

**PENNSYLVANIA ASSOCIATION FOR
JUSTICE (formerly PATLA) UNINSURED AND
UNDERINSURED MOTORIST UPDATE SUPPLEMENT
SPRING 2010¹**

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

Tannenbaum v. Nationwide Insurance Company, -- A.2d -- (Pa. April 28, 2010) (Pennsylvania Supreme Court Holds That Absent Subrogation Disability Benefits Are Not Capable Of Being Pled, Proven and Recovered in Underinsured Motorist Proceeding).

The Supreme Court majority opinion by Justice Saylor holds that benefits derived from personal disability policies are considered benefits part of "any program, group contract or other arrangement" under Sections 1720 and 1722 of the Pennsylvania Motor Vehicle Financial Responsibility Law ("MVFRL"). Therefore, absent a subrogation or reimbursement obligation the insured, cannot collect and plead, prove and recover these benefits in his underinsured motorist proceeding. Justice Saylor was joined by Chief Justice Castille and Justice Eakin to form the majority and Justice Tood authored a dissent joined by Justice Baer. Justice McCaffery did not participate since he was on the Superior Court panel.

The Superior Court initially reversed the trial court and held that personal disability policies are both separate from UIM or UM coverage and are paid for exclusively by the claimant either directly, or through payroll deductions which result in lower wages. Therefore, payments received from these coverages do not duplicate benefits. The insurance company argued that disability benefits paid by UNUM should be set-off from the underinsured motorist recovery.

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

The majority opinion by Justice Saylor focuses on the plain language of Section 1722 of the MVFRL and the fact that it refers to "any" coverage as a "program, group contract or other arrangement". Therefore, the personal disability plans would be considered within the scope of Sections 1720 and 1722.

The Court reviews its prior precedent and notes that all of the previous cases regarding the issue are focusing on "first party" coverages under Section 1714 and 1719 and not Sections 1720 and 1722. It differentiates the disability plan payments under Section 1720 and 1722, where they are sought in underinsured motorist proceedings as opposed to first party benefit disputes. It finds that the Panichelli v. Liberty Mut. Ins. Group, 669 A.2d 930 (Pa. 1996) lines of cases is not disturbed.

Justice Todd writes a dissent which outlines the provisions of the law which would lead her to affirm.

D'Adamo v. Erie Insurance Exchange, -- A.2d -- (Pa. Super. April 30, 2010) (Pennsylvania Superior Court Holds That Motor Vehicle Liability Coverage And Umbrella Policy Are Both Considered In Determining A Credit In UIM).

These consolidated cases involve people injured in the same car accident. An arbitration panel determined that each injured person was to receive a gross award of \$850,000.00. Each person had received \$250,000.00 under the third party automobile policy. There was also possibly \$500,000.00 in coverage from the third party personal umbrella policy which were still not resolved.

Erie Insurance filed a Motion to Mold the Award to reflect that all but \$100,000 of the award would be covered by adding the liability and umbrella policy of the third party driver. D'Adamo and Holocher, the injured parties, sought to recover the full amount of the award.

The trial court granted the motion to mold and held that the insurance company is entitled to a credit for the full amount of the underlying umbrella coverage and liability coverage against the underinsured motorist award. D'Adamo and Holocher appealed and the Superior Court affirms.

According to the Superior Court opinion by Judge Gantman, the Erie policy had an exhaustion clause which provided:

"When the accident involves underinsured motor vehicles, we will not pay until all other forms of insurance under all bodily injury liability bonds and insurance policies and self-insurance plans applicable at the time of the accident have been exhausted by payment of their limits or have been resolved by settlement or by final resolution of the court."

The insureds argued that:

(1) The Erie insurance exhaustion clause was ambiguous when compared to the mandates of Pennsylvania's Motor Vehicle Financial Responsibility Law; and

(2) Including umbrella policies as part of the exhaustion clause would violate the public policy of Pennsylvania, in this context.

The decision enforces the exhaustion clause and holds that the award should be molded to apply a \$750,000 credit to the \$850,000 gross award. As such, the trial court's denial of the motion to vacate/modify the arbitration award was affirmed.

Heller v. State Farm Insurance Companies, Civ. No. 408-2008 (Venango Co. April 29, 2010) (Trial Court Holds That Generette Does Not Apply When Attempting To Receive Benefits On Personal Policy When Already Received Coverage From An Insurer On Same Level).

Frank Heller was involved in a work related accident while operating his Borough police vehicle. At the time of the accident he had a State Farm policy which provided for underinsured motorist benefits non-stacked. He also had a second policy with Erie Insurance which provided coverage and it paid the claim. He then sought benefits under the State Farm policy and they were denied due to the "other insurance" clause. Heller argued that the clause is not valid under the Pennsylvania Supreme Court decision in Generette v. Donegal, 957 A.2d 1180 (Pa. 2008).

The trial court finds that the Generette case is distinguishable from Heller because Heller was facing an "other insurance clause" on the same priority of coverage for benefits where in Generette the insured was going from one level to another. In Heller's case he was facing a true stacking issue and in Generette it was a priority of coverage so the trial court enforces the waiver of stacking and "other insurance" clause.

Importantly, Heller appears not to have argued that there was no knowing waiver of inter-policy stacking under the Pennsylvania Supreme Court decision in Craley v. State Farm, 895 A.2d 530 (Pa. 2006). This argument may have precluded the stacking waiver from even being enforced and avoided the "other insurance" clause being implicated.

Adragna v. State Farm, No. 291-2009-Civil (Pike Co. May 5, 2010) (Trial Court Holds No UM Coverage For Debris In Roadway).

This is a case involving an uninsured motorist claim after a single car motor vehicle accident. The insured claimed that the accident was caused she swerved and lost control of her vehicle trying to avoid debris on the roadway that had fallen off of a vehicle. As most policies, the State Farm policy provided uninsured motorist coverage bodily injury, "caused by an accident that involves the ownership, maintenance, or use of an uninsured motor vehicle as a motor vehicle." State Farm denied the claim arguing that the accident was caused by the debris and not as a result of the ownership, maintenance or use of a motor vehicle.

The insured argued that the debris had to have been in the road due to the uninsured/phantom motorist being negligent. There was no testimony of how the bundles came to be on the roadway, no witnesses, and no other evidence from any source to explain the location of the debris on the highway at the time of her accident.

The trial court holds that there is no coverage. The decision mainly relies upon Smith v. USAA, 572 A.2d 785, 787 (Pa.Super. 1990); where the Pennsylvania Superior Court held that there was no uninsured motorist coverage where a passenger on a hay wagon threw hay at a person who was caused to crash his bike into a tree as a result. Additionally, American National Prop. & Cas. Co. v. Terwillinger, 2007 U.S. Dist. LEXIS 9018 (W.D. Pa. 2007) was a case where the District Court held that there was no coverage after concluding that an accident was caused by debris on the road, and it was a loose gravel mixture that another motor vehicle caused to be on the road. In that case, the court found that the accident could not be considered one involving another vehicle.

The trial court Judge Chelak notes that in all of those cases, and this one, the plaintiffs were injured by the debris itself, a source which is external to the vehicle, not a vehicle. Judge Chelak finds that whether or not the debris must have come from a vehicle did not matter because the injuries would still be deemed to have been caused by the debris not a vehicle.

Erie Insurance v. Holt, 57 Chester Co. L. Reporter 106 (2009) (Dealer Policy Is A Fleet Policy And Authorized Person Executed Sign Down Even If Form Does Not Include A Corporate Identify).

After a motor vehicle accident, on May 18, 2007, a claim for underinsured motorist benefits was made under a policy covering the vehicle being driven by the injured victim at the time of the accident. The vehicle had "dealer tags" at the time of the accident and the policy provided for underinsured motorist coverage but in amounts less than the liability coverage of \$1 million. The injured party sought stacking and the full amount of the \$1 million coverage.

The trial court likened the policy with "dealer tags" similar to a corporate fleet policy rather than a personal policy. Therefore, under the Pennsylvania Supreme Court decision in Everhart v. PMA Ins. Co., 938 A.2d 301 (Pa. 2007) stacking does not apply. Further, the trial court found that as long as a person was authorized to execute a sign down waiver, then the waiver was valid. The lack of a corporate identification did not make the written request for lower limits invalid.

Miller v. State Farm, 2010 Del. LEXIS 184 (Del. April 21, 2010) (Delaware Supreme Court Holds That It is Error To Admit Into Third Party or UIM Case A Compromise And Release Of A Workers Compensation Claim).

At the Big Auto seminar in Pittsburgh a question was asked about the admissibility or offset in a third party/UIM case of a workers comp payment made directly to the injured person. We discussed the Dillow v. Myers, 916 A.2d 698 (Pa. Super. 2007) decision.

On April 21, 2010 in Miller v. State Farm, the Delaware Supreme Court reversed the lower court and held that under Delaware law the Superior Court erred by admitting evidence of a workers compensation settlement which was in violation of the collateral source rule.

This case was initially a joint 3rd party and UIM case but then before the UIM case went to trial, the third party case settled. The plaintiff also settled his workers compensation case before the UIM trial. The lower court admitted evidence of the workers compensation settlement and the Supreme Court of Delaware holds that this was error which was more than harmless so a new trial was ordered.

Below is a link to the opinion. Since Pennsylvania law has similar statutory provisions this may be helpful as well.

<http://courts.state.de.us/opinions/download.aspx?ID=137070>

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

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

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

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

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