PBA Midyear Winter Meeting-
Update on Civil Issues "AUTO LAW" [1]
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Section 1731 Rejection of Coverage

Bricker v. State Farm Mutual Automobile Insurance Company, No. 102 MDA 2014 (Pa. Super. Ct. Aug. 22, 2014) (memorandum) (Superior Court Voids Rejection of Underinsured Motorist Form).

After being seriously injured in a car accident and recovering the liability coverage, the insured Bricker sought underinsured motorist (UIM) coverage from a personal policy. State Farm denied the claim because of a purported rejection of coverage form.

Borgia argued that the rejection form was not valid because the form referred to a different policy number and thus could not meet the "this policy" language that is included in the mandated statutory language. The trial court noted that the UIM rejection form complied with the statutory language of Section 1731 of the Pennsylvania Motor Vehicle Financial Responsibility Law (MVFRL) but, even though it referred to a different policy number, that the form was still valid because the insured provided no explanation of why she signed the forms.

The Superior Court first notes that any "deviations from the specific statutory requirements in the wording or procedures surrounding the UIM rejection form will render it void". p. 7 opinion. Plainly, "without a valid rejection, the insured has not rejected UIM protection." p. 7 opinion. The UIM form executed is itself valid since it meets all the statutory requirements; it contains the mandatory

[1] Powerpoint presentation will be posted on the Schmidt Kramer PC web site at www.schmidtkramer.com.

statutory language; it is written on a separate sheet of paper; and it has the insured's dated signature.

HOWEVER, it is uncertain which policy it pertains to. Since the rejection form does not identify which policy it pertains to, the form is ambiguous when the plain language of the policy is reviewed as a whole. Since there is an ambiguity, the coverage is construed in favor of coverage.

Also, in this case, it is the insurance company with the burden of proof. Therefore, not only does the form need to comply with the MVFRL by language, but it must also have a policy number.

Rosas-Ramirez v. Bristol West Ins. Co., May Term, 2013, No. 02905 (C.P. Phila. Oct. 29, 2013), appeal withdrawn, No. 2629 EAD 2013 (Pa.Super. Ct. Dec. 19, 2013) (Typographical Error Not Enough To Invalidate Waiver).

The trial court holds that a typographical error of "Motorists" instead of "Motorist" in the title of an underinsured motorist (UIM) rejection form did not invalidate the form. The body of the form complies precisely with § 1731 and the extra "s" was an innocent mistake which amounts to nothing more than inconsequential surplusage and immaterial variance. The trial court writes that "[p]romoting justice does not mean that a typographical error will result in an insured's getting a windfall of coverage when the insured neither intended to have nor paid for such coverage". The complaint is dismissed.

Webb v. Discovery Prop. & Cas. Ins. Co., 2014 WL 105608 (M.D. Pa. Jan. 9, 2014) (mem.) (District Court denies a motion for class certification in a case involving the Pennsylvania Motor Vehicle Financial Responsibility Law (MVFRL)).

The court in the same case previously held that the insurer's underinsured motorist (UIM) rejection forms violated 1731(c) given the added language the insurer incorporated into the rejection form. The plaintiff filed a motion seeking class certification and appointment of counsel.

The court denies the class certification motion because the requirements of Fed.R.C.P. 23(a)(1) regarding numerosity, commonality and predominance have not been met. The Court finds that even though UIM coverage was not validly waived, each individual class member's entitlement to benefits will depend on a host of individualized considerations pertaining to the facts of each policyholders accidents and injuries.

Thus, there is no need to bind the policyholders to a determination of an action they have not manifested any desire to join. Class action certification is denied and appointment of class counsel deemed moot.

Egan v. USI Mid-Atlantic, Inc., 92 A.3d 1 (Pa. Super. Ct. April 2, 2014) (Superior Court Holds That A Rejection Form Under The MVFRL Applies To Commercial Fleet Vehicles And An Insurance Agent Can Be Responsible For Punitive Damages).

This Superior Court opinion involves the applicability of the rejection of uninsured and underinsured waiver on a corporate fleet policy. The court discusses the entire Motor Vehicle Financial Responsibility Law (MVFRL) and how Sections 1731 and 1738 work. The Superior Court concludes, as a matter of law, that Section 1731 mandates UM/UIM coverage must be offered on a commercial fleet vehicle, and any rejection form must comply with Section 1731. Also, the court finds that an insurance broker can be held liable for punitive damages for his or her actions in the handling of the uninsured and underinsured motorist claim).

Section 1734 – Sign Down of Coverage

Davis v. Allstate Prop. & Cas. Co., No. 13-cv-07038 (E.D. Pa. Sept. 30, 2014) (District Court Enforces Sign Down But Allows Bad Faith To Proceed).

An underinsured motorist (UIM) claim was filed after a car accident and the third party claim settled. A dispute arose over the validity of the sign down in coverage for UIM benefits when the insured signs the paperwork but the agent completes the form. Also, a simultaneous bad faith claim was filed.

The court analyzes Section 1734 of the Pennsylvania Motor Vehicle Financial Responsibility Law (MVFRL) and finds that the purported Section 1734 reduction form, which was signed but not actually prepared by both named insureds, is still valid. This is so even if the form was partially completed by the insurance agent. The reasoning is because the insured actually still signed the form. The statute does not require the insured to be the one who fills out the forms.

The insured also argued that the sign down was not valid because a Section 1791 Important Notice was not signed by both insureds. The court finds that this is not a requirement of the MVFRL. Also, the fact a § 1791 Important Notice form does not contain signatures of both named insureds is irrelevant because when a valid 1731 or 1734 waiver exists, the absence of a valid 1791 Important Notice does not merit policy reformation.

Therefore, Allstate correctly denied the UIM claim in excess of amount contracted for via the 1734 reduction. However, the court allows the plaintiff an opportunity to amend the complaint regarding bad faith allegations which may still be able to withstand a motion to dismiss.

<u>Brittain v. National Cas. Co.</u>, No. 1:13-cv-0040 (W.D. Pa. Sept 11, 2014) (Renter Of Rental Car Found To Have Different Levels Of Bodily Injury And Underinsured Motorist Coverage).

Brittain rented a car from Thrifty and was injured in a car accident on February 4, 2007. He settled the third party case for the bodily injury limits for the other driver. He had signed a form rejecting UIM benefits. A trial court held the form was void because it did not comply with the terms of the statutory mandates of the Pennsylvania Motor Vehicle Financial Responsibility Law (MVFRL). However, the amount of the UIM coverage was never fully determined.

The issue ultimately arose as to how much the UIM limits were because the declaration sheet showed liability coverage of $1 million. The MVFRL states that BI is the same as UIM coverage if the rejection form is void. However, a separate endorsement said that renters only receive liability coverage of $15,000. Therefore, 2 different levels of coverage existed for liability insurance and then would exist for UIM coverage. The insured claims entitlement to $1 million of coverage, and the company argues only $15,000 since the renter was making the claim.

The District Court upholds the endorsement which limits the coverage for renters as opposed to anyone else such as a passenger or employee. The Court holds that the renter (Brittain) is only entitled to UIM coverage of $15,000 since that is the amount of coverage for a renter. A non-renter such as an employee of Thrifty would receive $1 million in UIM coverage since that is the liability coverage for a non-renter.

<u>Henderson v. Charter Oak Ins. Co.</u>, NO. 12-4363 (E.D. Pa. March 21, 2014) (District Court Holds That Sign Down Applies Through Lifetime Of Entire Policy, Despite Insurance Company Testimony And Intent).

In 2008-09, the insured executed a proper sign down under Section 1734 of the Motor Vehicle Financial Responsibility Law (MVFRL) from $1 million of UIM coverage to $35,000 of UIM coverage. Then, in 2010-11 the sign down forms were not signed again and the election was that the insured wanted the minimum UIM coverage. An underwriter testified that the forms only apply from year to year. Therefore, the underwriter was testifying that the sign down forms needed to be signed again to be valid.

The Plaintiff insured argued that there was $1 million in UIM coverage because the form was not re-executed properly in 2010-11 and his accident occurred during that time period. The insurance company denied the $1 million and said it was only $35,000 in coverage because the sign down under the policy once executed applied during the entire lifetime of that policy.

The Court finds that, despite the underwriter's testimony, the Pennsylvania Supreme Court opinion in Blood v. Old Guard Ins. Co., 934 A.2d 1218 (Pa. 2007) controls. The Blood case holds that the sign down form is good through the entire lifetime of the policy, unless the company receives a written request for higher coverage. In this case, there was no such written request so the District Court holds that the insured is only entitled to $35,000 in underinsured motorist coverage, despite any testimony from the underwriters.

Section 1738 – Rejection of Stacking

Bumbarger v. Peerless Indemnity Insurance Company, 93 A.3d 872 (Pa. Super. Ct. June 6, 2014) (en banc) (Superior Court Follows Sackett I And Holds New Rejection Form Needed – Also Clarifies Sackett II).

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

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

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

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

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

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

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

Auto Policy Exclusions

Clarke v. MMG Ins. Co., 100 A.3d 271 (Pa. Super. Ct. Sept. 4, 2014) (Superior Court Voids Household Exclusion Based Upon Language In Policy).

This case deals with a motorcycle accident and the the validity of the household exclusion in a policy. The insured was operating his American Modern Select insured motorcycle when he was seriously injured by another vehicle. He settled the third party claim and the primary claim for underinsured motorist (UIM) coverage on the motorcycle he was operating. He then sought underinsured motorist coverage on a policy with MMG which insured his personal autos. MMG denied the UIM claim on the basis of the household exclusion. The trial court found in favor of the insurance company and the insured appealed.

The Superior Court published opinion reverses the trial court based upon the clear language of the UIM provision in the MMG policy. The MMG policy only excludes UIM coverage when the insured is operating a "vehicle that is not insured for this coverage". However, the uninsured (UM) endorsement excludes

coverage when you are operating a vehicle "not insured for this coverage under this policy". The trial court read both provisions as a whole and excluded coverage. However, the Superior Court opines that the provisions are separate and distinct and have different meanings and applications.

Under the UIM endorsement Clarke is entitled to UIM coverage because he was operating a vehicle that was insured for UIM coverage. The language in the UM portion of the policy does not apply to limit coverage.

Trimmer v. Nationwide Mut. Ins. Co., No. 54 WDA 2014 (Pa. Super. Ct. Oct. 21, 2014) (mem.) (Pennsylvania Superior Memorandum Upholds Excluded Driver Endorsement).

This car accident claim involves a situation where Nationwide denied liability coverage pursuant to the excluded driver endorsement on a policy. Nationwide refused to write an auto policy to an insured because of their son's driving record. As a result, the company was willing to write the policy if their son was an excluded driver. Once it did, an accident occurred and the son was driving so Nationwide denied the claim.

The court finds that the insurer may properly refuse to issue a policy under § 1718(c)(1) so long as the insurer's decision is not based on any of the reasons set forth in § 991.2003(a). Nowhere in § 991.2003(a) does it say that DUI is a prohibited reason for refusing to write a policy. Also, the court notes that the overarching public policy of Pennsylvania Motor Vehicle Financial Responsibility Law (MVFRL) is a concern over increasing cost of insurance premiums. Therefore, Nationwide properly declined to insure tortfeasor under § 1718(c)(1)).

The Superior Court rejects appellants' argument that Nationwide had no right under 40 P.S. § 991.2003(a) to refuse to write a policy under 75 Pa.C.S.A. §1718(c)(1). Therefore, the request to exclude their son as a driver was valid and coverage was properly denied.

Erie Ins. Group v. Catania, 95 A.3d 320 (Pa. Super. Ct. June 30, 2014) (Pa. Super. Upholds Regular Use Exclusion In Uninsured Motorist Case – Evidence Of Premiums Paid).

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

The Superior Court affirms the trial court decision. First, the Superior Court follows its recent 2013 decision in Hand v. City of Philadelphia, 65 A.2d 916 (Pa. Super. 2013) as well as the Supreme Court opinion in Williams v. GEICO, 32 A.3d 1195 (Pa. 2011) and another Superior Court opinion in Brink v. Erie Ins. Group, 940 A.2d 528 (Pa. Super. 2008). It holds that Catania is not entitled to relief while driving a delivery truck for his employer which he did not own and was regularly used but not insured under the Erie policy.

Second, the court rejects the argument that Catania had a reasonable expectation of coverage.

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

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

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

Donegal Mut. Ins. Co. v. Smith, No. 219 WDA 2013 (Pa. Super. Ct. Dec. 13, 2013) (mem.) (Court reviews the term "use" in motor vehicle policy and application to car accident).

The trial court held that Donegal's policy language was ambiguous as it did not define "use". Therefore, Donegal's non permissive use exclusion was deemed not applicable. The Superior Court holds that the order was a final, appealable order.

Addressing the main substantive issue, the court addressed whether the non-permissive use exclusion in the policy Donegal issued to Mrs. Smith applied to her injured son (Matthew Garland) who was a passenger in a vehicle--owned by a Mr. Dzambo--that was involved in a one-car accident and for which Matthew sought UM benefits. The vehicle was driven by tortfeasor/Nathan Smith. Donegal argued that although Matthew was not the operator of the Dzambo vehicle, he helped steal the car and was considered a "user" of the vehicle without the owner's permission and thus subject to the non-permissive use

exclusion in his mother's policy with Donegal. Therefore, Donegal was justified in denying Matthew's claim for UM benefits. Matthew on the other hand, argued that the exclusion did not apply to him because he was not the driver, and alternatively, the exclusion is ambiguous, to which the trial court agreed.

Canto v. Erie Ins. Co., No. 573 MDA 2013 (Pa.Super. Ct. Dec. 10, 2013) (mem.) (Court upholds the household exclusion).

The Superior Court upholds the household exclusion despite an argument that several of the Supreme Court Justices have opined in concurring and joinder opinions that cost containment should be abandoned as the overarching concern of the MVFRL. Here, appellant/father was operating his son's vehicle when he was struck by an uninsured tortfeasor. The father collected UM under his son's policy but was denied UM benefits under his own policy with Erie based on the household exclusion. The father and son lived together and the appellant tried to distinguish his case by pointing to the fact that he was an operator and not a passenger and that his coverage with Erie had higher UM limits than his son's policy. However, those distinguishing facts were not controlling according to the Superior Court.

The Court rejects the Appellant's argument that the purpose of the MVFRL is that of remedial public policy to promote the recovery of damages for innocent victims. The Court holds that it is bound by precedent and it is up to the Supreme Court to overrule the line of cases that have interpreted the MVFRL as having cost containment as its goal. The appellant waived the lack of notice of Erie's inclusion of the household exclusion in the policy because that issue was first raised on appeal; trial court's order sustaining POs of Erie and dismissing the amended complaint is affirmed.

Colonna v. Allstate Fire & Cas. Ins. Co., 2013 WL 6244683 (M.D. Pa. Dec. 3, 2013) (mem.) (Household exclusion upheld by District Court).

The District Court grants Allstate's motion to dismiss an underinsured motorist (UIM) claim based on a household exclusion. In this case, while parents were driving their son's car, they were injured in a motor vehicle accident caused by a third-party. The parents collected the tortfeasor's liability limits as well as the UIM limits under their son's auto policy, but when they made a claim for UIM benefits against their own auto policy, Allstate denied their claim based on the household exclusion.

Allstate had issued separate policies to the parents and to their son. To argue against the exclusion, the parents focused on the timing of when the policies were purchased, i.e., they purchased their policy in 2010 prior to their son

purchasing his policy in 2011. Although the insureds parents did not argue that the household exclusion is ambiguous or vague, they argued that it should not apply because when they purchased their policy, Allstate failed to perform any risk-based analysis to justify including it in their policy.

The District Court opines that the timing of the policy purchase does not bolster plaintiffs' argument because when the plaintiffs' purchased their auto policy, Allstate had no reason to know of any additional risk it might be insuring. The plaintiffs admitted that they did not have any resident relatives or additional vehicles not insured by Allstate and at the time of the accident, the son was living with the parents. The court cites to other case law dealing with the household exclusion and, based upon Allstate's policy language, grants Allstate's motion to dismiss.

Immunity Cases

Merryman v. PennDOT, No. 11-02, 161 (C.P. Lycoming, Sept. 17, 2014) (Trial Court Holds That PennDot Immunity Applies After Vehicle Collides Into Headwall).

Plaintiff's decedent's vehicle was struck by another vehicle and then collided into a headwall that was built too high. A lawsuit was filed alleging PennDot was liable and an exception to sovereign immunity applied.

The trial court rejects plaintiff's argument that PennDOT is liable under personal property or real estate exceptions to sovereign immunity for intersection accident. The personal property exception is not applicable because the headwall was securely and permanently attached to the earth. The real estate exception is not applicable because the headwall did not cause the accident. Further, although it may have caused further injury; the real estate exception does not apply where the injury is merely facilitated by a condition; the vehicle that struck the plaintiff's decedent's vehicle that caused the accident.

Hull v. Reading Township, 55 Adams Co. L. J. 211 (2013) (Court affirms roadway defect dismissal).

Plaintiff sustained injuries when her vehicle left the roadway and rolled over. She sued the township for not maintaining the roadway which resulted in a road edge drop off. The court renders a directed verdict that the township was negligent per se but the jury decided causation, contributory negligence, and damages.

The jury found that the plaintiff was 68% negligent. The court rules that violation of a statute may be negligence per se and liability may be based on that

negligence but only if such negligence is the proximate cause of the accident. Further, absent clear causal connection between defendant's negligence and plaintiff's injury, determining causation is for the fact finder.

The court denies plaintiff's motion for a JNOV or alternatively a new trial. The defendant's expert opined that plaintiff's speeding caused her vehicle to leave the roadway and plaintiff did not offer opposing expert testimony.

Evidence/Procedure Rules

Niklaus v. Wild, No. 10-02, 079 (C.P. Lycoming, Sept. 16, 2014) (Trial Court Holds That Social Security Determination Not Admissible).

At trial, the court refused to allow the plaintiff to introduce a Social Security administrative law judge's determination of disability even though the defendant, on cross examination, asked the plaintiff if she filed for Social Security disability 2 months prior to the accident. The trial court found that the determination of social security disability was cumulative and of little probative value. Also, any probative value was outweighed by its prejudicial effect since the defendant was not a participant in the administrative hearing and the determination of causation of injuries was not relevant to the administrative law judge. Further, the administrative law judge who opined on causation was not a medical expert.

The plaintiff filed post-trial motions. The trial court denied the post-trial motions.

Senese v. Liberty Mutual, Inc., No. 13-5139 (E.D. Pa. Aug. 19, 2014) (District Court Limits Expert Testimony In Uninsured Motorist Case).

The car accident claim involves the issue of an unidentified motorist and the applicability of uninsured (UM) motorist coverage. The central issue is whether an insured sustained injuries as a result of an unidentified motorist who caused an accident. A jury found that an unidentified motorist existed and was negligent but was not the factual cause of the accident. Therefore, the insured could not recover.

At trial the court limited the insured's expert testimony which included accident causation. In post-trial motions the court finds that there was no error in precluding the insured's expert testimony since it was not deemed reliable nor would it aid the jury. These are two of the requirements for expert testimony to be admissible in federal court under Daubert. The Court also finds that there was a reasonable basis for the jury to find that the unidentified vehicle did not

cause the accident and the accident would have occurred anyway. Post trial motions are denied.

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

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

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

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

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

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

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

Griffith v. Allstate Ins. Co., No. 3:13-cv-02674 (M.D. Pa. Feb. 21, 2014) (mem.) (District Court Denies Motion To Sever And Stay Underinsured Motorist Case).

The District Court for the Middle District of Pennsylvania denies Allstate's motion to sever and stay a bad faith claim from UIM breach of contract claim. The Court finds that there are central questions involved in each claim which

significantly intertwined. Also, the Court finds that only the claim adjuster's notes may qualify as work product and evidence and testimony of both claims will overlap significantly so bifurcation would double the life of this action.

Therefore, any discovery disputes or questions of privilege can be handled through discovery dispute procedures. The motion is denied.

Fieldhouse v. Metropolitan Prop. & Cas. Ins. Co., 1226 EDA 2013 (Pa. Super. Ct. April 9, 2014) (not published) (Court Clarifies Difference Between The Proper Preliminary Objection And New Matter).

In this non-published Superior Court opinion the court focuses on the important difference between what can be filed as a Preliminary Objection under Pennsylvania Civil Procedure Rule 1028 and an Affirmative Defense under Pennsylvania Civil Procedure Rule 1030. In this case, the defendant filed Preliminary Objections, including statute of limitations. Based upon the pleading the objection, the trial court dismissed the case.

The Plaintiff appealed and argued that the statute of limitations defense in a Preliminary Objection is not allowed. The Superior Court reverses the trial court and holds that the statute of limitations must be plead as an affirmative defense in New Matter and not as a Preliminary Objection. Then the Plaintiff can create a record that will be useful for the court to determine the validity of the defense. Also, Rule 1030 specifically states that statute of limitations shall be raised by New Matter. The dismissal is vacated and the case remanded.

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

In this case, the Plaintiff underwent three previous defense exams and the Defendant sought a fourth one for pain management. The Plaintiff objected. The trial court finds that the Defendant failed to show good cause for requiring the Plaintiff to undergo a pain management exam when 3 other exams had already been performed. No new injury was alleged nor did the Plaintiff conceal any injury.

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

Venue

Lee v. Thrower, No. 2421 EDA 2013 (Pa.Super. Ct. Sept. 29, 2014) (mem.) (Superior Court Memorandum Upholds Transfer Of Case From Philadelphia County To Centre County).

A lawsuit was filed in Philadelphia County based upon one of the defendants residing in the county. However, a motion to tranfer was filed based upon *forum non conveniens*. The trial court granted the motion to transfer the case to Centre County and an appeal was taken.

Applying the balancing test on forum transfer under Cheeseman v. Lethal Exterminator, Inc., 701 A.2d 156 (Pa. 1997) the trial court transferred the case. Upon the appeal of the case, the Superior Court applies Cheeseman and the recent Supreme Court opinion in Bratic v. Rubendall, -- A. 3d – (Pa. Aug. 18, 2014) and affirms the transfer of the case from Philadelphia County to Centre County based on *forum non conveniens*. The auto accident occurred in Centre County, the defendants reside in Centre County, and multiple witness located in Centre County wrote affidavits that trial in Philadelphia would cause disruptions based on family and work commitments.

The court holds that the trial court did not abuse its discretion. The court affirms trial court's holding that trial in Philadelphia County would be oppressive.

Otto v. Erie Insurance Exchange, NO. 13-6722 (E.D. Pa. March 31, 2014) (Court Analyzes Forum Selection Clause Language).

The case addresses the scope of an Erie Insurance forum selection clause when the insured is suing for underinsured motorist (UIM) coverage. Based upon diversity at the time of filing the suit, Otto filed suit in the Eastern District of Pennsylvania. The Erie policy mandated that a suit "must be filed in a court of competent jurisdiction in the county and state of [the Ottos'] legal domicile at the time of the accident." Erie argued that this language requires the case be filed in state court only. Otto countered that the forum selection clause is broad and includes both federal and state court.

Applying the Third Circuit case of Jumara v. State Farm Insurance Company, 55 F.3d 873 (3d. Cir. 1995) the court finds that the language in the forum selection clause includes the federal court located in the county the insured resides at the time of the accident. Since the Eastern District federal court included Montgomery County where the Ottos' resided, the federal court is proper. Erie Insurance's motion to dismiss based upon forum non conveniens is denied because the decision to file suit in federal court complies with the forum selection clause.

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

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

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

McAteer v. State Farm Mut. Auto. Ins. Co., No. 1428 EDA 2013 (Pa. Super. Ct. Jan. 7, 2014) (mem.) (Panel affirms venue transfer in UIM arbitration case).

The Superior Court in a memorandum opinion finds that the appellant/McAteer failed to address the dispositive issue of venue, i.e., that when an arbitration clause calls for arbitration in one particular county, the parties to the contract are limited to that single forum. The finding is that the appellant failed to develop an argument over the position the trial court took that it was bound by a prior ruling transferring the case to Bucks County, and the appellant failed to assert a specific contractual basis that would have permitted venue in any county in which she resided at the time she filed her petition to appoint a third arbitrator and compel arbitration.

Collateral Estoppel/Res Judicata

USAA v. Hudson, No. 224 EDA 2014 (Pa. Super. Ct. Sept. 24, 2014) (Memorandum) (Superior Court Memorandum Opinion Holds That Prior Underinsured Motorist Proceeding Is Binding On Subsequent Underinsured Motorist Proceeding).

This case involves a claim for Underinsured Motorist Coverage (UIM) benefits on a second personal policy after an arbitration award for UIM benefits under a primary policy. In this case, the primary UIM coverage was with Allstate. There was a standard arbitration proceeding which resulted in an award for Hudson in the amount of $75,000. After a credit for the third party coverage of $15,000, the insured Hudson received $60,000 on the primary $100,000 UIM policy coverage.

Then, later she sought UIM coverage under her personal UIM policy with USAA, which was secondary. The company denied the claim by arguing that the issue of damages had already been litigated. The trial court found in favor of the insurance company and Hudson appealed.

The Superior Court holds that Hudson is estopped from re-litigating the claim because the "issue" of damages had already been litigated. Since the award of the UIM was less than the amount of the UIM coverage on the second policy, she could not recover.

Gallagher v. Ohio Casualty Ins. Co., 13-0168 (E.D. Pa. April 9, 2014) (District Courts Finds Non-Binding ADR Award Precludes UIM Claim But Is Not Collateral Estoppel).

This memorandum opinion from the Eastern District of Pennsylvania involves a Koken case where the underlying third party case settled. During the underlying third party case a NON-BINDING arbitration was held and the arbitrator entered a "settlement value" of about $59,000 less than the $100,000 third party policy limits. The Plaintiff/insured Gallagher declined the value determination and proceeded with the third party case. After some additional discovery the third party claim settled for the same amount as the arbitrator's value.

Then Gallagher filed a claim for underinsured motorist (UIM) coverage. However, Ohio Casualty denied a claim existed based upon the non-binding arbitration value. Gallagher filed suit. Ohio Casualty argued that the UIM case could not proceed because the third party was not an "underinsured" motorist under the Pennsylvania Motor Vehicle Financial Responsibility Law (MVFRL), the third party coverage was not exhausted, and the claim was barred by collateral estoppel.

The Court finds that the third party was not an "underinsured" motorist as defined by the MVFRL. The only evidence of the other driver being underinsured was the policy limits and the settlement. The Court finds that the insured/plaintiff failed to present any evidence that the damages could meet or exceed the third party coverage of $100,000. Since the only evidence was the arbitrator's value, the court finds that the third party cannot be "underinsured" and Gallagher cannot present a UIM claim. However, the Court continues to write that the UIM claim would not be barred by collateral estoppel because the non-binding arbitration did not result in a final judgment.

Koken/Bad Faith/Discovery

Borgia v. State Farm Mut. Auto. Ins. Co., No. 14-3149 (E.D.Pa. Sept 3, 2014) (District Court Rules On Discovery Issues in Underinsured Motorist Bad Faith Case).

An insurance bad faith suit was filed by Borgia after the alleged improper handling of an underinsured (UIM) motorist claim. During the discovery process, Borgia sought discovery of various materials, including reserve information and e-mails. State Farm argued that the information was protected as work product in anticipation of litigation. In determining the work product issue, the court determines that State Farm reasonably anticipated litigation regarding the Plaintiff's UIM claim when the company first retained outside counsel to assist in handling the claim. This date essentially becomes the dividing line for when materials must be produced. Thus, State Farm is required to produce un-redacted documents, including about reserves, unless it has a reasonable, good faith basis to conclude the redacted material was not generated until the date outside counsel was retained, or later.

However, important to the analysis, is that even if the documents are prepared after the date counsel was hired, the information may still be discoverable if the documents would have been prepared in the ordinary course of business anyways. After reviewing the documents the court itself concluded that the company had a reasonable basis to anticipate litigation when it hired outside counsel, and that the documents would not have been prepared anyways.

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

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

The District Court grants, in part, and denies, in part, Defendant's motion for a protective order regarding the proposed depositions of Defendant's CEO, CFO, and Claims Manager. The District Court finds that Defendant's position in seeking the protective order is overly simplistic. The argument is that only two lower level people made all of the decisions in the handling of the UIM claim. However, the court considers whether company policies implemented by their superiors affected their decision making in a way contradictory to their insured's

interests. Therefore, the District Court allows the deposition of the CFO and Claims Manager and, depending on those depositions the court will entertain a request to depose the CEO.

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

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

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

Sharp v. Travelers Personal Security Ins. Co., NO. 12 CV 6483 (Lack. Co. March 7, 2014) (Trial Court Rules On Discovery Issues In Insurance Bad Faith Case).

The trial court in Lackawanna County deals with the discovery of different parts of an insurance company's files and other documentation as a result of the lawsuit which was filed for Breach of Contract and violations of the Unfair Trade Practices and Consumer Protection Law (UTPCPL). In this case, the Plaintiff was seeking the discovery of the insurer's loss reserves for the insured's claims; underinsured motorist (UIM) claim file for the insured; the insurer's claims practice manual; the personnel files for certain adjusters of the insurer; a compilation of other peer reviews requested by the insurer; other lawsuits and Insurance Department Complaints pertaining to medical expense benefits claims against the insurer under insurance policies with insurance coverage of $100,000 or more; records of payments made to the health care professionals who conducted any peer reviews in this matter; and materials generated by the insurer after the insured's medical expense benefits claim was initially closed by the insurer.

The only reason for many of the discovery requests being denied by the trial court is because the insured did not file a claim independently for Bad Faith Liability. The Court finds that since the insured has not asserted an independent

claim for Bad Faith Liability against the insurer, its reserves information is protected from discovery as Opinion Work Product, and the personnel files of its claims representatives are not discoverable. Also, the insurer's closed UIM file for the insured relevant to any issues in this case is not discoverable. However, the 2009 – 2010 claims practice manuals and training materials concerning the handling of medical expense benefit claims are relevant to the insured's allegations that the insurer violated the UTPCPL by engaging in deceptive practices and committing actionable malfeasance by abusing the peer review process. Proper medical examination procedures and treble damages are warranted under the UTPCPL since the insurer acted intentionally or recklessly in that regard.

For those reasons, Travelers is required to provide the requested documentation relating to other litigation and administrative complaints, and peer reviews initiated by the insurer in cases with such coverage limits of $100,000 or more. It is also necessary that they produce payments made to the health care professionals who conducted peer reviews of the insured's treatment, provided that the Plaintiff executed a Confidentiality Agreement with respect to the proprietary information or trade secrets reflected in the claims manuals; and training materials and vendor agreements. The insurer may also redact identities of the insurer to filed Administrative complaints with the Insurance Commissioner.

Last, the insurer is required to submit all post initial file closure materials to a Special Master for an "in-camera" review to determine whether those documents are protected from discovery as Opinion Work Product.

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

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

Act 6/Damages

Renner v. Progressive Northern Ins. Co., 2:12-CV-2570-CDJ (E.D. Pa. March 18, 2014) (Court Allows Medical Expenses Already Paid To Be Recovered Even If Not Subject To Reimbursement).

The case centers on the admissibility at a underinsured motorist (UIM) trial of medical expenses for which the insured already received payment from her own auto insurance company. In this case, a car accident occurred in Delaware, with a Delaware driver. The insured Renner recovered the third party, and coverage from the Delaware driver and settled for the third party limits. She then sought underinsured motorist UIM coverage from Progressive under her Pennsylvania policy. The Progressive policy contained a provision which stated that any dispute as to the coverage or provisions shall "be governed by the law of the state listed on your application as your residence." At the time of the application for coverage and accident, Renner was a resident of Pennsylvania. However, it also stated that the UIM claim is derivative of the third party claim since it is based upon the third party being underinsured.

Renner argued that the UIM provision applies because her claim arises as a result of the injuries caused by a third party. This is then a derivative claim and basically is part of the third party claim. This distinction is important because in Delaware the collateral source rule applies and a person may recover for medical bills already paid, even if not subject to reimbursement. However, if Pennsylvania law applied then the medical expenses could not be recovered. Progressive argued that the choice of law provision controls and the Pennsylvania law applies.

The District Court relies heavily on Willett v. Allstate Ins. Co., 359 Fed. Appx. 349 (3d Cir. 2009) which holds that the UIM claim is derivative of the third party claim. In this case, the third party claim followed Delaware law so the derivative claim should as well. The court holds that the insurance policy's UIM clause controls over the general choice of law provision and the UIM clause requires that the court apply the Delaware law.

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

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

company has a duty to re-price the bill in order to delay the exhaustion of the first party benefits.

The insured filed suit and the insurance company filed preliminary objections which argued that it did not have a duty, per § 1797(a), to adjust plaintiff's medical expenses in order to postpone exhaustion of plaintiff's first-party benefits. The court holds that there is such a duty and cites to the Superior Court case in Pittsburgh Neurosurgery Associates Inc. v. Danner, 733 A.2d 1279 (Pa. Super. 1999) and more recent Commonwealth Court case in Houston v. SEPTA, 19 A.3d 6 (Pa. Commw. 2011).

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

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

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

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

Glick v. Progressive Northern Ins. Co., No. 2073 EDA 2012 (Pa.Super. Ct. Jan. 24, 2014) (mem.)

The issue in this case pertains to the "reasonable proof of the amount of benefits" language in § 1716 of the Pennsylvania Motor Vehicle Financial Responsibility Law (MVFRL). The court finds that a provider's submission of invoice form HCFA-1500 to an insurer does not equate with reasonable proof of the amount of benefits owed. Instead, receipt of the form by the insurer merely indicates the treatment that was provided and that such treatment was medically justified.

The HCFA form does not establish coverage for such treatment, nor does mere submission of the form, for example, address causation. The form HCFA 1500 is relevant but is not sufficient evidence of the amount of benefits owed. A Peer

Review Organization provides a forum to challenge the medical necessity of a treatment, it does not permit an insurer to investigate or challenge a bill on other grounds, such as whether a patient lacks coverage under a particular auto policy, whether a patient's injuries resulted from a motor vehicle accident, or whether a patient may be entitled to coverage under a different insurance policy.

The court finds that what constitutes "reasonable proof" under § 1716 is a fact question answered on a case by case basis. Therefore, this factual inquiry requires individualized determination not readily suitable for class certification, and class certification is revoked.

AAA Mid-Atlantic v. Ryan, 84 A.3d 626 (Pa. 2014) (Pennsylvania Supreme Court Holds That Underinsured Motorist Credit Is Applied Based Upon Liability Apportioned By A Jury To All Tortfeasors).

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

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

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