OVERVIEW OF THE MVFRL AND INSURANCE POLICY PROVISIONS

At first glance, any person who is the owner of a motor vehicle, motorcycle, trailer or any other vehicle which requires insurance would think that he or she is protected provided that the vehicle is registered and insured in the Commonwealth of Pennsylvania. Unfortunately, that is not always the case and, with the appellate decisions over the past several years, now it is even more important to not only understand the meaning and applicability for all of the coverages listed on a motor vehicle insurance policy but also the meaning and applicability of every word and exclusion in the policy. For the auto practitioner it is even more important to keep up to date with the various court decisions along with the various nuances of them as well as the various legislative proposals which may impact the Pennsylvania Motor Vehicle Financial Responsibility Law (MVFRL).

There are many issues to be considered when reviewing a motor vehicle insurance policy. Sometimes, the policy may contain a provision that is invalid because it directly conflicts with the MVFRL. Thus, it is also important to know and understand the various provisions of the MVFRL.

Obtain all the Proper Documentation for the Case

Throughout the past several years, many insureds were successful because they obtain the proper documentation from insurance agent and/or the insurance company, as well as creating a record for the court to determine and make findings in fact in favor of coverage. An insurance company will not always have in its possession all of the proper documentation and forms which will enable an attorney to properly evaluate uninsured or underinsured motorist coverage issues. An insurance agent may have more of the documentation or even the client at his or her home. When presented with some of these, it is incumbent on the attorney to ask the client to look through the contents of their entire house or home to provide the attorney will all documentation surrounding the insurance policy. In addition, either the attorney can request or the client should be asked to visit his or her insurance agent's office to ask for copies of the entire file.

Also, obtain a certified copy of the insurance policy which was in effect **at the time** of the accident. The insurance companies set premiums and coverage based upon what is and is not available at the time they set their premiums. Thus, exclusions

are added sometimes years later after an accident. Thus, the exclusion may not be in a particular policy at the time of the client's accident.

Checklist of issues to focus on when preparing the auto case

A. Common Exclusions/Limitations and Cases:

1. Excluded/Named driver exclusion. Progressive Northern Ins. Co. v. Schneck, 813 A.2d 828 (Pa. 2002); Donegal v. Fackler, 835 A.2d 712 (Pa. Super. 2003).

2. Who is an "insured". Prudential v. Colbert, 813 A.2d 747 (Pa. 2002).

3. Household/Family car exclusion. GEICO v. Ayers, 18 A.3d 1093 - (Pa. 2011), Erie Ins. Exch. v. Baker, 972 A.2d 507 (Pa. 2009); Prudential v. Colbert; Old Guard Ins. Co. v. Houck, 801 A.2d 559 (Pa. Super. 2002), appeal denied, --- A.2d --- (Pa. March 14, 2003); Rudloff v. Nationwide Mut. Ins. Co., 806 A.2d 1270 (Pa. Super. Sept. 11, 2002)(en banc).

4. Non-owned car/regularly used non-owned vehicle exclusion. Williams v. GEICO, --- A.3d --- (Pa. 2011); Burstein v. Prudential Prop. & Cas. Ins. Co., 801 A.2d 516 (Pa. 2002).

5. Permissive driver exclusion.

6. Workers Comp. Exclusion, Heller v. League of Cities, --- A.3d --- (Pa. 2011).

7. Government vehicle exclusion. Kmonk-Sullivan v. State Farm Mutual Ins. Co., 788 A.2d 955 (Pa. 2001).

8. Definitional exclusion limiting coverage to those people only occupying cars as opposed to other vehicles. Richmond v. Prudential Prop. and Cas. Ins. Co., 789 A.2d 271 (Pa. Super. 2001); Prudential Prop. & Cas. Ins. Co. v. Ziatyk, 793 A.2d 965 (Pa. Super. Feb. 27, 2002).

B. Uninsured and underinsured selection (Section 1731). American International Insurance Co. v. Vaxmonsky, 916 A.2d 1106 (Pa. Super. 2006).

C. Stacking or rejection of stacking (Section 1738). Sackett v. Nationwide, 940 A.2d 329 (Pa. 2007) (Sackett I).

D. Section 1734 sign down of coverage (Section 1734). Blood v. Old Guard, 934 A.2d 1218 (Pa. 2007).

E. Section 1705 limited tort/full tort selection notice. (Section 1705).

F. Uninsured and underinsured motorist set-off clauses.

G. Rightness of claim and exhaustion clauses. Krakower v. Nationwide Mut. Ins. Co., 790 A.2d 1039 (Pa. Super. 2001), appeal denied, 805 A.2d 524 (Pa. 2002).

H. Jurisdictional issues.

I. Priority of coverage (Section 1733).

J. Limited tort.

K. Availability of remedy. Nationwide Mut. Ins. Co. v. Heintz, 804 A.2d 1209 (Pa. Super. 2002), appeal denied, --- A.2d --- (Pa. March 14, 2003).

L. Molding of coverage. Shankweiler v. Regan, C.P. Del. Co., No. 99-6101 (Del. Co. Sept. 5, 2002).

M. Self-insured status and what is required of a self-insured (Section 1787). Smith v. Enterprise Leasing Co. of Philadelphia, --- A.2d --- (Pa. Super. Sept. 24, 2003).

N. Medical and Wage loss Benefits (Section 1712).

O. Is there an arbitration clause?

Forms to consider obtaining:

There are forms which can be obtained, depending upon the circumstances. The forms which should be obtained, if they are important and are of relevance to your case, depending upon your investigation and review of the insurance declaration

sheet and the facts, circumstances and damages of the accident. The forms to consider obtaining are as follows:

1. Section 1705 limited tort-full tort selection notice.

Although the Supreme Court of Pennsylvania has found that there is no remedy for failing to provide a differential and cost premiums when selecting limited tort as opposed to full tort, a form is still required in order to make a valid selection. The statute specifically sets outs that if a form is not returned or there is no signature or form, then a person has full tort. Accordingly, if a person you meet with has a declaration sheet which has limited tort, but there is no form signed in possession of the agent or the company, or even noted on an application for coverage, then an insured should have full tort.

2. Section 1731 rejection of uninsured or rejection of underinsured motorist coverage.

Even though there are certain claims which have been set aside by the various courts, the statute still specifically says in Section 1731(c.1) that the forms must be signed by the first named insured and dated to be valid and any rejection form that does not comply specifically with this Section is void.

3. Section 1734 sign down.

The courts have stated that although there has never been a format set out in the statute, a writing is still required or there is no sign down of coverage.

4. Section 1738 uninsured coverage limits/underinsured coverage limit form to reject stacking.

Even though the decisions of the various Appellate Courts have not been favorable for the insured over the last few years, there are ways to argue that exclusions can be set aside. There are also ways to argue against the various sign downs, rejections, and selections for coverage.

Many insurance companies have, in some way, attempted to modify the definition an "insured" entitled to uninsured or underinsured motorist benefits in motor vehicle insurance policies. In the Pennsylvania Motor Vehicle Financial Responsibility Law ("MVFRL"), "insured" is defined as any of the following:

(1) An individual identified by name as an insured in the policy of motor vehicle liability insurance.

(2) If residing in the household of the named insured:

(i) A spouse or other relative of the named insured; or

(ii) A minor in the custody of either the named insured or relative of the named insured.

75 Pa. C.S.A. Section 1702.

The Pennsylvania Supreme Court dealt with a case where an insurance company attempted to modify the definition of "insured" in a motor vehicle insurance policy. In Prudential v. Colbert, 813 A.2d 747 (Pa. 2002), Adam Colbert resided with his parents when he was involved in a significant motor vehicle accident. At the time of his accident, he was driving a vehicle which he owned and insured personally with State Farm. His parents owned three vehicles that were insured through Prudential. He recovered the liability coverage from the third party and underinsured motorist benefits under his State Farm policy. He then made a claim for underinsured motorist coverage under his parents' policy since he was a resident relative of the household at the time of the accident and met the definition of "insured" under the MVFRL.

The Prudential policy, however, provided a narrow definition of "insured", which was different from the one set forth in the MVFRL. Under the Prudential definition of "insured", Colbert was not considered an "insured" entitled to coverage under the policy.

The Prudential policy provided:

WHO IS AN INSURED

IN YOUR CAR (INCLUDES A SUBSTITUTE CAR)

You and a resident relative are insured while using your car or a substitute car covered under this part.

Other people are insured while using your car or a substitute car covered under this part if you give them permission to use it. They must use the car in the way you intended.

The Prudential policy required Colbert to either be occupying or using his parents' vehicle or a substitute vehicle at the time of an accident in order to qualify as an "insured". The Supreme Court reviews the provisions of the MVFRL and Allwein v. Donegal Mutual Insurance Company, 671 A.2d 744 (Pa.Super. 1996). It finds that insurance companies cannot re-write the MVFRL and contract terms which conflict

with and restrict the terms of the MVFRL cannot be given effect, even if the terms are clear and ambiguous. The Court held that the Prudential policy had a more restrictive definition of "insured", and it conflicted with the MVFRL and writes, "[n]othing in the MVFRL permits Prudential or any other insurer to diminish the MVFRL's definition of "insured" and thereby provide coverage of a lesser scope than the MVFRL requires." Accordingly, Prudential's definition of "insured" impermissibly narrowed and conflicted with the plain language of the MVFRL and was declared invalid by all of the Justices.

The definition of "insured" was addressed in the uninsured and underinsured motorist provisions of a policy in USF&G v. Tierney, 213 F.Supp. 2nd 468 (M.D. Pa., July 9, 2002). In Tierney, the United States District Court in the Middle District of Pennsylvania determined that a corporate officer was not an insured under a business auto policy issued to her corporation because she was the "named insured" listed on the policy. In Tierney, the corporate officer, Cecilia Ann Tierney, was injured in a motor vehicle accident. At the time of the accident, she was employed with Tierney Associates, which maintained a business auto policy. The vehicle she was operating at the time of the accident was not a listed vehicle on the business auto policy for Tierney Associates. After she recovered the liability limits from the third party and underinsured motorist benefits from her personal policy, she sought UIM benefits under the business auto policy issued to Tierney Associates.

The Tierney USF&G policy defined an "insured" as:

> **(1) You.**
> **(2) If you are an individual, any "family member".**
> **(3) Anyone else "occupying" a covered "motor vehicle".**
> **(4) Anyone for damages he or she is entitled to recover because of "bodily injury" sustained by another "insured".**

The policy further defined "you" and "your" as the named insured, and the named insured was identified as Tierney Associates. The Court determined that coverage was limited to the named insured, Tierney Associates, and occupants of the insured corporate vehicles. The plain language of the policy controlled and was not against public policy, confirming that a corporate employee is not entitled to Class I status under a business auto policy issued to a corporation and not expressly classifying the named employee as a named insured.

There are forms which can be provided by insurance agents to provide coverage to a corporate officer or employee. This should extend to them named insured status and coverage. However, even if Tierney qualified as a named insured the issue of the "non-owned regularly used vehicle" exclusion would most likely be raised.

It is important to recognize that many insurance companies are becoming very aggressive and attempting to limit and restrict the definition of "insured" status to individuals through the terms of insurance policies. Any client's policy must be examined and any attempts by the company to modify the definition of "insured" to provide for more restrictive coverage than as otherwise required in the MVFRL should be challenged and set aside.

Where to Litigate the Coverage Issue?

When faced with a coverage issue, an initial determination must be made whether to litigate the coverage issue through a Declaratory Judgment Action or proceed with the case through Arbitration. Usually, the arbitration provision in the insurance policy will determine the jurisdiction and setting for any arbitration. However, in some cases, the arbitration clauses are vague. In other cases, the insurance company may agree to one forum or the other at the request of the insured. Also, sometimes the insurance company may try to avoid arbitration altogether, even if the only issue is damages.

It becomes important to consider the issues to be decided and the implications of proceeding with the case in court or arbitration. When thinking about these issues the type of court is considered (ie. State v. Federal). Also, the county or District Court must be considered. When thinking about arbitration, the outcome of previous arbitrations on the same issue and area must be considered as well as the likelihood of the various arbitrators being involved in the case.

First and foremost, insurance company's are no longer mandated to arbitrate. IFP v. Koken, 889 Pa. 550 (Pa. 2005). However, if there is an arbitration clause, several insurance companies modified their insurance policies to require that most coverage issues be determined through Declaratory Judgment Actions and only damage issues decided by Arbitration.

The common everyday arbitration clause provides in part:

> **If we and an "insured" do not agree:**
>
> **(1) Whether that "insured" is legally entitled to recover damages; or**
>
> **(2) As to the amount of damages which are recoverable by that "insured"; from the owner operator of an "underinsured" motor vehicle, then the matter may be arbitrated. Either party may make a demand for arbitration. Arbitration shall be conducted with the provisions of the Pennsylvania Uniform Arbitration Act.**

This arbitration clause will generally be interpreted that, since there is no limiting language, every issue is subject to arbitration and not a court action. The reason for this interpretation will be due to the fact that there is no limiting language or exceptions in the provision which states that certain issues "shall be decided by a court".

The Superior Court held in Henning v. State Farm Mutual Automobile Insurance Company, 795 A.2d 994 (Pa.Super. 2002), there are certain limitations which can be placed within an arbitration clause to limit certain issues to a "court" and not Arbitration. Some companies have language which states that:

> **If there is no agreement, these two questions shall be decided by arbitration at the request of the insured or us. The arbitrator's decision shall be limited to these two questions.**

GENERAL PRACTICE TIPS:

How the Client Can Help Get the Proper Documentation for the Case

Throughout the past several years, many cases have been successful based upon obtaining the proper documentation from either an insurance agent or the insurance company, as well as creating a record for the court to determine and make findings in fact in favor of coverage. An insurance company will not always have in its possession all of the proper documentation and forms which will enable an attorney to properly evaluate an uninsured or underinsured motorist coverage issue. An insurance agent may have more of the documentation or even the client at his or her home. When presented with some of these, it is incumbent on the attorney to ask the client to look through the contents of their entire house or home to provide the attorney will all documentation surrounding the insurance policy. In addition, either the attorney can request or the client should be asked to visit his or her insurance agent's office to ask for copies of the entire file.

Also, obtain a certified copy of the insurance policy which was in effect **at the time** of the accident. The insurance companies set premiums and coverage based upon what is and is not available at the time they set their premiums. Thus, exclusions are added sometimes years later after an accident. Thus, the exclusion may not be in a particular policy at the time of the client's accident.

Priority of Coverages:

The priority of recovery is set forth in the Pennsylvania Motor Vehicle Financial Responsibility Law (MVFRL) in 75 Pa. C.S. § 1733. Recovery is first applies against the policy applicable to the vehicle occupied by the injured person at the time of the

accident. The second level of coverage is provided by any other policy covering a motor vehicle not involved in the accident to which the person is an insured. It is possible that at the time of an accident, an injured person may be occupying a motor vehicle owned by his or her employer or someone else. If the vehicle the injured is occupying has UM or UIM coverage the injured must seek benefits from the employer or other person's UM/UIM coverage before seeking UM/UIM coverage on their own policy.

Once it is determined which policy must be pursued first and the extent of UM/UIM coverage available on the vehicle in which an injured person is an occupant, the next step is to determine all other policies the person is a named insured or insured and all policies the person may be an insured by being a member of a household with another family member or even being named as a driver. It is important to determine the household and residency of an individual. It is certainly possible that a person may be a resident in more than one household for insurance coverage purposes. Erie Insurance v. Flood, 649 A.2d 736 (Pa. Commwlth. 1994). In that situation, UM/UIM coverage may be available through family members at more than one household.

It is also allowable to stack coverages in the Commonwealth of Pennsylvania. In Utica Mutual Insurance v. Contrisciane, 504 Pa. 328, 473 A.2d 1005 (1984) the Supreme Court of Pennsylvania defined the class of insured's who may stack benefits. People are placed in three classes for stacking as follows: (1) the named insured, any designated insured or residents of the same household, the spouses or relatives of either the named insured or the designated insured; (2) any other person while occupying an insured highway vehicle; and (3) any person with respect to damages he or she is entitled to recover because of the bodily injury to which insurance applies sustained by an insured under 1 or 2 above.

In order to preserve a UIM claim, you must settle for most of the liability coverage. The insured is either required to exhaust the liability insurance available for the tortfeasor or give a credit to the UIM carrier for the amount that is not exhausted. Boyle v. Erie Insurance, 656 A.2d 941 (Pa. Super. 1995).

Gap v. Excess

Pennsylvania is an excess coverage state. This means that UIM coverage applicable for an accident victim is in addition to liability coverage obtained from the tortfeasor. In 1995, the Superior Court determined Allwein v. Donegal Mutual Insurance Co., 671 A.2d 744 (Pa. Super. 1996) appeal denied, 546 Pa. 660, 685 A.2d 541 (1996) and determined that provisions of a Donegal policy which provided gap coverage rather than excess coverage were not void against public policy and would be enforced. The underlying rational of the majority was that the amendments to

the MVFRL in 1990 was not mandatory. The case was reargued before the Court en banc in November 1995 which reversed the earlier decision and now Pennsylvania is an excess state. See also Generette v. Donegal, 957 A.2d 1180 (Pa. 2008).

CONSENT TO SETTLE

It is usually necessary to seek consent to settle carrier prior to settling the underlying tort claim. Consent to settle is a means by which the UIM carrier protected subrogation rights against the tortfeasor. Consent to settle is important since it has been held that a claimant who sells the underlying tort claim without consent to settle from the UIM carrier may be barred from recovering UIM benefits if the UIM carrier can show prejudice. Nationwide Ins. Co. v. Lehman, 743 A.2d 933 (Pa. Super. 2000).

A UIM carrier may refuse to grant consent to settle. However, in Daley-Sand v. West American Insurance Company, 564 A.2d 965 (Pa. Super. 1989) the Superior Court approved a procedure by which a person may proceed with UIM claim in the face of a UIM carrier's refusal to grant the consent to settle. In Daley-Sand the Court of Common Pleas ordered that the insured was authorized to settle with the tortfeasor's insurance carrier for the tortfeasor's limits and then execute a release in favor of the tortfeasor while at the same time preserving the insured's right to UIM benefits. The Court stayed the Order for thirty (30) days providing the UIM carrier with the opportunity to preserve its subrogation rights by tendering to the insured the amount of the settlement offered on behalf of the tortfeasor with the UIM arbitration to proceed thereafter. Subrogation rights of the UIM carrier were preserved when the UIM carrier substitutes its payment for the payment made by the tortfeasor's insurance company. The UIM carrier was to be reimbursed for the payment made on behalf of the tortfeasor out of the eventual recovery from the tortfeasor, thereby reserving its subrogation interests. See also Nationwide v. Schneider, 960 A.2d 442 (Pa. 2008).

EXHAUSTION OF LIMITS

In Boyle v. Erie Insurance, 656 A.2d 941 (Pa. Super. 1995) the Superior Court determined that a injured victim is not required to exhaust the limits of the tortfeasors before proceeding with a UIM Claim. In Boyle a third party claims was made against two people arising out of a motor vehicle accident. The plaintiff received the limits on one of the tortfeasors and settled for 50% of the limits on the second tortfeasor. The Plaintiff was insured with Erie for UIM benefits and the Court refused to enforce the exhaustion of limits clause in the Erie UIM policy. The Court reasoned that to enforce the exhaustion of the limits clause would prevent an injured party from accepting a reasonable settlement and force the injured party to go to trial and obtain final judgment in order to determine damages, however, the

Court recognized that the UIM carrier is entitled to protection provided by the exhaustion of limits clause. The Court held that the Plaintiff can accept less than the full limits and proceed with the UIM claim while giving Erie credit for the portion of the tortfeasor's limits that were not paid in settlement.

The exhaustion of limits issue is only applicable to the motor vehicle tortfeasor responsible for the accident. If there are non motor vehicle tortfeasors such as a product liability defendant or a government defendant responsible for the highway conditions, it is not necessary to exhaust those limits prior to pursuing a UIM claim. Kester v. Erie, 582 A.2d 17 (Pa. Super. 1990), petition for allocatur denied, 527 Pa. 624, 592 A.2d 45 (1991); See also Nationwide v. Schneider, 960 A.2d 442 (Pa. 2008).

Various Exhaustion Clauses

In Harper v. Providence Washington, 753 A.2d 282 (Pa. Super. 2000), the plaintiff Herman Harper, was injured in a car accident within the scope of his employment. Harper's employer provided UM/UIM insurance coverage to the plaintiff, Harper, through the defendant, Providence Washington Insurance Company (hereinafter "Providence"). Following the accident, the plaintiff, Harper, filed a third party action against the tortfeasor in New Jersey. Believing his injuries exceeded the available tortfeasor policy limits, the plaintiff Harper made claim under the Providence policy for UM/UIM benefits. With respect to the UIM claim, Providence contested the nature and extent of the injuries to the plaintiff, Harper, and the matter was set for arbitration. The defendant, Providence, requested a continuance pending resolution of the plaintiff's third party tort action. However, this request was refused and the matter proceeded to arbitration where the arbiters awarded the plaintiff, Harper, $350,000 and allowing a credit to Providence for the tortfeasor's liability limits of $100,000 brought the net award to $250,000.

Offsets/Reimbursement

Evaluating insurance issues, particularly subrogation and reimbursement claims, in personal injury/wrongful death cases is important for both the Plaintiff and Defense attorneys. It is very import to understand and know whether a third party has a subrogation/reimbursement interest in the case. These outside claims may greatly impact the damages which can be plead, proven and recovered. Also, if not adequately investigated the Plaintiff's attorney may be facing possible legal negligence claims later on after the case has settled.

It is usually best to start with determining the type of case involved (i.e. motor vehicle/non-motor vehicle case). Second, determine any potential type of subrogation/reimbursement claim. Third, determine if a claim has been made by an outside source and if so whether or not it is valid. Fourth, if no subrogation claim has been made, determine whether or not you have an obligation to notify the

source of the third party claim or if you only need to advise your client of the possible claim. Every practitioner involved in a personal injury lawsuit must be cognizant of the various types of subrogation/reimbursement claims in order to properly represent the client.

Presently, in motor vehicle accident cases, subrogation is limited by the Pennsylvania Motor Vehicle Financial Responsibility Law (hereinafter "PaMVFRL"), 75 Pa.C.S.A. §1720. However, it needs to be remembered that under initial enactment of the 1990 Amendments to the PaMVFRL, section 1720 precluded the reimbursement and subrogation claims of most private entities, including worker's compensation carriers and private health insurers. However, in 1993, amendments to the PaMVFRL eliminated the prohibition of subrogation as it related to worker's compensation carriers. On August 31, 1993, Act 44 amended the Worker's Compensation Act and repealed section 1720 of the PaMVFRL as it related to barring subrogation by worker's compensation carriers.

Due to the change in the law it is important to determine whether or not a work related motor vehicle accident occurred on, after or before August 31, 1993. Depending on the date of accident the worker's compensation carrier may not be entitled to subrogation for benefits paid. If an accident arose out of the maintenance or use of a motor vehicle, but occurred prior to Act 44 amendments in 1993, then the worker's compensation carrier is not entitled to subrogation. However, if the accident occurred as a result of a motor vehicle accident on or after August 31, 1993, then the worker's compensation carrier is entitled to subrogation. In non-motor vehicle accident related cases, worker's compensation has always been entitled to reimbursement. Not only is the date of accident important but also the issue of the accident occurring "arising out of the maintenance or use of a motor vehicle" is important. Cases discussing each issue are referenced below.

The various types of subrogation/reimbursement claims by private and public insurers are outlined below as well as several cases which address issues involving the claims.

Appendix contains various forms, policy provisions, etc. which will be utilized for explanation throughout.