Civil Litigation Update
Pennsylvania Association for Justice (PAJ)

AUTO LAW UPDATE
Fall 2014

Scott B. Cooper, Esquire
SCHMIDT KRAMER P.C.

209 State Street
Harrisburg, PA 17101

27 South 34th Street
Camp Hill, PA 17011

scooper@schmidtkramer.com
Phone: 717-888-8888 or 717-232-6300
Fax: 717-232-6467

Underinsured Motorist Statute of Limitations

Wilson v. Great American Insurance Company, NO. 12-5700 (E.D. Pa. Oct. 28, 2013) (District Court Rules On When 4 Yr. Underinsured Motorist Statute of Limitations Starts to Run).

The case involves a limited issue of when is the date that the statute of limitations (SOL) starts to run in an underinsured motorist (UIM) claim. The insurance company in Wilson claimed that the SOL starts when the underlying liability limits were tendered. The insured Wilson claimed it is when the third party release is signed. The District Court holds that the *date the release is signed* is the date when the SOL starts to run.

QUALIFICATIONS FOR COVERAGE

Estate of O'Connell v. Progressive Insurance Company, 79 A.3d 1134 (Pa. Super. Ct. Oct. 8, 2013) (Pennsylvania Superior Court Rules On Definition of The Term "underinsured motor vehicle").

In this case, the driver was operating the insured's vehicle with permission and caused a single car fatal accident. The two passengers in the vehicle were also the owners of the vehicle. The liability coverage was paid $100,000 on the policy. Then, the tortfeasor operator had an excess policy which also paid

liability coverage. After receiving the liability coverage from the excess carrier, the Estates of the two passengers sought underinsured motorist (UIM) coverage on the same policy for which it had initially collected liability coverage. The Estates argued that the "underinsured" vehicle was the other excess policy for the tortfeasor and not the main policy which had already paid the $100,000 in liability. The trial court granted the insurance company Preliminary Objections and the Estates appealed.

The Superior Court affirms the trial court and holds that in order for UIM coverage to be implicated in a case there must be at least a multi-vehicle accident, or at least a vehicle and pedestrian accident. This case involves a single vehicle accident so there is no "underinsured" motor vehicle.

Vanderhoff v. Harleysville, 78 A.3d 1060 (Pa. Oct. 30, 2013) (Vanderhoff II) (Pennsylvania Supreme Court Announces Ruling in Phantom Vehicle/Uninsured Motorist Case).

The case deals with what is involved with preserving an uninsured motorist claim involving a phantom vehicle. It was initially the subject of a Pennsylvania Supreme Court opinion in 2010 where the Court held that an insured need not report a phantom vehicle to his or her insurance company within thirty (30) days but the company can deny coverage if it can show prejudice was suffered by the late reporting. Vanderhoff v. Harleysville, 997 A.2d. 328 (Pa. 2010). The case was then remanded back to the trial court for a hearing on the issue of prejudice.

At the trial court level, on remand, to prove prejudice the insurance company presented testimony of an insurance adjuster to explain how the typical uninsured claim is investigated, a local attorney who testified what actions he may have taken if the claim was reported earlier than the eight (8) months in this case, an investigator who testified that the investigation would have been much different if reported sooner, and an accident reconstructionist to testify on the importance of timeliness in reporting the accident. The trial court found that the evidence was insufficient to establish prejudice but did not provide an "explicit, distinct rationale for its finding".

The Superior Court found that the trial court failing to provide a distinct and explicit reason for its rationale is fatal to affirming the opinion. Therefore, the court accepts the testimony of the insurance carrier and finds that prejudice exists in the case. Specifically, the Court held that "[u]nder the specific facts of this case, we conclude that this argument constitutes a clear abuse of discretion..." The trial court was reversed.

In an Order dated November 14, 2012, Pennsylvania Supreme Court granted the Petition for Allowance for Appeal and defined the issues in that Order as involving the following:

(1) What constitutes "actual prejudice" to relieve and insurance company of its obligation to pay insurance benefits to an insured?

(2) Should "actual prejudice" involve proof by an insurance carrier that it suffered a real material impairment of its ability to investigation and defend an uninsured claim?

(3) What constitutes a reasonable basis for a trial court finding that prejudice exists in a late report of a phantom vehicle?

In its majority opinion in Vanderhoff II the Court concludes that all three issues are really part of the same test. In applying its rationale to the questions posed it makes its holding on all the issues.

It holds that "these cases must be addressed on a case-by-case basis wherein the court balances the extent and success of the insurer's investigation with the insured's reasons for the delay. The 30-day notice requirement is there for a reason. It is reasonable that insureds must alert the insurer within a month's time. While an insurer will not be permitted to deny coverage absent prejudice caused by an insured's delay in notice, showing such prejudice does not require proof of what the insurer would have found had timely notice been provided. To demand such evidence would result in a Mobius strip whereby, to show prejudice, the insurer would have to show through concrete evidence the evidence it was unable to uncover due to the untimely notice. While the insurer is always obligated to investigate the case such as it can, where an insured's delay results in an inability to thoroughly investigate the claim and thereby uncover relevant facts, prejudice is established. Handling these cases in this manner promotes prompt notice and advances MVFRL goals while encouraging insurers to investigate phantom vehicle claims."

Accordingly, the Superior Court decision is affirmed. The case would seem to make certain that an insured places the company on notice as soon as possible. It also would seem to make this a case by case test.

Vanderhoff v. Harleysville, 40 A.3d 744 (Pa. Super. Ct. 2012) (Pennsylvania Superior Court Holds That Insured Not Entitled To Uninsured Motorist Coverage Because Of Prejudice Suffered By Late Reporting).

This case was initially the subject of a Pennsylvania Supreme Court opinion in 2010 where the Court held that an insured need not report a phantom vehicle to his or her insurance company within thirty (30) days *but* the company can deny coverage if it can show prejudice was suffered by the late reporting. Vanderhoff v. Harleysville, 997 A.2d. 328 (Pa. 2010)(Vanderhoff I). The case was then remanded back to the trial court for a hearing on the issue of prejudice.

At the trial court level, on remand, to prove prejudice the insurance company presented testimony of an insurance adjuster to explain how the typical uninsured claim is investigated, a local attorney who testified what actions he may have taken if the claim was reported earlier than the eight (8) months in this case, an investigator who testified that the investigation would have been much different if reported sooner, and an accident reconstructionist to testify on the importance of timeliness in reporting the accident. The trial court found that the evidence was insufficient to establish prejudice but did not provide an "explicit, distinct rationale for its finding".

The Superior Court finds that the trial court failing to provide a distinct and explicit reason for its rationale is fatal to affirming the opinion. Therefore, the court accepts the testimony of the insurance carrier and finds that prejudice exists in the case. Specifically, the Court holds that "[u]nder the specific facts of this case, we conclude that this argument constitutes a clear abuse of discretion..." The trial court is reversed.

A discussion of the Supreme Court opinion is also helpful. In the Supreme Court, the majority opinion by Justice Baer (joined by C.J. Castille, and Justices Todd and McCaffery) holds that the case is controlled by the Court's precedent in Brakeman v. Potomac Ins. Co., 371 A.2d 193 (Pa. 1977). In Brakeman, the Court held that to deny UM benefits to an insured, an insurer must demonstrate prejudice resulting from the insured's failure to provide notice. The Court found that it is not bound by its more recent opinion in State Farm Ins. Co. v. Foster, 889 A.2d 78 (Pa. 2005), which involved the mandatory reporting of the accident to law enforcement within 30 days of the accident.

The Court observes that Section 1702 of the Motor Vehicle Financial Responsibility Law (MVFRL) sets forth and defines the requirements for reporting an uninsured motorist claim involving a phantom vehicle and these mandates cannot be modified by the insurance contract. In Vanderhoff, the Court writes that the Superior Court erred when it held Harleysville was not required to pay UM benefits when the claim was not reported until eight months after the

accident when prejudice was not established. Since the accident was reported to law enforcement within 30 days, as required, the decision is reversed and the case remanded to the trial court to determine whether or not the insurance company can establish prejudice due to the late reporting.

Justice Eakin (joined by Justice Saylor) dissents and would have affirmed because section 1702 does not contain a prejudice requirement.

Marandure v. Erie Ins. Exch., 57 Northampton Co. Rpt. 914 (2013) (Trial Court Allows Uninsured Motorist Case With Reporting Issue to Proceed).

The trial court in Northampton County denies the insurer's Motion for Summary Judgment where the plaintiff testified, albeit contrary to what she previously stated, that she called the local police via 911 from the accident scene and told the police that she had been sideswiped by an unidentified tractor-trailer. The plaintiff contended that she also reported the accident to the state police via a PennDOT Driver's Accident Report form.

Reviewing established case law precedent and the provisions of the Pennsylvania Motor Vehicle Financial Responsibility Law (MVFRL), particularly Section 1702, the trial court states that just submitting the PennDOT form is not sufficient to comply with section 1702. However, the plaintiff's deposition testimony alone raises an issue of fact which defeats the insurer's motion despite the plaintiff's inability to produce cell phone records or the local police report, and the fact that she stated previously that she had not reported the accident to the local police.

SECTION 1731 REJECTION OF UNINSURED AND UNDERINSURED COVERAGE

Robinson v. Travelers Indemnity Co. of America, -- F.3d -- (3d. Cir. March 21, 2013) (Third Circuit Reverses District Court And Validates Underinsured Coverage Rejection Form – Finds Failure To Specifically Comply With Section 1731 Of MVFRL Is NOT Fatal).

The Third Circuit vacates and reverses the memorandum opinion from the Eastern District of Pennsylvania in Robinson v. Travelers Indemnity Company of America, No. 11-5267 (E.D. Pa. Feb 29, 2012). The case involves the challenge to an insurance company's rejection of underinsured motorist form. In this case, the named insured (Robinson's employer) executed an underinsured motorist waiver but inserted the word "motorists" in the phrase "underinsured coverage" in the form mandated by the Pennsylvania Motor Vehicle Financial Responsibility Law (MVFRL). Robinson argued that the additional word invalidated the form under

Section 1731 of the MVFRL because it was not in specific compliance with the MVFRL.

Judge Ludwig from the Eastern District of Pennsylvania relied upon the Pennsylvania Superior Court opinion in Jones v. Unitrin, 40 A.3d 125 (Pa. Super. Ct. 2012) where the court invalidated a similar form when the insurance company used a rejection form which did not track the MVFRL mandate. In Robinson, as in Jones, Judge Ludwig held that the rejection form is not valid and Robinson was entitled to underinsured motorist coverage.

The Third Circuit reverses and finds that the addition of the word "motorists" to the form actually clarified the wording of the form and it does not want to "elevate form over substance in a hyperliteral interpretation" of the law. Also, the Jones case is distinguished since Jones was decided based upon subject matter and placement of an additional sentence as opposed to a clarification in Robinson's case.

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

Weilacher v. State Farm, 65 A.3d 976 (Pa. Super. Ct. April 25, 2013) (Pennsylvania Superior Court Finds No Written Request For Lower Underinsured Motorist (UIM) Coverage When A Form Is Never Signed And Remedy Is UIM Equals Liability Coverage).

This case involves the issue of a written request for lower underinsured (UIM) motorist coverage, or the alleged written request. In this case, a policy was issued in 1994 with bodily injury coverage of 25K. The insured rejected UIM coverage by signing the appropriate 1731 rejection form. Then, in around 2000, the insured added UIM coverage at 25K. The policy remained in effect and premiums were paid with bodily injury (BI) being 25K and UIM at 25K.

In 2009 the insured increases the BI coverage from 25K to 500K but the UIM remained at 25K. There is a car accident in 2010 and the insured claimed to be entitled to 500K in UIM coverage because they never signed a written request of lower UIM limits. Therefore, Weilacher argued that the limits are automatically equal to the BI coverage of 500K. State Farm argued that under Blood v. Old Guard, 934 A.2d 1218 (Pa. 2007) the UIM limits were only 25K and the trial court agreed.

The Superior Court reverses and holds that because the insured never executed any written request for lower limits through the lifetime of the policy the UIM coverage is 500K. It distinguishes Blood because in Blood the insured at least

executed a written request for lower limits earlier in the lifetime of the policy. Also, the Superior Court holds that there is a remedy for failing to obtain the required written request, and that is the UIM automatically equals the BI coverage.

SECTION 1738 REJECTION OF STACKING OF UNINSURED AND UNDERINSURED MOTORIST BENEFITS

Sackett v. Nationwide Mut. Ins. Co., 4 A.3d 637 (Pa. Super. 2010) (Sackett III) (Pennsylvania Superior Court Holds That Insurance Company Is Required To Have New Rejection Of Stacking Form Executed When Additional Vehicle Is Purchased And Not Automatically Added To Existing Policy).

After this case was remanded by the Pennsylvania Supreme Court to the trial court for a bench trial on whether a third car was added to an existing insurance policy under the "newly acquired vehicle" clause of a policy, the trial court held that no such event occurred and thus the insured was required to be provided a new rejection of stacking form. Since the insured did not reject stacking, anew, the policy automatically provided stacking. Nationwide appealed by arguing that the vehicle was added under such a clause.

On review, the Superior Court holds that the Trial Court correctly decided the third vehicle was NOT added under a newly/after acquired vehicle clause in an insurance policy and the insurer should have had the insured sign a new rejection of stacking form, in order for non-stacking to apply when adding an additional car to a two car policy.

In Sackett II the Supreme Court remanded this case to the trial court where a nonjury trial was 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 rejected stacking. 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 purchased and added prior to him taking possession of the vehicle.

Adopting Sackett's argument, the Superior Court, as did the trial court, writes 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 purchased and added to a policy. However, that holding was *only modified* in Sackett v. Nationwide Mut. Ins. Co., 940 A.2d 329 (Pa. 2007) (Sackett II) wherein the Court states that an exception to Sackett I exists if a vehicle is added under a newly acquired vehicle clause and such a clause is present under the facts of the case. This would be a clause in a policy that provides automatic coverage and would back date coverage to the date of a purchase of the vehicle.

Just as the trial court, the Superior Court presently found Sackett did not add any vehicle under the newly-acquired vehicle clause contained in the insurance policy. Additional rejection stacking forms were required under Sackett I, and were not signed. Thus, Sackett is entitled to stacking under Sackett I.

Bumbarger v. Peerless Indemnity Insurance Company, --- A.3d --- (Pa. Super. June 6, 2014) (en banc) (Superior Court Follows Sackett I And Holds New Rejection Form Needed – Also Clarifies Sackett II).

This important opinion addresses the stacking issue involving the application of the Sackett line of cases as to when a new rejection of stacking form is required after an insured adds a car to a policy. In 2007, Bumbarger initially had a 2 car policy and rejected stacking. She then added a third vehicle, later in 2007, and a fourth vehicle, early in 2009. At no time when the additional vehicles were added to the policy was a new rejection of stacking waiver signed. She was then injured in a car accident with an uninsured motorist in December 2009, after all of the vehicles were added.

She made a claim for stacked uninsured motorist benefits by claiming that Peerless owed her stacked coverage because a new rejection of stacking form was never executed after the initial rejection form was signed for the two car policy. Peerless denied that stacking applied because it believed that the vehicles were added by default under a "newly acquired auto" clause.

The en banc panel finds that the vehicles were added as almost all vehicles are added, by an endorsement, and not under the "newly acquired auto" clause. Thus, a new waiver form is required. The 'newly acquired' vehicle clause only applies when the company is adding a vehicle to an existing policy and back dates the coverage due to the coverage being automatic. In this case, the company already knew about the new vehicles before they were added to the policy by endorsement. Thus, under the Sackett line of cases, stacking applies.

Grudkowski v. Foremost Ins. Co., -- F.3d App. -- (3d. Cir. Feb. 27, 2014) (Not Precedential) (Third Circuit Rules On Whether Motor Vehicle Insurance Policy Must Provide Stacking On Antique Vehicle Policies).

This case focuses on an insurance company trying to limit stacking on an antique motor vehicle. The insured purchased stacking on two separate antique policies covering two separate vehicles. However, the policies only allowed you to stack if you were occupying the antique vehicle, making it impossible to stack one vehicle's coverage onto the other because an insured cannot be occupying two vehicles at once.

After being injured while occupying one of the antique vehicles the insured sought to stack the other policy because she was paying for stacking. However, since she was not occupying the other antique vehicle the policy did not provide coverage. She sued claiming that the restriction in the policy rendered stacking illusory.

The District Court dismissed her claim finding that the Pennsylvania Motor Vehicle Financial Responsibility Law (MVFRL) does not require stacking to apply to antique vehicles. She appealed and the Appellate Court in the Third Circuit affirms and finds that antique vehicles are treated different under the MVFRL and St. Paul Mercury Ins. Co. v. Corbett, 630 A.2d 28, 30 (Pa. Super. Ct. 1993) (en banc). Therefore, the limitation is allowed.

EXCLUSIONS

Exclusions Added After Policy Issued

Oesterling v. Allstate Ins. Co., No. 11429 of 2008 (Lawrence Co. Dec. 17, 2012) (Trial Court Holds That Validity Of Household Exclusion Added After Policy Issued Is An Issue Of Fact for Jury).

This case and the trial court opinion from Lawrence County involve the applicability of the household exclusion which was added to a policy several years after the policy was initially purchased. The trial court denies Allstate Insurance Company's renewed Motion for Summary Judgment.

The jury will now decide whether a change in wording to household exclusion that was made to the auto policy several years after the policy was initially purchased was a material alteration of coverage. If so, Allstate has the burden to notify the insured Oesterling of the change to ensure that he understood and accepted the change in the policy. However, if the jury

determines the household exclusion was of a type that was typical of such a policy then the insured has the burden to read and understand his policy.

Household/Family Car

GEICO v. Ayers, 18 A.3d 1093 (Pa. April 28, 2011) (Equally Divided Pennsylvania Supreme Court Opines On Household Exclusion Issue When Same Company Insures Motorcycle And Car In Same Household – Superior Court Opinion in GEICO v. Ayers, 955 A.2d 1025 (Pa. Super. Ct. 2008) Affirmed).

The Supreme Court of Pennsylvania granted a Petition for Allowance of Appeal in this case involving the applicability of the household exclusion where the named insured pays for stacking and insures all of the vehicles with the same insurance company. This case is factually different than the plurality Opinion in Erie Ins. Exch. v. Baker, 972 A. 2d 507 (Pa. 2009), because that case involved different insurance companies.

In Ayers, it is the same named insured, same insurance company, and the insured paid for stacking on both policies. He also was insuring a motorcycle and a passenger vehicle. The Superior Court originally enforced the exclusion in GEICO v. Ayers, 955 A.2d 1025 (Pa. Super. 2008), and this was the appeal of that decision.

The issue certified by the Court was:

> July 27, 2010
>
> Allocatur Granted Per Curiam
>
> AND NOW, this 27th day of July, 2010 the Petition for Allowance of Appeal is GRANTED, LIMITED TO the issue set forth below.
>
> *Does the application of a household vehicle exclusion violate Section 1738 of the Motor Vehicle Financial Responsibility Law ("MVFRL"), where the same insurance company insures all vehicles owned by an insured, and where the exclusion denies inter-policy stacking to the insured who has paid for stacking and has not executed a stacking waiver?*
>
> Madame Justice Orie Melvin did not participate in the consideration or decision of this matter.

The Court is evenly divided (CJ Castille, Eakin and Saylor to validate) and (Baer, Todd and McCaffery to invalidate) and the Superior Court opinion validating the exclusion is affirmed.

Justice Saylor writes a separate opinion in support of affirmance. He indicates that if this case involved personal vehicles across the board and not motorcycles then the outcome would be different. Thus, in the case where companies such as Farmers and State Farm only write single motor vehicle policies and the person has stacking the exclusion would probably be deemed invalid.

The key distinction is the motorcycle policy issue based upon risk.

Swarner v. Mutual Benefit, 72 A.3d 641 (Pa. Super. Ct. July 19, 2013) (Petition for allowance of appeal denied) (Pennsylvania Superior Court Invalidates Underinsured Motorist Household Exclusion In Case Arising Out Of Motorcycle Accident).

This published opinion shows the importance of reading the insurance policy. The Pennsylvania Superior Court reverses a trial court opinion and finds that a household exclusion in an insurance policy is not valid, under the facts of the case. In the case, the Plaintiff Swarner was a passenger on a motorcycle. The motorcycle hit Vehicle A as it made a left hand turn in front of Swarner who was thrown off the motorcycle and landed in the road.

After a brief period of time, while she was lying unconscious in the roadway, she was then hit by Vehicle B. Swarner settled for the bodily injury (BI) limits from both insurers for operators of Vehicles A and B and the underinsured motorist (UIM) limits on a personal motorcycle policy for the vehicle Swarner was operating. Swarner then sought UIM coverage on a personal household vehicle policy with Mutual Benefit which denied coverage asserting a household vehicle exclusion.

The trial court found in favor of the insurance company and upheld the exclusion by finding that the exclusion applied because Swarner was "occupying" the motorcycle when she was hit by the second vehicle. The Superior Court reverses and finds that because Swarner is not "occupying" the motorcycle when the second vehicle which caused injury struck her that the exclusion does not apply.

Williams v. GEICO, 32 A.3d 1195 (Pa. Oct. 19, 2011) (Pennsylvania Supreme Court Upholds Regular Use Exclusion As Applied To State Trooper Injured In Course And Scope Of Employment While Operating State Police Vehicle That Does Not Provide Underinsured Motorist Coverage).

In this case the Pennsylvania Supreme Court reviews the validity of the "regular use" exclusion for underinsured motorist coverage in a personal policy as applied to a Pennsylvania State Trooper who is injured in the course and scope of his employment while operating the police cruiser which does not provide UIM coverage. The driver who caused the accident in which Williams was injured was underinsured and since the state police vehicles do not provide underinsured motorist (UIM) coverage Williams sought UIM coverage under his personal policy with GEICO.

The GEICO policy contained the regular use exclusion and the Pennsylvania Supreme Court was addressing whether the exclusion is valid in light of its precedent in Burstein v. Prudential Prop. & Cas. Ins. Co., 809 A.2d 204 (Pa. 2002) where an insured cannot obtain UIM coverage on his or her work vehicle.

The Supreme Court upholds the exclusion. The Court notes that the legislature should create a special public policy exception for first responders and that there is no evidence in the record that Williams could not obtain UIM coverage on the GEICO policy without the exclusion. The Court writes, "[i]n summary, we reaffirm the decision in Burstein, holding that the regular-use exclusion is not void as against public policy. A contrary decision is untenable, as it would require insurers to compensate for risks they have not agreed to insure, and for which premiums have not been collected."

The Court affirms the Superior Court's memorandum opinion.

Erie Ins. Group v. Catania, --- A.3d --- (Pa. Super. June 30, 2014) (Pa. Super. Upholds Regular Use Exclusion In Uninsured Motorist Case – Evidence Of Premiums Paid).

Catania was injured by an uninsured motorist while in the course and scope of his employment. He pursued an uninsured motorist (UM) claim with his personal carrier Erie which denied coverage under the regular use exclusion. The trial court found in favor of Erie and the insured appealed.

The Superior Court affirms the trial court decision. First, the Superior Court follows its recent 2013 decision in Hand v. City of Philadelphia, 65 A.2d 916 (Pa. Super. 2013) as well as the Supreme Court opinion in Williams v. GEICO, 32 A.3d 1195

(Pa. 2011) and another Superior Court opinion in Brink v. Erie Ins. Group, 940 A.2d 528 (Pa. Super. 2008). It holds that Catania is not entitled to relief while driving a delivery truck for his employer which he did not own and was regularly used but not insured under the Erie policy.

Second, the court rejects the argument that Catania had a reasonable expectation of coverage. The court holds that the Erie policy only covered personal vehicles and in its coverage and premium structure never contemplated exposure for injuries that occurred in a non-owned work vehicle so Catania could not have any expectation of coverage.

Abbie Csovelak 9/15/14 7:24 AM
Comment [1]: I would separate this into two sentences so it is easier for the reader to follow.

***Ciminel v. Erie Ins. Exch.*, No. 578 WDA 2013 (Pa.Super. Ct. Jan. 9, 2014) (mem.) (Regular use exclusion upheld as applied to a police officer injured in the line of duty).**

The plaintiff/police officer was injured while on duty and attempted to collect underinsured motorist (UIM) benefits from his personal auto policy but his insurer denied the claim on basis of the regularly used non-owned vehicle exclusion.

The Superior Court panel finds that the term "regularly used" is not ambiguous even though the policy does not define "regularly used". Also, the term "regular use" may be in the body of the policy but that usage has no impact on the ordinary meaning of the regular use exclusion in the UM/UIM endorsement. Also, the plaintiff's reasonable expectations of coverage are irrelevant given that the exclusion is not ambiguous and the regular use exclusion does not violate public policy nor does it violate the MVFRL.

Workers Compensation

Heller v. Pennsylvania League of Cities, 32 A.3d 1213 (Pa. Oct. 19, 2011) (Pennsylvania Supreme Court Strikes Down Workers' Compensation Exclusion For Underinsured Motorist Coverage).

In this 5-2 Majority Opinion the Pennsylvania Supreme Court strikes down an exclusion contained in a motor vehicle insurance policy which excluded underinsured motorist (UIM) coverage if the insured was injured while acting in the course and scope of his employment and received workers' compensation benefits. The case involved Frank Heller who was working as a police officer at the time of an accident with an underinsured motorist. His police department's vehicle actually provided for UIM coverage since it was bargained for and purchased. However, an exclusion in the policy stripped the coverage if the insured was injured in the course and scope of his or her employment and received worker's compensation benefits. The Pennsylvania Supreme Court agreed to address whether this exclusion violates public policy.

The Majority Opinion by Justice Orie Melvin observes that if the exclusion is upheld then UIM coverage would be basically illusory under the policy. Also, the goal of having worker's compensation subrogation in car accidents prevail over the auto insurance carrier from Act 44 would not be furthered.

The Court writes that, "[i]n summation, we find that while the exclusionary provision does not facially violate the cost containment policy of the MVFRL, its inclusion in an employer-sponsored policy operates to foreclose the majority of expected claims. Thus, the exclusion renders the coverage illusory, and the insurer receives a windfall by charging a premium for the coverage. Moreover, where a third-party tortfeasor causes a work-related injury, Act 44 dictates that the ultimate burden for the payment of benefits must rest upon the tortfeasor or the UM/UIM carrier. Penn PRIME's exclusion reverses this legislative priority by frustrating the right of subrogation, thereby ensuring that the burden for the payment of benefits remains on the employer and its workers' compensation carrier. Since the workers' compensation exclusion operates to render the instant UIM coverage illusory and runs counter to the intended compensatory scheme established by the General Assembly, we find it void as against public policy."

The Court invalidates the workers' compensation exclusion.

Co-Employee

Erie Ins. Exch. v. Conley, 29 A.3d 389 (Pa. Super. Ct. July 27, 2011) (Superior Court Holds That Employee Is Not Entitled To UM/UIM Coverage On Personal Insurance Policy After His Employer or Co-Employee Is Negligent).

The Superior Court addresses an issue that had been litigated and unanswered by our appellate courts for several years. The issue is whether an insured is allowed to collect uninsured (UM) and/or underinsured (UIM) motorist coverage from his personal motor vehicle insurance carrier when he is injured in a car accident caused by the negligence of his employer or a co-employee, while in the course and scope of his employment. The trial court granted Erie's Motion for Judgment on the Pleadings finding that Conley was not entitled to any UM and/or UIM coverage because under the policy and state "law" he was not owed for his losses when the employer and co-employee are immune from suit under the Pennsylvania Workmen's Compensation law.

The Superior Court opinion by Judge Colville reviews the insurance policy and Pennsylvania workers' compensation and motor vehicle financial responsibility laws. He observes that under the language of the policy the "law" must entitle Conley to receive damages from the owner or operator of an uninsured or

underinsured vehicle to recover UM or UIM coverage. In Conley's accident his employer was driving the vehicle and caused the accident. By law, the employer is immune from suit since the accident occurred in the scope of the employment. There are no exceptions to the workers' compensation statute applicable.

Therefore, the Court finds no requirement under the "law" to pay for third party damages. Under the policy the insurance company is not required to provide uninsured or underinsured motorist coverage and the trial court decision is affirmed.

SETOFFS/OFFSETS

Smith v. Rohrbaugh, 54 A.3d 892 (Pa. Super. Ct. Sept. 28, 2012) (en banc) (Superior Court Holds That Third Party No Longer Allowed To Take A Credit For UIM Settlement).

The en banc panel overrules Pusl v. Means, 982 A.2d 550 (Pa. Super. Sept 23, 2009), petition for allowance of appeal denied, 991 A.2d 313 (Pa. 2010) where a three judge panel of the Superior Court allowed the molding of a third party verdict to reflect the previous underinsured motorist (UIM) settlement for the same accident when the UIM carrier had waived subrogation.

The court finds that the Pusl holding was incorrect because an underinsured motorist claim is not the same as a first party benefit under Section 1722 of the Pennsylvania Motor Vehicle Financial Responsibility Law (MVFRL). Only in those cases could the Plaintiff arguably be precluded from recovering monies already received. Therefore, if a UIM claim is not a first party benefit under Section 1722 then the UIM claim is not subject to an offset or credit from the third party recovery. The en banc opinion reverses a trial court order which had followed Pusl and molded a third party verdict to zero.

******REVERSED - Pusl v. Means, 991 A.2d 313 (Pa. March 23, 2010), appeal denied, 982 A.2d. 550 (Pa. Super. Sept 23, 2009) (Pennsylvania Supreme Court Denies Petition for Allowance of Appeal in Motor Vehicle Case Where Superior Court Allowed Molding Of Jury Verdict To Reflect Previous Underinsured Motorist Recovery For Same Accident).**

On March 23, 2010, The Pennsylvania Supreme Court denied the Plaintiff's Petition for Allowance of Appeal. In this case, the plaintiff settled an underinsured motorist (UIM) claim prior to trial for $75,000 and received a verdict of $100,000. The record contained no evidence of whether subrogation was waived, so the Superior Court molded the verdict to $25,000.

By way of background, The Plaintiff Pusl was involved and injured in a car accident with the Defendant. Pusl made a third party claim against Means but also a 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. Again, there was no record of whether the underinsured motorist carrier State Farm waived subrogation or assigned its subrogation claim to Pusl. The trial court granted the motion, molded the verdict and Pusl appealed.

The Superior Court affirmed 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, on 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.

Thus, until something changes in the statutes or case law make sure to be extra careful when settling the UIM claim prior to the third party claim.

AAA Mid-Atlantic v. Ryan, -- A.3d -- (Pa. 2014) (Pennsylvania Supreme Court Holds That Underinsured Motorist Credit Is Applied Based Upon Liability Apportioned By A Jury To All Tortfeasors).

The Pennsylvania Supreme Court opinion reverses a Superior Court memorandum panel opinion which held that the amount of damages which may be offset against the recovery under a underinsured motorist (UIM) policy includes damages recovered from all tortfeasors held liable, and not just an offset for those sums paid under one tortfeasor's auto policy.

In Ryan, the insureds were fully compensated from the City of Philadelphia in a portion of the case. The case against the City was not based upon any theory of liability for motor vehicle negligence. The insureds then sought the policy limits from the UIM carrier based upon the policy limits of the negligent tortfeasor driver only.

The Court writes that when applying the facts of the case to the law the purpose of the Pennsylvania Motor Vehicle Financial Responsibility Law (MVFRL) is not furthered by allowing the insured Ryan to recover additional damages from their UIM insurer. Further, there was no basis for the Superior Court to conclude that the limit of liability clause in AAA's policy violated the MVFRL's policy of protecting injured victims from underinsured motorists. The Superior Court's determination is contrary to Pennsylvania law which precludes double recovery for the same injury. The Court reverses and remands.

EVIDENTIARY/PROCEDURAL ISSUES

Pavelko v. Unitrin Direct Auto Ins., No. 11190 of 2012 (C.P. Lawrence June 12, 2014) (Trial Court Rules On Duty Of An Auto Insurance Company To Re-price In Accordance With Act 6/Also Cites Counsels Conduct In Statements Made in Brief).

This Act 6 cases deals with the obligation of an insurance company to apply Act 6 reductions after the Plaintiff/insured is injured in a car accident. The insurance company wanted to simply pay the full amount of a bill to a hospital so that it could exhaust the first-party benefits. The insured argued that the insurance company has a duty to re-price the bill in order to delay the exhaustion of the first party benefits.

The insured filed suit and the insurance company filed preliminary objections which argued that it did not have a duty, per § 1797(a), to adjust plaintiff's medical expenses in order to postpone exhaustion of plaintiff's first-party benefits. The court holds that there is such a duty and cites to the Superior Court

case in Pittsburgh Neurosurgery Associates Inc. v. Danner, 733 A.2d 1279 (Pa. Super. 1999) and more recent Commonwealth Court case in Houston v. SEPTA, 19 A.3d 6 (Pa. Commw. 2011).

Also, the trial court cites to certain statements made by Plaintiff's counsel in the brief and filings. The court finds the statements unprofessional and is a good example of what not to write in a brief.

Swalinski v. Forsyth, 2012-SU-1529-69 (York Co. Aug. 5, 2014) (Trial Court Grants Motion To Consolidate Cases Involving Two Separate Accidents and Lawsuits Involving Same Plaintiff).

The case involves a Plaintiff who was injured in two separate accidents and filed separate lawsuits against the torfeasors. The injuries sustained in both accidents were similar so the concern is that if the cases were separate then the Defendants in each case could try to blame the other for the injuries. The Plaintiff sought to consolidate the two cases to prevent having to litigate the injuries and damages in separate lawsuits. Both Defendants opposed the motion.

The trial court grants the motion to consolidate. The accidents occurred in the same county about two weeks apart and involved the same, or similar, injuries. The trial court finds that the cases, mainly the injuries, arise out of same common facts and issues warranting the cases to be consolidated.

Thanks to Auto Section and List serve member and Future Leader Section member Abbie Trone of my firm.

Aminov v. WCAB (Ewell), 2013 WL 3546351 (Pa. Cmwlth. Ct. July 15, 2013) (mem.) (Commonwealth Court Holds That Carrier Allowed To Subrogate From Employee On Underinsured Motorist Claim Despite Third Party Settlement Agreement).

This Commonwealth Court opinion looks at the workers' compensation insurance carrier's subrogation rights to an underinsured motorist (UIM) recovery even though the Third Party Settlement Agreement (TPSA) said that the carrier was accepting monies "in full satisfaction of their subrogation lien."

The Commonwealth Court finds that the evidence shows that all parties knew about the UIM claim, and the insurance company placed counsel on notice in a letter stating that it was not waiving a lien on the employer's UIM policy. Since the language in the TPSA was subject to two different interpretations, the Court looks outside the agreement and holds that the "in full satisfaction" language was not releasing the claim to the UIM monies.

Thus, in order for the UIM monies to have been released, it probably should have been explicitly stated in the TPSA. This case is important for counsel to know when trying to resolve a workers' compensation claim and by obtaining a waiver of subrogation. Basically, always be clear and place everything explicitly on the record.

Marlette v. State Farm Mut. Ins. Co., 57 A.3d 1224 (Pa. Dec. 28. 2012) (Pennsylvania Supreme Court Reverses Pennsylvania Superior Court AND Holds That Delay Damages In Underinsured Motorist Claim Are Not Calculated based Upon Award But Are Based Upon The Policy Limit).

This is a case originally arising out of a Koken trial for underinsured motorist benefits. The insured received an award well in excess of the policy limits. The trial court held, and the Superior Court as well, that the delay damages are calculated based upon the actual jury verdict and not the policy limits, even if the verdict is higher than the policy. In this case there was a policy limit of $250,000 and an underinsured motorist verdict of $550,000. The Superior Court held, with Judge Bowes dissenting, that delay damages are based upon the award and not the policy limit.

On November 7, 2011, the Pennsylvania Supreme Court granted a Petition for Allowance of Appeal to hear the following issue:

> *Did the Superior Court err (as identified in the dissenting opinion) in holding, in conflict with Allen v. M[e]llinger, that plaintiffs may recover delay damages based on the full amount of the jury verdict rather than on the legally recoverable molded verdict, which was reduced to reflect the insurance policy limits that plaintiffs were permitted to receive?*

The Supreme Court reverses and holds that the Plaintiff may only recover delay damages on the amount of legally recoverable damages, after the verdict is molded to reflect the policy limits.

The Supreme Court finds that the Superior Court improperly concluded that the plain language of Rule 238 required that delay damages be calculated based on the jury's award of damages. Further, it improperly opined that limiting delay damages to the amount of a molded verdict eliminated the unpredictability of outcome that motivates an insurer to make a reasonable settlement offer.

The Supreme Court holds that a plaintiff's recovery of delay damages under Rule 238 is limited to the amount of the legally recoverable molded verdict as reflected by the insurance policy limits. Accordingly, the Court vacates the

Superior Court's decision and remands it for reinstatement of the trial court's original award of delay damages based upon the policy limit.

Roth v. Erie Ins. Co., -- A.3d -- (Pa. Super. Ct. Feb. 7, 2014) (Pennsylvania Superior Court Holds That Delay Damages May Be Awarded On Future Medical Bill Award).

The Pennsylvania Superior Court decides the issue of how delay damages are determined when future medical expenses are awarded in a jury trial. The trial court held that delay damages only apply to damages for pain and suffering and not the amount of $20,000 which was allocated towards future medical expenses.

The Superior Court reverses in this case of first impression and opines that the future medical expenses are related to the injured Plaintiff's "bodily injuries" and are covered under Rule 238. They should be awarded for future medical expenses. Thus, the Superior Court holds that the trial court erred and delay damages should be added to the amount of future medical bills.

(Court Splits 3-3 and Issues not decided) Lipsky v. State Farm Mutual Automobile Insurance. 41 A.3d 1288 (Pa. April 24, 2012) (Pennsylvania Supreme Court Agrees To Hear Case On Collecting Damages Only For Emotional Distress In The Absence Of Any Physical Injury).

The Pennsylvania Supreme Court has granted an allowance of appeal in a case that questions whether emotional distress without a physical injury is covered under an automobile insurance policy's definition of bodily injury. The definition of bodily injury in the insurance policy defined "bodily injury" as "bodily injury to a person and sickness, disease or death which results from it."

The case arises out of a parent and siblings who witnessed their son and brother struck by a car and killed. They sought damages under the bodily injury portion of the policy insuring the car involved. A panel of the Superior Court in a memorandum opinion held that the family could collect damages under the policy because witnessing a family member killed by a car is a distinct bodily injury covered under the policy's definition of "bodily injury."

The panel upheld a trial court's ruling that the definition of "bodily injury" in State Farm's policy was ambiguous enough to allow for negligent infliction of emotional distress (NIED) to be included as a bodily injury, but on different

grounds. The Superior Court found the definition wasn't ambiguous, but rather, was simply broad enough to include emotional harm without physical injury.

The court also said in the opinion that "nothing in the language of the State Farm policy departs from the common law understanding that the injury contemplated in such a NIED claim results not from the bodily injuries suffered by the accident victim but from the claimant's witnessing the accident from nearby." Therefore, separate limits applied.

State Farm appealed and the Supreme Court has granted the appeal to hear the following issues:

ORDER

PER CURIAM

AND NOW, this 24th day of April, 2012, the Petition for Allowance of Appeal is hereby GRANTED. The issues, as phrased by petitioner, are:

> a. Whether a claim for emotional distress without physical injury is covered by a liability insurance policy which provides coverage for "bodily injury" defined as "bodily injury to a person and sickness, disease or death which results from it."
>
> b. Assuming, arguendo, that such claims do constitute bodily injury, whether plaintiffs' claims for emotional distress are subject to the "each accident" liability limits of the State Farm insurance policy, rather than the "each person" liability limits, despite the fact that plaintiffs' emotional distress resulted from the bodily injury suffered by Benjamin Lipsky, and the policy includes within its "each person" limits "all injury and damages to others resulting from this bodily injury."

Oral Argument was in the Fall 2012. Ultimately the Court could not decide the issues based upon a 3-3 split.

Clemens v. New York Central Mut. Fire Ins. Co., 2014 WL 3508221 (M.D. Pa. July 14, 2014) (mem.) (Federal District Court Rules On Motions To Depose Insurance Company Employees And Executives In An Underinsured Motorist/Bad Faith Claim – Koken).

This case initially involved both an underinsured motorist claim (UIM) and a bad faith claim. The UIM case settled and the bad faith claim remained so the Plaintiff's counsel sought to depose various people who are employed by the insurance company for the insured. The insurance company filed a motion for a protective order.

The District Court grants, in part, and denies, in part, Defendant's motion for a protective order regarding the proposed depositions of Defendant's CEO, CFO, and Claims Manager. The District Court finds that Defendant's position in seeking the protective order is overly simplistic. The argument is that only two lower level people made all of the decisions in the handling of the UIM claim. However, the court finds that although only two lower level people made all the decisions regarding how and when to settle the UIM claim, it begs the question whether company policies implemented by their superiors affected their decision making in a way contradictory to their insured's interests. Therefore, the District Court allows the deposition of the CFO and Claims Manager and, depending on those depositions the court will entertain a request to depose the CEO.

Wagner v. State Farm Mut. Auto. Ins. Co., No. 5:13-cv-06645 (E.D. Pa. Feb. 20, 2014) (District Court Rules On Discovery Deposition of Adjuster in Underinsured Motorist Case).

The District Court denies the plaintiff's motion to compel deposition of a claim representative and team manager in an underinsured motorist breach of contract claim, where no bad faith claim was brought. The Court finds that information about claims handling is not relevant to a breach of contract claim and writes that the "Plaintiff does not allege in his Complaint that Defendant acted in bad faith by failing to properly investigate, evaluate, or negotiate his UIM claim; absent such allegations, discovery related to claims handling is outside the scope of discovery for a breach of contract claim". The motion to compel is denied.

Gilroy v. Housing & Redevelopment Ins. Exch., No. 09 cv 9064 (C.P. Lackawanna April 23, 2014) (mem.) (Trial Court Denies Motion For 4th Defense Exam).

In this case, the Plaintiff underwent three previous defense exams and the Defendant sought a fourth one for pain management. The Plaintiff objected. The trial court finds that the Defendant failed to show good cause for requiring

the Plaintiff to undergo a pain management exam when 3 other exams had already been performed. No new injury was alleged nor did the Plaintiff conceal any injury.

The trial court notes that the Plaintiff's pain was always at issue and the Defendant had the opportunity for pain management to be addressed during the prior exams. Importantly, Rule 4010 does not specifically permit or prohibit more than one exam but the defendant has a heightened burden of showing good cause for a supplemental medical examination.

Pleading Punitive Damages In Your Third Party Case

Stemrich v. Zabiyaka, Civil No. 1:12-CV-1409 (M.D. Pa. July 2, 2013) (Federal District Court Allows Amendment To Complaint For Punitive Damages).

This truck accident litigation involves a motion to amend a complaint to add punitive damages, after the deposition of the Defendant was taken and a safety expert report was produced. Judge Rambo observes that the Plaintiff's trucking safety expert notes numerous violations of the Federal Motor Carrier Safety Regulations. This report, in conjunction with the deposition testimony of the truck driver, provides a sufficient basis to advance punitive damage claims against both the truck driver and trucking company.

Therefore, given the liberal right to amend a pleading in federal court, the Motion to Amend is granted.

Thanks for Michael O'Donnell of the O'Donnell Law Firm in Kingston.

Rockwell v. Knott and New Prime, NO. 12 CV 1114 (Lack Co. Aug. 13, 2013) (Trial Court Grants Summary judgment Of Punitive Damages Claim Because Lack Of Evidence With Regards To Distracted Driving).

This case is a Motion for Summary Judgment involving the issue of alleging punitive damages when a person is believed to be looking downward at the display screen of a GPS application on a cell phone, rather than at the roadway, at the time of a motor vehicle accident. Although in this case the Defendant's Motion is granted, the trial court explains under what circumstances the Plaintiff would have been able to defeat the motion.

For instance, evidence in the record suggesting that the Defendant driver was actually viewing the GPS as he proceeded to turn and caused the accident would likely have defeated the Motion for Summary Judgment. In this case,

Preliminary Objections most likely would have been denied, but at the later stage there was no evidence to create an issue of fact for trial.

Hof, Wake-up Call: Eliminating the major roadblock that cell phone driving creates for employer liability, Comment, 84 Temp. L. Rev. 701 (Spring 2012).

More and more, the issue of using your cell phone while driving a vehicle is becoming an issue which may subject a driver to punitive damages. However, if the driver is in the course and scope of his or her employment at the time of the accident, then the employer may be secondarily liable under a theory of respondeat superior. For an excellent discussion of the theory and ways to possibly recover under this new legal theory it is urged that the Comment of Isaac Hof in the Temple Law Review be read thoroughly.

UNINSURED AND UNDERINSURED MOTORIST ARBITRATION/KOKEN AND CIVIL PROCEDURE

Garcia v. Brock-Weinstein, 2014 WL 2957487 (E.D. Pa. July 1, 2014) (mem.).(District Court Grants Motion To Sever Jointly Filed Case Involving Two Separate Accidents).

The District Court grants a motion to sever after the Plaintiff injured his back in two separate auto accidents--one in 2012 and one in 2013. The 2013 accident was argued to have exacerbated the 2012 back injury. The Plaintiff sues the tortfeasors involved in each accident and contests the severance motion on the basis of the same body part being injured.

The court determines that joinder is improper and severance should be granted because the accidents occurred at different times, at different places, with different defendants and the liability of each defendant should be considered separately.

Stepanovich v. State Farm, 78 A.3d 1147 (Pa. Super. Ct. Oct 15, 2013) (Pennsylvania Superior Court Writes That Mentioning Insurance In Koken Case Is Not Violative of Pennsylvania Rule of Evidence Rule 411).

Initially, Judge O'Reilly in Allegheny County held that it was a violation of due process for the Plaintiff NOT to be allowed to identify both the third party and the UIM carrier in the jointly tried Koken case. The case was appealed and at the appellate level the Pennsylvania Superior Court makes two important findings that:

1. it is not a violation of Rule 411 of the rules of evidence for the insurance company to be identified (see page 8 and footnote 5) and
2. the Plaintiff in this case cannot prevail because he did not show how the failing to identify the insurance company was prejudicial to due process rights. The dissent says that it was proven by the plaintiff being "double teamed".

Essentially, the finding is that mentioning insurance at a Koken trial does not violate the Pennsylvania Rules of Evidence. Since it will be almost impossible to prove prejudice of not mentioning the prejudice then the insured should be allowed to mention it.

PAJ's Amicus Brief which was authored by Len Sloane, Jim Haggerty and Mike Davey is cited in footnote 5. Jennifer Webster of Perer Kontos and myself represented the Plaintiff.

Noone v. Progressive Direct Insurance Company, No. 3:12 CV 1675 (M.D. Pa. May 28, 2013) (District Court Holds That Amount Of Underinsured Motorist Coverage Available And Third Party Settlement Are Admissible In *Koken* Trial).

This case involves a underinsured motorist (UIM) claim and bad faith arising out of the handling of a car accident case. Since the insurance policy did not mandate arbitration the Plaintiff filed suit in court.
In anticipation of the pre-trial conference the insurance company filed several motions in limine seeking to preclude the Plaintiff from introducing pieces of information involving the underinsured motorist claim, coverage, premiums and the third party case.

Judge Munley denies Progressive's motion in limine seeking to preclude plaintiff's introduction of the amount of premiums plaintiff paid, the amount of UIM benefits available, and the amount plaintiff received from the tortfeasor.

Skrocki v. Row, No. 1990 EDA 2012 (Pa.Super. Oct. 17, 2013) (mem.) (Pennsylvania Superior Court Reveres Trial Court Koken Order Which Moved Third Party Case from Philadelphia County to Berks County).

The insured brought suit against the tortfeasor and underinsured motorist carrier (UIM) insurer in Philadelphia County because the UIM insurer does business there. The trial court granted the UIM insurer's motion to sever and transferred the UIM claim to Berks County based on forum non conveniens. The tortfeasor then filed untimely preliminary objections to venue in Philadelphia and the Plaintiff filed preliminary objections to the torteasor's preliminary objections on the basis that tortfeasor's objecitons were not filed within 20 days.

The Pennsylvania Superior Court reverses and holds that the trial court erred in granting tortfeasor's preliminary objections because if a claim is filed in a proper venue, it remains proper throughout the litigation. Therefore, the trial court's severance of the third party claim from the UIM claim and the transferring the UIM claim to Berks did not render venue against tortfeasor in Philadelphia improper. The tortfeasor can still file a motion to transfer based on forum non conveniens.

Barnabei v. Schell, No. 1759 EDA 2013 (Pa.Super. Ct. Feb. 20, 2014) (mem.) (Pennsylvania Superior Court Affirms Trial Court Venue Ruling.

The plaintiff filed a claim in Philadelphia County based upon the Defendant becoming intoxicated in the County. The trial court rejected the plaintiff's argument which ultimately resulted in an accident in Delaware County. The trial court granted the Defendant's preliminary objections and transferred the case to Delaware County.

The Superior Court affirms and observes that the allegation where part of the defendant's acts were committed in Philadelphia County is insufficient to establish venue as it amounts to just a part of an occurrence. Further, satisfying part of an occurrence does not satisfy Pa.R.C.P. 1006 and all the facts that satisfied the elements of negligence occurred in Delaware County.

Bad Faith

§ 8371. Actions on insurance policies.

In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:

1. Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate plus 3%.
2. Award punitive damages against the insurer.
3. Assess court costs and attorney's fees against the insurer.

42 Pa. C.S.A. § 8371.

Padilla v. State Farm Mut. Auto. Ins. Co., 2014 WL 3109999 (E.D. Pa. July 8, 2014) (mem.) (Koken - District Court Denies Motion To Dismiss Bad Faith Claim (UIM Breach)).

The case involves a lawsuit arising out of an underinsured motorist (UIM) claim. The Plaintiff brought claims for breach of contract and bad faith based upon State Farm's conduct of delaying its investigation of an underinsured motorist claim (UIM) after repeated requests for a claim evaluation. The company allegedly kept requesting more information from the Plaintiff or simply ignored the Plaintiff's requests.

Also, when State Farm finally made an offer, it was allegedly unreasonably low. The District Court notes that one could infer that the Plaintiff's UIM claim could be evaluated relatively quickly given State Farm was the insurer for the tortfeasor as well as the Plaintiff's UIM insurer. The allegations point to State Farm's lack of a reasonable basis for its delay and partial denial of benefits along with an inference of self-interest. Therefore, the Plaintiff has alleged a plausible bad faith claim and is allowed to proceed.

Clark v. Progressive Advanced Insurance Company, No. 12-6174 (E.D. Pa. April 26, 2013) (Bad Faith Claim Dismissed Because Complaint Allegations Not Specific).

This case involves a bad faith claim filed under Section 8371 of the Pennsylvania Judicial Code and arises after the Plaintiff claimed there was an inadequate offer of monies by the insurance company in an underinsured motorist (UIM) case.

The Plaintiff's claims were that a UIM claim was submitted and then an offer made and rejected. The Complaint alleged that the offer was unreasonable. The Court summarizes the facts in the complaint as stating that a UIM claim was made after the insured complied with the terms of the policy and then rejected. The Court finds that only materials facts may be taken as true to determine whether a "plausible claim for relief" has been state. It then concludes that the "facts are not sufficient to state a plausible claim for relief under Pennsylvania's bad faith statute." The claim for bad faith is dismissed without prejudice.

Tubman v. USAA Casualty Insurance Company, 943 F.Supp.2d 525 (E.D. Pa. April 30, 2013) (District Court Dismisses Fiduciary Duty Claim In Bad Faith Underinsured Motorist Suit).

The case involves a multi-count complaint arising out of an underinsured motorist (UIM) case. Among the counts in the complaint are claims for breach

of contract, statutory bad faith, breach of fiduciary duty, common law bad faith and a violation of the Unfair Trade Practices and Consumer Protection Act.

The District Court finds that because of its hybrid nature of being both a first party and third party claim, a UIM case does not provide a right to a fiduciary duty. Therefore, the claim for breach of fiduciary duty is dismissed. The Court also holds that a UIM claim, as stated, is not a case where both a statutory and common law bad faith claim can be simultaneously filed because the common law right is subsumed by the breach of contract claim. Thus, the common law bad faith claim is dismissed. Lastly, the Court finds that no claim for violating the Unfair Trade Practices Act can exist in this case.

Deibler v. Nationwide Mut. Ins. Co., 2013 WL 4511313 (W.D. Pa. Aug. 23, 2013) (mem.) (District Court Dismisses Bad Faith Claim Filed After underinsured Motorist Proceeding Concludes).

The District Court grants the insurance company's Motion for Summary Judgment to dismiss the insured Deibler's bad faith claim with prejudice. The District Court finds that insurance company did not commit bad faith when it failed to (1) obtain insured's statement, (2) inform the insured of the right to file UIM claim, and/or make a claim determination without having the insured's statement under oath. Also, a violation of insurer's claims practice manual does not necessarily give rise to a bad faith claim.