UNINSURED/UNDERINSURED MOTORIST AND BAD FAITH UPDATE SPRING 2012[1]

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JURISDICTION

Wilton v. Seven Falls Co., 515 U.S. 277 (1995); State Auto Ins. Co. v. Summy, 234 F.3d 131 (3d Cir. 2000).

Purcell v. State Farm Mut. Auto. Ins. Co., NO. 11-7004 (E.D. Pa. Feb. 10, 2012) (District Court Renders Ruling On Timeliness Of Motions To Dismiss, After Removal, In Federal Court).

After a car accident the insured filed a claim in state court against her insurer State Farm for unpaid underinsured motorist benefits. As part of the Complaint the insured sought recovery based on breach of contract, statutory bad faith under Section 8371, and bad faith for violations of the Unfair Trade Practices Act. The case was removed by State Farm from state court to federal court and then six days later State Farm filed a Motion to Dismiss.

Purcell, the insured, opposed the Motion to Dismiss by arguing that the Motion was not timely because under federal rule 12(a) it was not filed within 21 days after service of the complaint. However, the District Court finds that since the action was removed from state court to federal court that Rule 81(c) applies, and not rule 12, which provides that State Farm had seven days after the notice of removal was filed to file the Motion to Dismiss. Since Rule 81 applies then the Motion was timely.

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

Ozanne v. State Farm Mut. Auto. Ins. Co., 2:11-cv-00327-TFM (Mcverry J., W.D. Pa. May 5, 2011) (District Court Allows Claim To Proceed Against Adjuster And Grants Remand To State Court).

The Plaintiff Ozanne was injured in a car accident in June 2007 and filed an underinsured motorist claim. After not being able to settle the claim Ozanne filed suit as is required in her insurance policy. The underinsured motorist claim resulted in a verdict of $1 million in the Court of Common Pleas of Beaver County. Ozanne then filed a bad faith claim in state court against the insurance company as well as a claim against the adjuster for actions under the Unfair Trade Practices Act because the adjuster was allegedly using the case as a "test case". The insurance company removed the case to federal court.

Ozanne filed a Motion to Remand because there was not complete diversity. The insurance company argued that the adjuster being named was a fraudulent joinder intended only to destroy diversity. After noting the high burden to show a fraudulent joinder the court observed that arguably there was a claim under the Unfair Trade Practices Act for the affirmative actions alleged against the adjuster Perry Morgan. If this occurred, it would be improper affirmative conduct that amounts to a cause of action. Therefore, the claim is not "wholly insubstantial and frivolous" and the remand motion is granted.

QUALIFICATIONS FOR COVERAGE

"**Underinsured motor vehicle.**" A motor vehicle for which the limits of available liability insurance and self-insurance are insufficient to pay losses and damages.

"**Uninsured motor vehicle.**" Any of the following:

(1) A motor vehicle for which there is no liability insurance or self-insurance applicable at the time of the accident.

(2) A motor vehicle for which the insurance company denies coverage or the insurance company is or becomes involved in insolvency proceedings in any jurisdiction.

(3) An unidentified motor vehicle that causes an accident resulting in injury provided the accident is reported to the police or proper governmental authority and the claimant notifies his insurer within 30 days, or as soon as practicable thereafter, that the claimant or his legal representative has a legal action arising out of the accident.

75 Pa. C.S.A.. § 1702.

Allstate Prop. and Cas. Ins. Co. v. Squires, 667 F.3d 388 (3d. Cir 2012) (Third Circuit Holds Uninsured Motorist Claim May Exist After Box Falls Off Of Car).

The case involves the appeal of a District Court order dismissing a claim for uninsured motorist (UM) coverage after an insured was injured in a car accident. The insured Squires sustained injuries in a car accident after swerving to avoid an approximately two-foot square cardboard box lying in the middle of his lane of travel. The parties stipulated that an unidentified vehicle had to have dropped the box. The District Court held that, as a matter of law, the accident caused by a box which fell from an unidentified vehicle cannot be considered to have arisen out of the "ownership, maintenance or use of an automobile." The case was dismissed on a Motion for Judgment on the Pleadings. Squires appealed.

The Third Circuit reverses and holds that, as plead, the box falling off the unidentified vehicle may, as a matter of law, considered to be "arising out of" the ownership, maintenance or use of the vehicle. Relying mainly upon the Pennsylvania Supreme Court opinion in Manufacturers Cas. Ins. Co. v. Goodville Mutual Ins. Co., 170 A.2d 571 (Pa. 1961) the federal appeals court finds that a "but for" test is the necessary analysis to review the pleading for coverage and "Squires at this time only need to have alleged adequately that the unidentifiable vehicle's use was a but-

for cause of his injuries" so the case should be re-instated. Squires will still need to show the uninsured vehicle proximately caused his injuries.

Allstate Fire and Cas. Ins. Co. v. Hymes, 29 A.3d 1169 (Pa. Super. Sept. 14, 2011) (Pennsylvania Superior Court Holds That Driver Is Still Occupying A Motorcycle When Sustaining Injuries After Being Thrown Off Of Motorcycle).

The Superior Court reviews the applicability of the household exclusion when someone is injured after being thrown from the motorcycle he was operating after colliding with a car. In this case, the injured driver was operating his motorcycle and collided with a car. He was thrown from the car and then injured. He did not have underinsured (UIM) motorist coverage on the motorcycle but sought UIM coverage on his parents' policy with Allstate since he was a resident relative at the time of the accident. The Allstate policy excluded coverage if he was injured while "on" the motorcycle. He argued that since the injuries were sustained while not "on" the motorcycle, but after being thrown "off" of it, that the exclusion did not apply.

This is an excellent point and argument which had never been made in the appellate court. The Superior Court, however, concludes that the injuries were the direct result of the injured driver's operation of his motorcycle while "on" it. Therefore, it holds that recovery of UIM benefits was properly excluded under the household exclusion. The reason why Hymes wanted to argue he was not on the motorcycle and thus not occupying it was because if he is not occupying the motorcycle then he is technically a pedestrian and the exclusion would not factually apply to him.

Vanderhoff v. Harleysville, --- A.3d --- (Pa. Super. 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). 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.

SECTION 1731 REJECTION OF UNINSURED AND UNDERINSURED COVERAGE

§ 1731. Availability, scope and amount of coverage.

(a) Mandatory offering.--No motor vehicle liability insurance policy shall be delivered or issued for delivery in this Commonwealth, with respect to any motor vehicle registered or principally garaged in this Commonwealth, unless uninsured motorist and underinsured motorist coverages are offered therein or supplemental thereto in amounts as provided in section 1734 (relating to request for lower limits of coverage). Purchase of uninsured motorist and underinsured motorist coverages is optional.

(b) Uninsured motorist coverage.--Uninsured motorist coverage shall provide protection for persons who suffer injury arising out of the maintenance or use of a motor vehicle and are legally entitled to recover damages therefor from owners or operators of uninsured motor vehicles. The named insured shall be informed that he may reject uninsured motorist coverage by signing the following written rejection form:

REJECTION OF UNINSURED MOTORIST PROTECTION

By signing this waiver I am rejecting uninsured motorist coverage under this policy, for myself and all relatives residing in my household. Uninsured coverage protects me and relatives living in my household for losses and damages suffered if injury is caused by the negligence of a driver who does not have any insurance to pay for losses and damages. I knowingly and voluntarily reject this coverage.

.....
Signature of First Named Insured
.....
Date

(b.1) Limitation of rejection.--Uninsured motorist protection may be rejected for the driver and passengers for rental or lease vehicles which are not otherwise common carriers by motor vehicle, but such coverage may only be rejected if the rental or lease agreement is signed by the person renting or leasing the vehicle and contains the following rejection language:

Rejection of Uninsured Motorist Protection

I am rejecting uninsured motorist coverage under this

rental or lease agreement, and any policy of insurance or self-insurance issued under this agreement, for myself and all other passengers of this vehicle. Uninsured coverage protects me and other passengers in this vehicle for losses and damages suffered if injury is caused by the negligence of a driver who does not have any insurance to pay for losses and damages.

(b.2) Rejection language change.--The rejection language of subsection (b.1) may only be changed grammatically to reflect a difference in tense in the rental agreement or lease agreement.

(b.3) Vehicle rental services.--The requirements of subsection (b.1) may be met in connection with an expedited vehicle rental service, which service by agreement of the renter does not require the renter's signature for each rental, if a master enrollment or rental agreement contains the rejection language of subsection (b.1) and such agreement is signed by the renter.

(c) Underinsured motorist coverage.--Underinsured motorist coverage shall provide protection for persons who suffer injury arising out of the maintenance or use of a motor vehicle and are legally entitled to recover damages therefor from owners or operators of underinsured motor vehicles. The named insured shall be informed that he may reject underinsured motorist coverage by signing the following written rejection form:

REJECTION OF UNDERINSURED MOTORIST PROTECTION

By signing this waiver I am rejecting underinsured motorist coverage under this policy, for myself and all relatives residing in my household. Underinsured coverage protects me and relatives living in my household for losses and damages suffered if injury is caused by the negligence of a driver who does not have enough insurance to pay for all losses and damages. I knowingly and voluntarily reject this coverage.

.....
Signature of First Named Insured
.....
Date

(c.1) Form of waiver.--Insurers shall print the rejection forms required by subsections (b) and (c) on separate sheets in prominent type and location. The forms must be signed by the first named insured and dated to be valid. The signatures on the

forms may be witnessed by an insurance agent or broker. Any rejection form that does not specifically comply with this section is void. If the insurer fails to produce a valid rejection form, uninsured or underinsured coverage, or both, as the case may be, under that policy shall be equal to the bodily injury liability limits. On policies in which either uninsured or underinsured coverage has been rejected, the policy renewals must contain notice in prominent type that the policy does not provide protection against damages caused by uninsured or underinsured motorists. Any person who executes a waiver under subsection (b) or (c) shall be precluded from claiming liability of any person based upon inadequate information.

(d) Limitation on recovery.--

(1) A person who recovers damages under uninsured motorist coverage or coverages cannot recover damages under underinsured motorist coverage or coverages for the same accident.

(2) A person precluded from maintaining an action for noneconomic damages under section 1705 (relating to election of tort options) may not recover from uninsured motorist coverage or underinsured motorist coverage for noneconomic damages.

75 Pa. C.S.A. § 1731.

Section 1731 mandates that every policy contain uninsured and underinsured motorist coverage equal to the liability coverage unless rejected.

Section 1731 mandates that the form "specifically" comply with the law and that any such rejection form which does not is void.

<u>Jones v. Unitrin</u>, --- 3d --- (Pa. Super. Ct. Feb. 6, 2012) (Pennsylvania Superior Court Invalidates Rejection of UIM Form).

The insured allegedly rejected underinsured motorist (UIM) coverage. However, the form did not "specifically" comply with Section 1731 of the Pennsylvania Motor Vehicle Financial Responsibility Law (MVFRL). After being injured in a car accident with an underinsured motorist Jones sought UIM coverage on the policy by arguing the insurance company utilized a defective form and under the law the UIM limits equal the liability limits. The trial court found that the addition of a sentence to the form was a minor deficiency and upheld the form. Jones appealed.

The Superior Court first notes that MVFRL in Section 1731 mandates strict compliance with the language of the statute and the forms identified therein. If they do not they are void. In this case the form was not specifically complying with Section 1731. The Superior Court holds that the addition of the sentence "By rejecting this coverage, I am also signing the waiver on P. 13 rejecting stacked limits of underinsured motorist coverage" invalidated the form. The trial court's decision to uphold the form is reversed.

Robinson v. Travelers Indemnity Co. of America, No. 11-5267 (E.D. Pa. Feb 29, 2012) (Federal Court Invalidates Underinsured Coverage Rejection Form – Finds No Specific Compliance With Section 1731 Of MVFRL).

Nora Robinson ("Robinson") was injured in a car accident with an underinsured motorist while operating her employer's commercial vehicle. The employer allegedly rejected underinsured motorist coverage on the corporate owned vehicle and its insurance carrier Travelers produced a signed waiver of underinsured motorist coverage. Due to the insurance company not producing a form which tracked the language of the mandates of Pennsylvania law, Robinson sought coverage.

As noted, 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 "motorists" 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 relies upon a recent February 2012 Pennsylvania Superior Court opinion in Jones v. Unitrin, -- A.3d -- (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 holds that the rejection for is not valid and Robinson is entitled to underinsured motorist coverage.

This case shows the importance of checking to make sure that the insurance company uses the proper forms when an insured has allegedly rejected uninsured or underinsured coverage.

<u>Douglas v. Discover Prop. & Cas.</u>, 801 F. Supp. 2d 724 (Munley J., M.D. Pa. Aug. 12, 2011) (District Court Holds That Rejection Of UM/UIM Forms Apply To Corporate Fleet Policies).

A driver Herman Douglas ("Douglas") was injured while operating a vehicle insured on a corporate fleet policy that was provided to him by his employer for regular use. The insurance carrier Discover claimed that the policy did not provide uninsured or underinsured motorist coverage and produced waivers. However, the waivers were not valid under Pennsylvania law so the insured sought the coverage. Discover argued that the forms were technically valid and that even if not valid the vehicle was covered under a corporate fleet policy so the waivers were not necessary.

By way of background, Douglas was provided the company car from Abbott labs and it was garaged in Pennsylvania. However, the policy was issued out of state. Judge Munley first finds that the form was not valid and thus is void under the law. Then, he holds that the rejection form requirement of Section 1731 of the Pennsylvania Motor Vehicle Financial Responsibility Law applies to a corporate fleet policy and is not the same as the rejection of stacking form under Section 1738, which does not apply to a corporate fleet policy. He also finds that even though the policy was written and issued out of state that Pennsylvania law applies when the car is clearly going to be principally garaged in Pennsylvania.

<u>Weigand v. Progressive et al.</u>, 09-S-1801 (Campbell J., Adams Co. May 31, 2011) (Trial Court Finds Underinsured Motorist Rejection Form Invalid But Enforces Other Insurance Clause).

The case involves two issues arising out of a motor vehicle accident which caused the death of a police officer. First, whether a rejection of underinsured motorist coverage (UIM) form is valid even though no policy number appears on the form and it is on a paper with a different insurance company (Erie) identified. Second, whether an "other insurance clause" is valid when the insured rejects stacking and he has two cars insured with different companies on two single vehicle policies.

First, the trial court finds the rejection form invalid because the form did not identify either a policy number or the proper company. The court notes that the statute and form specifically refers to "this policy" in the language of the form. Thus, it reasons that if there is no policy number or any clear indication of a proper company then the form cannot be valid and the law mandates UIM coverage equal to the liability coverage.

Second, the trial court finds that their was a knowing waiver of inter-policy stacking in the case because the insured only was insuring two vehicles under two single vehicle policies so he would had to have known he was rejecting inter-policy stacking. (However, if either policy was a multi-vehicle policy the outcome may be different).

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

§ 1734. Request for lower limits of coverage.

> A named insured may request in writing the issuance of coverages under section 1731 (relating to availability, scope and amount of coverage) in amounts equal to or less than the limits of liability for bodily injury.

75 Pa. C.S.A. § 1734.

Section 1734 requires a named insured to make a written request for lower uninsured or underinsured limits or the limits equal the liability coverage.

Section 1734 does not contain a specific form.

Section 1734 form applies throughout the entire lifetime of the policy.

Section 1734 form must be executed by a named insured.

Orsag v. Farmers New Century Ins., 15 A.3d 896 (Pa. March 14, 2011) (Pennsylvania Supreme Court Holds That The Signature Alone On An Insurance Application Is Sufficient To Be A Written Request For Lower Limits).

Jeffrey and Kimberly Orsag argued that they were owed underinsured motorist (UIM) coverage equal to the $100,000 bodily injury limits they selected on their insurance application. However, their 2 page signed insurance application indicated that they were selecting $15,000 of UIM coverage. No other special forms were executed to lower the coverage and they argued that the application itself is not a sufficient "writing" under Section 1734 of the Pennsylvania Motor Vehicle Financial Responsibility Law to be a sufficient sign down of UIM coverage.

Even though they wrote on the application in a box that they were selecting $15,000 in uninsured and underinsured motorist coverage, the

Orsags argued that the request for lower underinsured motorist limits on the policy was not valid since the only “writing” to support any sign down was the signature at the end of an insurance application.

This was an unresolved issue and the Pennsylvania Supreme Court agreed to hear the case.

The question certified by the Court was:

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

The Court holds that the signature on the application alone is sufficient to be a sign down of uninsured and underinsured motorist benefits under Section 1734 of the Pennsylvania Motor Vehicle Financial Responsibility Law.

Writing for the lead three Justice opinion, Justice Eakin notes, "There may be a more detailed way of satisfying the 'writing' requirement, but it is unnecessary given the simple language of Section 1734 and the manner in which insurance coverage amounts are selected," His opinion adds, "Though it is laudable for insurance companies to provide additional information regarding UM/UIM insurance beyond what is found in the application, we see no purpose in requiring a separate statement when it is clear from the coverage selected that the insured intended reduced UM/UIM coverage."

The Court relies mainly on two previous Supreme Court cases on the 1734 issue — Lewis v. Erie Ins. Exchange, 793 A.2d 143 (Pa. 2002) and Blood v. Old Guard Ins. Co., 934 A.2d 1218 (Pa. 2007). Following the language from those previous two cases, the Court observes that there are detailed requirements for rejecting UM/UIM coverage outright in Section 1731 of the law, but there are no such requirements for lowering the limits of that coverage and the most effective way to expressly designate the amount of coverage is to select a specific dollar amount on an insurance application. That is what the Orsags did. Justice Eakin is joined in the decision by Chief Justice Castille and Justice Joan Orie Melvin.

Justice Thomas G. Saylor writes a concurring opinion that is joined by Justice Todd. He notes that the scope of the court's review did not include whether the Orsags were given a valid Section 1791 notice form or information on their coverage options, but only whether the form they

did fill out was legally sufficient to meet the written requirements standards of Section 1734. He said a signed application requesting specific UM/UIM coverage "plainly satisfies" the requirements of the section.

Justice Baer writes a lengthy dissent that is joined by Justice McCaffery. He does not think a generic application, without more information, satisfies the writing requirement of Section 1734. He observes that the language accompanying the insurance application Lewis, was "substantially more informative" and that, unlike an outright rejection of UM/UIM coverage, a request for reduced coverage requires a signature and an express designation of the amount of coverage requested. The application in Orsag failed that test and increased the potential confusion due to an absence of knowledge regarding MVFRL protections related to UM/UIM coverage. He writes that "To rectify this potential for confusion, I conclude that a Section 1734 written request must include more than a signature on an application for insurance that provides the coverage amounts,"...."Specifically, the application must include an indication that the insured intended to contract for UM/UIM coverage limits less than the otherwise statutorily mandated coverage equal to the amount of bodily injury liability coverage."

Nationwide v. Catalini, 18 A.3d 1206 (Pa. Super. Ct. March 25, 2011) (Pennsylvania Superior Court Case Enforcing 1734 Sign Down When Limits Are Increased).

This was originally a memorandum opinion and then the court granted Nationwide's Motion to Publish. The case involves a 2002 policy originally issued with BI liability limits of $100,000/$300,000 and uninsured/underinsured limits of $15,000/$30,000. Around 2004, the insured lowered the liability limits to $25,000/$50,000 and requested the uninsured/underinsured limits be increased to $25,000/$50,000. He executed a change form and the limits were changed. Then in 2006 the insured changed the policy again by adding a vehicle and raising the liability limits to $100,000/$300,000. He received a policy change form increasing the limits and the form indicated that all other coverage remained the same. The coverage was then $100,000/$300,000 for liability and $25,000/$50,000 for uninsured/underinsured coverage.

Sometime thereafter, he was injured in a car accident and sought $100,000 of underinsured motorist coverage, not $25,000 because he did not sign a new form to keep the lower underinsured motorist coverage in 2006 when the liability limits increased to $100,000. Judge Bowes relies upon Blood v. Old Guard, 934 A.2d 1218 (Pa. 2007) and finds persuasive the case of State Farm Mut. Auto Ins. Co. v. Hughes,

438 F.Supp. 2d 526 (E.D. Pa. 2006) to hold that "in the absence of a statutory provision requiring insurers to provide a named insured a new opportunity to reject or reduce UIM benefits when increasing bodily injury liability benefits under an existing policy, we will not manufacture such a requirement under the facts of this case." The Superior Court affirms the trial court declaratory judgment in favor of Nationwide.

SECTION 1738 REJECTION OF STACKING OF UNINSURED AND UNDERINSURED MOTORIST BENEFITS

§ 1738. Stacking of uninsured and underinsured benefits and option to waive.

(a) Limit for each vehicle.--When more than one vehicle is insured under one or more policies providing uninsured or underinsured motorist coverage, the stated limit for uninsured or underinsured coverage shall apply separately to each vehicle so insured. The limits of coverages available under this subchapter for an insured shall be the sum of the limits for each motor vehicle as to which the injured person is an insured.

(b) Waiver.--Notwithstanding the provisions of subsection (a), a named insured may waive coverage providing stacking of uninsured or underinsured coverages in which case the limits of coverage available under the policy for an insured shall be the stated limits for the motor vehicle as to which the injured person is an insured.

(c) More than one vehicle.--Each named insured purchasing uninsured or underinsured motorist coverage for more than one vehicle under a policy shall be provided the opportunity to waive the stacked limits of coverage and instead purchase coverage as described in subsection (b). The premiums for an insured who exercises such waiver shall be reduced to reflect the different cost of such coverage.

(d) Forms.--

(1) The named insured shall be informed that he may exercise the waiver of the stacked limits of uninsured motorist coverage by signing the following written rejection form:

UNINSURED COVERAGE LIMITS

By signing this waiver, I am rejecting stacked limits of uninsured motorist coverage under the policy for

myself and members of my household under which the limits of coverage available would be the sum of limits for each motor vehicle insured under the policy. Instead, the limits of coverage that I am purchasing shall be reduced to the limits stated in the policy. I knowingly and voluntarily reject the stacked limits of coverage. I understand that my premiums will be reduced if I reject this coverage.

.....
Signature of First Named Insured
.....
Date

(2) The named insured shall be informed that he may exercise the waiver of the stacked limits of underinsured motorist coverage by signing the following written rejection form:

UNDERINSURED COVERAGE LIMITS

By signing this waiver, I am rejecting stacked limits of underinsured motorist coverage under the policy for myself and members of my household under which the limits of coverage available would be the sum of limits for each motor vehicle insured under the policy. Instead, the limits of coverage that I am purchasing shall be reduced to the limits stated in the policy. I knowingly and voluntarily reject the stacked limits of coverage. I understand that my premiums will be reduced if I reject this coverage.

.....
Signature of First Named Insured
.....
Date

(e) Signature and date.--The forms described in subsection (d) must be signed by the first named insured and dated to be valid. Any rejection form that does not comply with this section is void.

75 Pa. C.S.A. § 1738.

Section 1738 mandates stacking on every policy unless a rejection of stacking form is signed by the first named insured. (Third Circuit said first named insured at the time policy is issued).

Section 1738 has a stated form and case law says can be a minor change in language from statute (not same as 1731) but court will not hesitate of invalidate if too much or confusing.

Section 1738 requires a new form when a vehicle is added unless the vehicle is added under a newly acquired vehicle provision which seldom occurs.

Section 1738 does not mandate a new rejection form if car is replaced on policy or deleted from policy.

Section 1738 applies to a corporate policy but does not apply to a fleet policy.

(Allowance of Appeal Denied) Sackett v. Nationwide Mut. Ins. Co., 4 A.3d 637 (Pa. Super. 2010) (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) (Sackett III).

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 well known opinions in Sackett I and 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 Ins. Co., No. 2010-1563-CD (Ammerman, J. Clearfield County Feb. 3, 2012) (Trial Court Follows Sackett Line Of Cases To Award Stacking On Four (4) Car Policy).

This involves the application of the "Sackett" line of cases from the Pennsylvania Supreme and Superior Courts to a stacking situation. In this case, Bumbarger initially had a two (2) car policy in 2007 and rejected stacking. Later in 2007, she then added a third vehicle and added a fourth vehicle early in 2009. At no time when the additional vehicles were added to the policy later in 2007 or 2009 was a new rejection of stacking waiver signed. She was then injured in a car accident with an uninsured motorist in December 2009.

She made a claim for stacked uninsured motorist benefits by claiming that Peerless owed her stacked coverage and not only coverage on one vehicle 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 both of the later added vehicles were added by default under a "newly acquired auto" clause.

The trial court finds that the vehicles were not added by default under the "newly acquired auto" clause but were added instead by endorsement. Adding a vehicle by default only applies when the company is covering a vehicle it does *not* know about. 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 because a new rejection of stacking for was not signed when the later added vehicle became part of the policy.

Nationwide Mut. Ins. Co. v. Zerr, No. 10-4199 (E.D. Pa. July 26, 2011) (New Stacking Waiver Required When Initial Rejection Of Stacking Form is Followed By Outright Rejection of Coverage).

The coverage issue involved in this case is whether a new rejection of stacking form is required when an insured who initially rejected underinsured (UIM) motorist coverage on a single vehicle policy, then rejects UIM coverage altogether, and then re-instates UIM coverage on the single vehicle policy.

Zerr purchased a single car policy in 1993 and rejected UIM stacking. In 1999 she dropped UIM coverage altogether and signed a rejection of UIM form. A week later, she modified the policy to cover a different vehicle and added UIM coverage back. Five (5) years later she was involved in an accident and sought UIM stacked coverage. The District Court holds that Zerr's decision to add UIM insurance in 1999 was a "purchase" (or essentially a re-purchase of UIM coverage) under Section 1738 of the Motor Vehicle Financial Responsibility Law (MVFRL) and a new rejection of stacking form was required. Since no form was signed in 1999 then stacking applies for this accident.

There is also a separate issue on the amount of credit a UIM carrier can take for the third party policy limits. The Court notes that the credit is based upon total available coverage and not based upon whether a disputed portion of a claim was paid.

EXCLUSIONS

Generally will enforce an exclusion contained in the original policy.

If exclusion is added after the policy is issued the company must tell you about it.

If policy is not the same as you specifically asked for the agent may be responsible.

Exclusions Added After Policy Issued

Oesterling v. Allstate Ins. Co., No. 11429 of 2008, C.A. (C.P.Lawrence June 28, 2011) (Trial Court Holds That Newly Added Exclusion In Motor Vehicle Policy May Be Invalid).

This case involves a dispute over underinsured (UIM) motorist coverage. Oesterling was injured while operating a motor scooter and settled the third party case. He then made a UIM claim with his personal carrier Allstate for the injuries suffered while riding his motor scooter. Allstate denied the claim based on the household exclusion.

Importantly, the exclusion was added to the policy after it was initially purchased and issued. The trial court holds that in order to enforce the exclusion the company must show that the insured was aware of the newly added exclusion and understood the change to be valid. Allstate failed to do so in this case and it was determined by the trial judge to be a jury issue. Therefore, Allstate may still be required to pay the UIM coverage if a jury finds that the insured was not aware of the exclusion and failed to understand the change.

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. 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.***

Sona v. State Farm Mut. Auto. Ins. Co., 805 F. Supp. 2d 72 (M.D. Pa. March 28, 2011) (District Court Refuses To Enforce Household Exclusion When Insured Not "Occupying" Owned Vehicle).

On March 28, 2011 the District Court for the Middle District of Pennsylvania granted the insureds' Motion for Summary Judgment in a case where the insurance company State Farm asserted the household exclusion. Judge Caputo enters Judgment in favor of the Sonas. He concludes that the injured Plaintiff was not "occupying" a vehicle at the time of an accident which caused injuries and resulted in an underinsured motorist claim (UIM).

The accident occurred when Mr. Sona drove his van to a garage to have his tires rotated and oil changed. In the back of his van was a dirt bike which he and his son-in-law took out of the back of the van so that its oil could also be changed. After the dirt bike was removed the mechanic drove the van into the garage bay and Mr. Sona started to manually push the dirt bike into the garage. He never sat on the dirt bike nor did he have the key in his possession. While pushing the dirt bike he was struck by a motorist who was backing out of a spot and was seriously injured. After settling for the liability limits he sought UIM coverage with State Farm which denied coverage based upon a household exclusion. The insurance company argued that he was "occupying" the dirt bike at the time of the accident and was excluded.

Judge Caputo recognizes that a dirt bike is considered a motor vehicle. Burdick v. Erie Ins., 946 A.2d 1106 (Pa. Super. 2008). He then finds that the controlling case to determine occupancy is the Pennsylvania Supreme Court opinion in Utica Mut. Ins. Co. v. Constrisciane, 504 Pa. 328 (Pa. 1984). He holds that Sona was not "occupying" the dirt bike when the accident occurred since Sona was simply moving the dirt bike for an oil change, he did not have possession of the keys and the motor was not turned on.

He writes that the "dirt bike, while technically a motor vehicle, was more akin to any other inanimate object, e.g. a piece of furniture, which Mr. Sona was moving at the time of the accident." Therefore, since Mr. Sona was not occupying the dirt bike the exclusion cannot be enforced and Sona receives the UIM coverage.

Regular-Use

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.

Rother v. Erie Ins. Exch., No. 14656 of 2008 (C.P. Luzerne June 27, 2011) (Trial Court Determines That "Regular Use" Is Factual Question Under Facts Of Case).

This case involves the applicability of the regular use exclusion. The trial court finds that the regular use exclusion is not contrary to public policy *but* what is less clear is its appropriate application to various factual situations. In this case, whether plaintiff Rother regularly used the vehicle in question is a genuine issue of material fact precluding summary judgment because he was only permitted to operate his father's

vehicle to go to work and for emergencies and had only used said vehicle seven times prior to the accident . Therefore, Erie's Motion for Summary Judgment was denied

Workers Compensation

§ 1720. Subrogation.

> In actions arising out of the maintenance or use of a motor vehicle, there shall be no right of subrogation or reimbursement from a claimant's tort recovery with respect to workers' compensation benefits, benefits available under section 1711 (relating to required benefits), 1712 (relating to availability of benefits) or 1715 (relating to availability of adequate limits) or benefits paid or payable by a program, group contract or other arrangement whether primary or excess under section 1719 (relating to coordination of benefits).
>
> *****_**1993 Partial Repeal.**_ *Section 25(b) of Act 44 of 1993 provided that section 1720 is repealed insofar as it relates to workers' compensation payments or other benefits payable under the Workers' Compensation Act.*

75 Pa. C.S.A. § 1720.

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. 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.

Petrochko v. Nationwide Ins. Co., No. 1605 MDA 2010 (Pa. Super. Nov. 10, 2011) (Non-Precedential) (Insured Not Eligible For Underinsured Motorist Benefits When Injured By Co-employee While In Course And Scope Of Employment).

In this case a worker was injured in a car accident caused by a co-employee. The accident occurred while both were in the course and scope of their employment. The injured worker filed a claim for underinsured motorist (UIM) benefits based upon the co-employees' negligence, even though the employee and employer are immune from suit. The trial court in Petrochko v. Nationwide Ins. Co., 15 D. & C.5th 312 (C.P. Lack. 2010) held that the insured could not recover UIM benefits. The case was appealed to the Superior Court.

The issue on the appeal was whether an insured is allowed to collect underinsured (UIM) motorist coverage from her personal motor vehicle insurance carrier when she is injured in a car accident caused by the negligence of her employer or co-employee, while in the course and scope of her employment.

The Superior Court's non-precedential opinion affirms the trial court and holds that the insured is not entitled to UIM benefits. By law, the employer is immune from suit since the accident occurred in the scope of employment. There are no exceptions to the workers' compensation statute applicable. Therefore, the Court finds no requirement to pay for third party damages. Under the policy and law the insurance company is not required to provide underinsured motorist coverage and the trial court decision is affirmed.

Auto Business Exclusion

Liberty Mutual Ins. Co. v. Sweeney, NO. 06-2227 (Tucker J. E.D. Pa. Oct. 7, 2011) (District Court Upholds "auto business exclusion").

The District Court reviews and court upholds an exclusion which denies underinsured motorist ("UIM") coverage while an insured is allegedly using a non-owned vehicle in "any kind of auto business" but sets aside a separate exclusion for using a non-owned "regularly used" vehicle. This accident occurred in February 2004 when the insured Sweeney was injured while driving a car he did not own but that he had taken home intending to deliver it to a customer the next morning to rent. The insured was injured the night before while driving from his home to a local food market to buy taco shells for dinner. Liberty Mutual denied a UIM claim based upon those two exclusions contained in the policy.

The District Court upholds the one exclusion (the "auto business") and finds the other exclusion ("regular use") not applicable. The court relies mainly upon Zizzia v. Mitchell, 418 A.2d 761 (Pa. Super. 1980) and finds that the "auto business" exclusion is valid because it refers to "any kind" of business and the insured was renting the vehicle to a customer. The Court finds that the specific use of the vehicle at the time of the accident is not enough to change the general purpose of the use of the vehicle which was for "renting" and thus the auto business exclusion applied.

On the applicability of the regular use exclusion the District Court finds that the use was not habitual but merely incidental so it cannot be a "regularly used" vehicle. Therefore, if the regular use was the only exclusion then the regular use exclusion could not be used to deny coverage. However, because the first exclusion is found to be valid there is no UIM coverage.

SETOFFS/OFFSETS

§ 1722. Preclusion of recovering required benefits.

> In any action for damages against a tortfeasor, or in any uninsured or underinsured motorist proceeding, arising out of the maintenance or use of a motor vehicle, a person who is eligible to receive benefits under the coverages set forth in this subchapter, or workers' compensation, or any program, group contract or other arrangement for payment of benefits as defined in section 1719 (relating to coordination of benefits) shall be precluded from recovering the amount of benefits paid or payable under this subchapter, or workers' compensation, or any program,

group contract or other arrangement for payment of benefits as defined in section 1719.

75 Pa. C.S.A. § 1722.

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.

However, on April 17, 2012 an en banc panel of the Pennsylvania Superior Court heard an appeal in Smith v. Rohrbaugh which dealt with the enforcement and validity of the Pusl argument and holding continuing to apply.

For a Sample Assignment, see next page.

ASSIGNMENT OF RIGHTS AGREEMENT

---------- and ---------- (hereinafter "Claimants") and ---------- ---------- Insurance Company (hereinafter Defendant") each being represented by an attorney of their choosing have engaged in arms length negotiations and settlement discussions regarding the settlement of Claimant's claim for UIM benefits under ---------- policy **#12345678**, issued to ---------- and ---------- arising out of a motor vehicle accident which occurred on ----------.

Now, therefore it is acknowledged by Claimants that Defendant has previously paid the Claimants $50,000, to settle their claim for underinsured motorist's benefits arising out of said accident, receipt of which is hereby acknowledged.

In addition, Claimants agree to pay Defendant $1,000 for assignment of its right of subrogation under said policy in connection with the Claimants' pending third party action filed against ---------- ---------- in the ---------- County Court of Common Pleas No. -------- of 0000, regarding the injuries which were sustained in the automobile accident of ---------- and which were the subject of the underinsured motorist claim. It is expressly understood that this amount shall be immediately paid to the Defendant, regardless of the outcome of any present or future litigation by Claimants against ---------- ----------.

Further it is understood that, by this agreement, Defendant does not intend to release or discharge its subrogation claim, but rather to transfer to Claimant its right of subrogation or reimbursement against any award or settlement in favor of the Claimants in [complete caption of action].

BY: _____
---------- ----------

_____
---------- ----------

BY: _____
---------- ---------- Insurance Company

EVIDENTIARY ISSUES

§ 1705 (b) Application of tort options.—

(1) The tort option elected by a named insured shall apply to all private passenger motor vehicle policies of the named insured issued by the same insurer and shall continue in force as to all subsequent renewal policies, replacement policies and any other private passenger motor vehicle policies under which the individual is a named insured until the insurer, or its authorized representative, receives a properly executed form electing the other tort option.

(2) The tort option elected by a named insured shall apply to all insureds under the private passenger motor vehicle policy who are not named insureds under another private passenger motor vehicle policy. In the case where more than one private passenger motor vehicle policy is applicable to an insured and the policies have conflicting tort options, the insured is bound by the tort option of the policy associated with the private passenger motor vehicle in which the insured is an occupant at the time of the accident if he is an insured on that policy and bound by the full tort option otherwise.

(3) An individual who is not an owner of a currently registered private passenger motor vehicle and who is not a named insured or insured under any private passenger motor vehicle policy shall not be precluded from maintaining an action for noneconomic loss or economic loss sustained in a motor vehicle accident as the consequence of the fault of another person pursuant to applicable tort law.

75 Pa. C.S.A. § 1705 (b)

§ 1714. Ineligible claimants.

> An owner of a currently registered motor vehicle who does not have financial responsibility or an operator or occupant of a recreational vehicle not intended for highway use, motorcycle, motor-driven cycle, motorized pedalcycle or like type vehicle required to be registered under this title cannot recover first party benefits.

75 Pa. C.S.A. § 1714.

Corbin v. Khosla, --- A.3d --- (Pa. 2012) (Pennsylvania Supreme Court Holds Uninsured Motorist Can Recover All Economic Losses From Tortfeasor and Tortfeasor's Liability Carrier).

The Pennsylvania Supreme Court answered a long awaited question regarding the injured victim's ability to recover medical bills from the third party tortfeasor under the third party tortfeasor's liability coverage, *if* the injured person is the owner of an uninsured vehicle. This case was initially heard in the federal court for the Eastern District of Pennsylvania. Then the case was appealed to the Third Circuit Court of Appeals. After the argument in front of the Third Circuit the federal court asked the Pennsylvania Supreme Court to answer the issue. The Pennsylvania Supreme Court agreed to answer the question.

The Supreme Court answers the question posed by the Third Circuit "in the negative: Section 1714 of the MVFRL does not preclude an uninsured motorist from recovering tort damages for economic loss from an alleged third party tortfeasor under the tortfeasor's liability coverage." Importantly, the Court also expressly abrogates any lower court cases such as Bryant v. Reddy and McClung v. Breneman which have ruled to the contrary.

§ 1720. Subrogation.

> In actions arising out of the maintenance or use of a motor vehicle, there shall be no right of subrogation or reimbursement from a claimant's tort recovery with respect to workers' compensation benefits, benefits available under section 1711 (relating to required benefits), 1712 (relating to availability of benefits) or 1715 (relating to availability of adequate limits) or benefits paid or payable by a program, group contract or other arrangement whether primary or excess under section 1719 (relating to coordination of benefits).

§ 1722. Preclusion of recovering required benefits.

> In any action for damages against a tortfeasor, or in any uninsured or underinsured motorist proceeding, arising out of the maintenance or use of a motor vehicle, a person who is eligible to receive benefits under the coverages set forth in this subchapter, or workers' compensation, or any program, group contract or other arrangement for payment of benefits as defined in section 1719 (relating to coordination of benefits) shall be precluded from recovering the amount of benefits paid or payable under this subchapter, or workers' compensation, or any program, group contract or other arrangement for payment of benefits as defined in section 1719.

75 Pa. C.S.A. § 1720 and § 1722.

Bieber v. Nace, 2011 WL 6180719 (M.D. Pa. Dec. 13, 2011) (Federal Court For The Middle District Holds Sections 1720 And 1722 Cannot Operate To Reduce Or Bar The Plaintiff's Recovery Of Medical Expenses Paid By An ERISA Plan).

After the Plaintiffs filed a suit arising out of a car accident for their harms and losses, the Defendants filed affirmative defenses which included claims that the Plaintiffs' recovery was reduced or barred by the provisions of the Pennsylvania Motor Vehicle Financial Responsibility Law (MVFRL). The case proceeded through discovery and the Plaintiffs produced proof that their medical bills were paid by a self-funded ERISA plan which was asserting a claim for subrogation/reimbursement. The Plaintiffs sought to plead, prove and recover those payments as part of their case.

In order to proceed the Plaintiffs filed a Motion in Limine to have the affirmative defenses stricken. They argued that the defenses should be stricken since the medical bills were paid by a self funded ERISA plan which was making a claim for reimbursement.

Judge Connor reviews the pertinent statutes and case law and finds that the MVFRL cannot reduce or bar the plaintiff's recovery of medical expenses paid for by ERISA plan. In this case, he finds that Section 1720 and 1722 are pre-empted by the federal laws since the medical bills were paid by the federal self funded ERISA Plan. He grants the Motion in Limine and strikes the defenses.

Kansky v. Snowman, 3:09cv1863 (Munley J., M.D. Pa. April 11, 2011) (Plaintiff Permitted To Plead Prove And Recover Future Medical Expenses Not Deemed "Payable").

The Plaintiffs and Defendant filed Motions in Limine in a lawsuit involving an injury arising out of a car accident. Among the admissibility rulings the court holds that the Plaintiff may plead, prove and recover future medical expenses.

The Defendant argued that under the Pennsylvania Motor Vehicle Financial Responsibility Law the Plaintiff was precluded from recovering these benefits which may be covered by health insurance. Judge Munley denies the Motion and finds that the expenses are not deemed "payable" under the law because there is no guarantee the Plaintiff will have health insurance at the time the bills are incurred. Therefore, the future medical expenses can be plead, proven and recovered.

Heebner v. Nationwide Ins. Enterprise, No. 10-2381 (E.D. Pa. Sept. 28, 2011) (District Court Holds That Delay Damages Are "Component" Of Compensatory Damages).

This case determines whether delay damages are included as a component of compensatory damages as provided in an insurance policy. In this case, Heebner was involved in an accident with an underinsured motorist (UIM) and was awarded $133,201.96. The UIM award was allocated $85,000.00 for compensatory damages and $48,201.96 for delay damages. Nationwide paid the $85,000.00 under the terms of Heebner's policy but denied that it had to pay the delay damages because it argued that delay damages are not damages for which it is liable under a UM/UIM policy.

District Judge Goldberg in the Eastern District rules that Nationwide must cover the entire judgment because delay damages are "merely an extension of the compensatory damages necessary to make a plaintiff whole." The Court relies mainly upon two Pennsylvania Supreme Court opinions in Colodonato v. Consol. Rail Corp., 470 A.2d 479 (Pa. 1983) and Laudenberger v. Port Auth. of Allegh. Cty., 436 A.2d 147 (Pa. 1981). Under these two cases delay damage are covered.

Marlette v. State Farm Mut. Ins. Co., 10 A.3d 347 (Pa. Super. Ct. 2010) (Pennsylvania Superior Court Holds That Delay Damages In Underinsured Motorist Claim Are Calculated based Upon Award And Not Policy Limit).

This is a case 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 if higher than the policy. In this case there was a policy limit of $250,000 and an underinsured motorist verdict of $550,000. Judge Musmanno holds that the delay damages are calculated based upon the entire verdict and not the policy limit. Judge Bowes dissented.

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 of Pennsylvania heard oral argument on the issue in Pittsburgh on April 10, 2012.

Hrebik/Rosenberger v. B&W Frey, No. 2009-C-6596 (Lehigh Co. March 22, 2011) (Trial Court Allows Plead, Prove And Recovery Of Special Damages When Workers Compensation Carrier Is Same As Third Party Carrier).

This case involves a work related car accident. The insurance carrier for the third party is also the same insurance carrier paying workers' compensation. The Defendant argued that under equitable principles the Plaintiff cannot plead, prove, and recover the medical bills and wage loss since the same carrier is also the third party carrier. The Plaintiffs argued that the ability to plead, prove, and recover as well as subrogation is statutory and mandatory. The trial court adopts the Plaintiffs' argument and will allow all the special damages to be plead, proven and recovered.

UNINSURED AND UNDERINSURED MOTORIST ARBITRATION/KOKEN AND CIVIL PROCEDURE

Craker v. State Farm Mut. Auto. Ins. Co., No. 11-0225 (Lancaster C.J., W.D. Pa. Sept. 29, 2011) (Court Denies State Farm Motion To Sever And Stay UIM/Bad Faith Case).

In this post-Koken era decision the federal court in the Western District of Pennsylvania denies State Farm's Motions to Sever and Stay a case arising out of an underinsured (UIM) motorist claim. Clinton Craker was involved in an accident with an underinsured motorist. He settled the third party case and then attempted to pursue a UIM claim. After not amicably resolving the UIM claim, he filed a state court action against State Farm seeking UIM benefits and also alleging bad faith.

State Farm removed the case to federal court and proceeded with discovery and various case management proceedings. On the eve of the discovery deadline, State Farm filed a Motion to Sever the UIM and Bad Faith Claims and also a Motion to stay the bad faith claim until after the UIM case was decided. As part of its submissions arguing for the severance and stay State Farm provided the court with state trial court Orders and Opinions which supported its view.

The District Court for the Western District denies both the Motion to Sever and the Motion to Stay. Chief Judge Lancaster finds that the Motion to Sever is not only impractical because it was filed late but also premature with regards to seeking a bifurcation, which is really what State Farm was seeking. He also notes that state court opinions cited by State Farm are not binding on the federal court and that State Farm "committed a strategic error by removing this case." The Motions to Sever and Stay are denied. Basically State Farm may have created its own problem by removing the case to federal court.

Purta v. Blower and Erie Ins. Exch., No. 2010-C-2515 (Lehigh Co. Sept. 20, 2011) (Trial Court Order Severs Third Party And Underinsured Motorist Claims For Trial).

This is a case involving a Motion to Sever jointly filed to sever the third party and underinsured motorist (UIM) claims just prior to trial. The trial court grants the Motion to Sever and Orders that the case proceed to trial with only the Plaintiffs and Defendant tortfeasor involved in the initial trial.

The trial court order states that "pursuant to the criteria set forth in Pa.R.C.P. 213(b), and so as to avoid confusion of the threshold issues of alleged liability and damages caused by the Defendant Blower as the tortfeasor, the claims against Erie will be severed and addressed in a subsequent trial if necessary."

A review of the docket indicates that the jury did not award any damages to Purta. Thus, the UIM claim is moot unless the verdict is set aside or reversed on appeal.

Sehl v. Neff, 26 A.3d 1130 (Pa. Super. July 25, 2011) (Superior Court Affirms Decision Moving Venue Of Claim Against Third Party In Jointly Filed UIM/Third Party Case).

This case involves the issue of venue of a lawsuit filed jointly against a third party defendant and an underinsured motorist carrier. The Defendant lived in one county where the accident also occurred but the underinsured motorist insurance company can be sued, and was sued, in another county.

In Sehl, the accident and third party were subject to venue in Montgomery County. The underinsured motorist carrier was subject to venue in Philadelphia County. The plaintiff filed a joint tort and breach of contract claim in Philadelphia County. The tortfeasor filed preliminary objections seeking venue moved against her to Montgomery County and they were granted.

The Superior Court holds that the trial court did not abuse its discretion to move venue against the tortfeasor because the claims against the third party and underinsured motorist carrier were not "joint or joint and several". Thus, they are considered "separate and distinct". The case, as alleged, did not involve an issue of improper joinder, but only venue.

Therefore, under Pennsylvania Rule of Civil Procedure 1006(c) (1) the only possible venue for the claim against the tortfeasor was Montgomery County. The trial Court order is affirmed and venue against the third party lies in Montgomery County.

Dunkleburger v. Erie Ins. Co., 2010-01956 (Lebanon Co. Jan. 24. 2011) (Lebanon County Court Of Common Pleas Will Sever And Stay Underinsured Motorist And Bad Faith Claims Pending Any Binding Precedent).

On January 24, 2011 the Court of Common Pleas in Lebanon County announced that in cases filed together with counts for underinsured motorist (UIM) and bad faith claims it will stay the bad faith case and sever it from the UIM claim pending the resolution of the UIM claim in front of a jury. Then, if necessary, the bad faith claim and discovery will proceed.

The Court reviews the various, and at some times conflicting, decisions of other counties. It finds that the most persuasive view it will follow, until any binding precedent from the Superior Court, is that the bad faith case should not proceed until the UIM claim is concluded.

Link v. Eckenrode/State Farm (No. 2009-1312) and Lydick v. Keilman (No. 2010-1700) (Cambria Co. Jan. 10, 2011) (Cambria County Courts Deny Motions To Sever Uninsured/Underinsured Motorist Claims From Third Party Claims Being Pursued In Same Proceeding).

In two (2) third party/insurance cases the en banc panel of the Court of Common Pleas of Cambria County on January 10, 2011 decides motions to sever claims where the injured victims of negligence are pursuing third party and uninsured (UM) or underinsured (UIM) motorist claims in the same proceeding. The majority opinion of the three (3) judge en banc panel holds that it would be judicious and more convenient to permit the plaintiff to join the third party and UM or UIM claims in the same proceeding where the cases involve the same or similar factual questions of liability and damages.

Also, the majority notes that it would expect all parties to "desire the consistency of a single verdict". Any concerns of the collateral source rule bring implicated can be "overcome by cautious trial management in presenting insurance evidence to the jury so as not to taint either party. The jury would also be instructed that, in the event the plaintiff recovers, contractual relationships would then determine whether the plaintiff's own insurance company is liable."

Rubin v. State Farm, 10cv1651 (W.D. Pa. Jan. 7, 2011) (Motion To Dismiss Underinsured Motorist That Is Pursued As A Breach Of Contract Claim Is Denied).

This case involves the denial of underinsured motorist (UIM) benefits. The insured filed a multiple count complaint. On amendment, the insured only continued to pursue the breach of contract claim but State Farm still filed a Motion to Dismiss by arguing that the Plaintiff failed to identify facts to establish a breach of contract when it was acknowledging a claim existed. The District Court denies the Motion to Dismiss and finds that the Plaintiff adequately pleads (1) the existence of a contract, (2) a breach of the duty imposed by the contract and (3) resultant damages. Therefore, the claim for breach of contract for not paying the UIM claim can continue.

Of note, in at least one other case State Farm is still making the same argument in state court.

Richner v. McCance and Erie Ins. Exch., 13 A.3d 950 (Pa. Super. Jan. 7, 2011) (Superior Court Rules On Joining Tort and Coverage Issue In Same Proceeding When One Claim Is Purely Tort And The Other Is A Coverage Issue).

The case involves a third party and coverage dispute for underinsured motorist (UIM) benefits that were joined in the same action. The insured Matthew Richner ("Richner") was injured in a car accident while operating his employer's vehicle. He pursued a third party claim against the other driver. Also, since the other driver apparently had a low liability policy, he pursued an underinsured motorist claim. Since his employer did not have UIM coverage he sought UIM coverage with his parent's policy. Erie denied coverage based upon the regular use exclusion. Richner denied the employer vehicle was "regularly used."

He filed suit in Allegheny County against the third party and Erie. Erie previously filed a Declaratory Judgment Action in Butler County on the "regular use" coverage issue. Erie filed preliminary objections in the Allegheny County case arguing that the pending Butler County case barred the second suit under lis pendens and the tort and coverage claims were misjoined. The Objections were overruled and Erie appealed.

The Pennsylvania Superior Court reverses and holds that under the doctrine of lis pendens the earlier Butler County Action barred the filing of the second action because the case involves the same set of facts, parties, issues and relief. Also, the Court holds that because their was a

tort action and a separate coverage issue being pursued the claims were misjoined under Pennsylvania Rule of Civil Procedure 2229(b) because the third party case is only about the injuries and tort issues and the coverage issue concerns the rights and the exclusion under the policy.

Therefore, the Court reverses the trial court. Importantly, in footnote 4 at the end of the opinion the Court writes that it is not ruling upon joining a third party and UIM claim where the same issues of liability and damages are being litigated. It writes that, "[w]e emphasize that we are not here deciding the propriety of the joinder of third party liability claims with post-Koken UIM benefits.

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 attorneys fees against the insurer.

42 Pa. C.S.A. § 8371.

Carcarey v. GEICO General Ins. Co., 2011 WL 5075055 (E.D. Pa. Oct. 26, 2011) (mem.) (District Court Grants Motion For Summary Judgment In Bad Faith Case Arising From Underinsured Motorist Case).

This is a contract case arising out of an uninsured motorist claim which also sought to make a claim for bad faith. GEICO files a Motion for Summary Judgment arguing that it did not commit bad faith in evaluating the claim nor in its offers.

The court initially finds that bad faith is not solely limited to claim denial and the making a settlement offer does not preclude a finding of bad faith. However, in this case it finds that the insurer's GEICO settlement offer of $75,000, which increased to $100,000, was not bad faith given issues surrounding decedent's residency status with policy holder and decedent's limited income. Also, the court discusses that the insurer did not act in bad faith by sending letters to the plaintiff's former

and existing counsel to try and ascertain who represented the plaintiff and insurer was not seeking out information from plaintiff's former counsel. Last, the court states that the defense counsel's decision to speak with a witness to determine if the witness wanted representation before delaying the deposition was not bad faith.

The District Court grants GEICO's Motion for Summary Judgment.

Welcomer v. Donegal, NO. 2011 CV 474 (Lewis J., Dauphin Co. June 27, 2011) (Trial Court Allows Discovery Of Insurance Company Evaluation Of Plaintiff's Claim And Adjuster Deposition In Claim Filed In State Court Against Insurance Company For Underinsured Motorist Benefits).

This case involves a dispute over underinsured motorist (UIM) benefits. As required by his policy and the insurance company, Welcomer filed suit against Donegal in state court alleging she was owed UIM benefits. Welcomer sought to take the deposition of the adjuster who handled her claim as well as the information regarding the evaluation of the claim. The Defendant Donegal objected.

The trial court sought letter briefs specifically addressing the discovery of an insurance adjuster's evaluation of the Plaintiff's claim, including the basis for the evaluation, and the deposition of the claims representative concerning the evaluation of the Plaintiff's claims. After reviewing the submissions, the trial court determined that the "evaluation of the Plaintiff's claim is relevant to the value of her damages, which is the subject of this dispute." The trial court ordered the information disclosed and the deposition to proceed.

Post note – the case ultimately settled shortly thereafter for a confidential amount.

Gillard v. AIG Ins., 15 A.3d 44 (Pa. Feb. 23, 2011) (Pennsylvania Supreme Court Rules On Attorney Client Privilege Issue).

This involves a bad faith claim arising out of an uninsured motorist proceeding. As part of discovery in the bad faith case, the Plaintiffs sought production of all documents from the file of the law firm that represented the insurance company in the uninsured motorist proceeding. The entire file was not turned over due to the alleged attorney-client privilege. The Plaintiff's argued that the documents from counsel to the company may be privileged but not from the client to the

company. The Supreme Court agreed to address the issue of whether the privilege applies only one way or two ways.

The Opinion (5-2) authored by Justice Saylor holds that "in Pennsylvania, the attorney-client privilege operates in a two way fashion to protect confidential client-to-attorney or attorney-to-client communications made for the purposes of obtaining or providing professional legal advice." Justice Saylor's opinion is specific to note for what purposes the communication must be made and also that there are existing practices, procedures, and limitations, including in camera judicial review and boundaries ascribed to the privilege to make sure that the privilege is not abused. For examples see footnote 8 of the Opinion.

http://www.pacourts.us/OpPosting/Supreme/out/J-58-2010mo.pdf