insurance company should have the opportunity to show that discovery of certain information relevant to the bad faith claim will unduly prejudice the insurance company in its defense of the UIM claim," Wettick said in Wutz.

Wettick said the counsel for State Farm, which was a co-defendant in Wutz , likened forking over claim evaluations to a defense in football furnishing its formation before the offense has to call its play.

The cases Cummins referred to each involve a claim of bad faith, which some attorneys said makes them distinguishable from straightforward UIM claims. But Cummins said Wettick was clear in his opinion that an adjuster's evaluation of a claim is not discoverable, whether or not there is an allegation of bad faith.

Cummins added, "It seems clear to me if the court was faced with the simpler context of a plaintiff only seeking UIM claims, that Judge Wettick's rationale still stands for the conclusion that he would not allow this type of discovery."

Cummins also said the Welcomer case lends credence to the notion that publicizing all Koken -related opinions is the best way to establish guidance for the state's trial courts on UIM issues.

"If anything, this case stresses the need for the bar to publicize any and all post- Koken decisions in order that an attempt can be made for a consistent common law to be developed on the various issues presented," Cummins wrote in an e-mail. "Currently, there are splits of authority on a variety of issues and the bench and the bar are in great need of appellate guidance."