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ANNUAL OVERVIEW AND UPDATE ON UM AND UIM ISSUES

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UM/UIM Rejection Forms

Ford v. American States Ins. Co.(Pa. 2017): "specifically comply" did not require "verbatim reproductions" of the statutory language. Adding "s" to title, and the word "motorists" to the second sentence of rejection form, did not inject ambiguity or change the coverage. When the form differs in an inconsequential way, it will be construed to specifically comply.

Dissent: "close is good enough" approach will allow insurers to tinker with the statutorily required language, and will require courts to oversee disputes as to whether changes are "inconsequential" or "inject ambiguity."

UM/UIM Rejection Forms
(cont'd)

Rarick v. Federated Serv. Ins. Co., **2018 U.S. Dist. LEXIS 114817 (E.D. Pa. July 10, 2018)** (upholding form that added "Option 2" to the heading, replaced the word "protection" with the word "coverage" and added an "s" to the end of the word "motorist"(so that the heading read "Rejection of Underinsured Motorists Coverage"), allegedly failed to use prominent type and prominent location for the heading, and changed the "proximal relation of the statutory language by "boxing" part of the form)

Employer purchased UM/UIM coverage for its directors, officers, partners, owners and their family members, but rejected the coverage for its employees. The court predicted that PA would uphold the "two-tier" system of UM/UIM coverage created by the policy.

UM/UIM Rejection Forms

***King v. U.S. Xpress, Inc.*, 2018 U.S. App. LEXIS 18820 (3d Cir. July 11, 2018):**
Upheld form for policy issued to corporation that added two clauses (italicized here) : "By signing this waiver I am rejecting uninsured motorist coverage under this policy for myself and all relatives residing in my household *and all persons driving or working under the authority of any named insured or riding as a passenger in an insured vehicle*. Uninsured coverage protects me and relatives residing 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 *for all insured drivers, and I act on full authority of all insureds under this commercial auto policy*."

The added language "tailors the waiver to the commercial setting and might by viewed as 'consequential' [but] we cannot imagine that the Pennsylvania courts would strike down what appears to be a necessary classification. Indeed, in the commercial setting, a waiver that refers only to households would be confusing and could potentially be misunderstood."

UM/UIM Rejection Forms

Elizaire v. The Travelers Cos., **2017 U.S. Dist. LEXIS 206150 (E.D. Pa. 2017)** (p. 423):

UIM rejection form with two added paragraphs before the §1731 language was upheld where the added language did not (1) create ambiguity, (2) modify the scope of coverage under the policy, or (3) contravene either contracting party's understanding of what coverage is provided under the policy or the insured's understanding of the consequences of signing the waiver:

> Underinsured motorists protection is insurance coverage you may purchase that protects only you and your family if you or they are injured by a negligent driver who does not have enough bodily injury insurance to cover your claims. This coverage is optional. However, we are required to include it in your policy unless you take steps to reject it.
>
> If you do not want this coverage, the insured named first on the application or the declarations page must sign and date the rejection of underinsured motorists protection below. If you want to keep this coverage, do not sign this waiver and go to the next page.

- "it is best practice for insurance companies not to supplement the required language of 1731 even if they believe such language might provide additional clarity to the statutory rejection language."

When must carrier get new rejection of stacking coverage?

Barnard; Newhook (p. 437)

Barnard v. Travelers Home & Marine Ins. Co., 289 F. Supp. 3d 633 (E.D. Pa. 2018)

2007: Insured purchased UM/UIM coverage with $50,000 per person limits. The policy coverage two vehicles; insured rejected stacking

2009: Insured increased UM/UIM coverage limits to $100,000 per person. No separate stacking rejection provided or executed.

2016: Insured in accident with UIM; claimed she was entitled to stacked UIM benefits because she had not rejected stacking when she increased her UIM limits in 2009.

When must carrier get new rejection of stacking coverage?

Barnard; Newhook (p. 437)

Barnard (cont'd)

- No Pennsylvania case law on point, issue "a close one"
- Concluded that the increase in limits constituted a "new purchase of coverage" for purposes of §1738, and new rejection of stacking was therefore required
- Third Circuit argument/submission date: November 5, 2018 (No. 18-1456).

When must carrier get new rejection of stacking coverage?

Barnard; Newhook (p. 437)

Newhook (2018 Pa. Super. Unpub. LEXIS 1303*)*

- Affirmed trial court: a new rejection of stacking was required when the insured added new vehicles to non-stacking policy.
- The policy contained an after-acquired vehicle clause
- Superior Court held that the vehicles were not added by that clause, because amended declarations pages were issued showing each added vehicle.
- Petition for allowance of appeal is pending, 478 MAL 2018.

Exclusion for Unidentified Driver in Household
Safe Auto v. Oriental-Guillermo (p. 473)

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170 A.3d 1170 (Pa. Super. 2017); Supreme Court granted appeal

- Driver/girlfriend lived with policyholder/boyfriend, but he did not list her as a driver on his policy
- Policy contained an "Unlisted Resident Driver Exclusion"
- It excluded unrelated persons who lived with the policyholder, unless they were listed on the policy as drivers
- Trial court and Superior Court upheld exclusion

Exclusion for unidentified household driver

Safe Auto v. Oriental-Guillermo (cont'd)

Superior Court Majority:

- Unambiguous, doesn't violate MVFRL or public policy
- § 1786(f) mandates insurance, but does not shift the risk of providing it to the insurance company
- Result not inconsistent with prior case upholding Named Driver Exclusions
- Doesn't violate public policy of "maximum feasible restoration," because the duty to obtain insurance lies with the insured

Exclusion for unidentified household driver
Safe Auto v. Oriental-Guillermo (cont'd)

Dissent:

- MVFRL not intended to abandon injured parties to protect insurers' bottom line
- Low-cost, low-coverage insurance effectively makes for no insurance at all
- MVFRL has dual purpose: lower cost and protect victims
- Insurer is in better position than victim to accept risk
- 1718(c) allows named-driver exclusions; 1786(f) "implicitly" directs coverage for permissive users

Exclusion for unidentified household driver
Safe Auto v. Oriental-Guillermo (cont'd)

Supreme Court granted appeal on 2 questions:

1. Did the Superior Court err in finding that the unlisted resident driver exclusion in a Personal Auto Policy is valid and enforceable and not violative of the terms and provisions of the MVFRL?
2. Did the Superior Court err in finding that the unlisted resident driver exclusion in a Personal Auto Policy is valid and enforceable and not violative of Pennsylvania public policy as embodied in § 1786 of the MVFRL, which implicitly directs that all permissive users of an insured vehicle be insured under the owner's insurance policy?

Oral argument scheduled: December 6, 2018.

Unlicensed Driver Exclusion

Duncan v. Omni Ins. Co. (pp. 472-73)

Duncan v. Omni Ins. Co ., 719 Fed. Appx. 102 (3d Cir. 2017)

Omni policy excluded coverage if insured vehicle operated by a driver who: … (c) Does not have a valid driver's license; or (d) Has a suspended or revoked driver's license."

- Omni refused to defend or indemnify Owner or Driver
- Plaintiff obtained judgments against both, took an assignment, sued Omni for breach of contract and bad faith
- District Court upheld exclusion; 3d Cir affirmed: One goal of MVFRL is compensation for injured victims, but others are cost containment and road safety. Weighing those competing policy interests is for the Legislature, not the courts.

Governmental Immunity

***Balentine v. Chester Water Auth.*, 191 A.3d 799 (Pa. 2018)** (p. 452)

- Municipality's vehicle negligently parked
- Another driver struck it, causing it to strike and kill plaintiff's decedent.
- Commonwealth Court :
  - municipal vehicle not in operation at the time, so vehicle exception to immunity did not apply
  - municipality was therefore immune from tort liability.

Supreme Court granted appeal and reversed

Governmental Immunity

Balentine v. Chester Water Auth. (cont'd)

Majority (Justices Mundy, Todd, Dougherty and Wecht): no immunity; movement of the vehicle is not required by the statutory language of the immunity exception (expressly overruling *Love v. City of Phila.*, 543 A.2d 531 (Pa. 1988)).

Concurrence (Justices Baer and Donohue): no immunity; the vehicle was in operation at the time of the accident, and motion is not required for "operation." Concurrence would not have overruled the narrow holding of *Love* that entering into or alighting from a vehicle is not "operation" of it, but agreed with disapproving case law such as *Wright v. Denny,* which relied on the broader *dicta* from *Love.*

Concurrence (Justices Wecht and Todd): agreed with overruling *Love*.

Dissent (Chief Justice Saylor): stare decisis; exceptions to immunity should be construed strictly.

Lack of immunity has implications for governmental/municipal vehicles as sources of UM benefits.

Household Vehicle Exclusions

Gallagher v. GEICO (in Supreme Ct.) (p. 459)

- Claimant had 2 policies with GEICO: one on motorcycle, the other on two autos, both with stacking UIM coverage.
- Accident on motorcycle
- Household vehicle exclusion in auto policy was enforced in Superior Court
- Superior Court panel suggested further review

Household Vehicle Exclusions

Gallagher v. GEICO (cont'd)

- Supreme Court granted appeal on 2 questions:
  1. Whether HHVE violates § 1738 where GEICO issued all household policies and unilaterally decided to issue 2 separate policies, the insured desired stacking, paid additional premiums for stacking, and never knowingly waived stacking of UIM benefits?
  2. Whether HHVE impermissibly narrows or conflicts with statutory mandates of MVFRL where evidence of record is that GEICO was fully aware of risks of insuring a motorcycle in same household as other family vehicles but unilaterally decided to write a separate motorcycle policy?

Argued April 10, 2018

UM/UIM Statute of Limitations
Erie v. Bristol, 174 A.3d 578 (Pa. 2017) (p.465)

Original issue: What is required to toll the statute of limitations in UM claims in policies with arbitration clauses?

Superior Court: Must file a complaint or a petition to compel arbitration within 4 years of underlying accident.

Supreme Court granted appeal: Was that holding contrary to its prior case law and Arbitration Act of 1927, 42 Pa.C.S. § 7304(a), which requires a claimant to file a Complaint or Petition only when "an opposing party refuse[s] to arbitrate."

Amended grant: Clarified that the Court was considering when the UM/UIM statute of limitations begins to run, as well as what is required to toll the statute.

Tolling the statute of limitations
Erie v. Bristol (cont'd)

- Trigger for running of the statute is a question of first impression.
- Court rejected analysis that knowledge of the "loss" is what triggers it.
- Court noted the competing public policy concerns:
  - Claimant: existing law encouraged carriers to delay and lull claimants into a false sense of security.
  - Erie: waiting for a "breach" would allow claimants to extend the claim indefinitely.
- Held: "There is no reason to create a special rule for determining when the statute of limitations starts to run in UM cases." The statute begins to run when there is a breach of the insurance contract, "which will be occasioned in this context by a denial of a claim or a refusal to arbitrate."

First Party Medical Examinations
Scott v. Travelers; Sayles v. Allstate

Scott v. Travelers Commercial Ins. Co., 2016 U.S. Dist. LEXIS 138728 (M.D. Pa. 2016): A policy provision stating that the insured must submit to medical examinations as often as the insurer "reasonably requires" violates §1796 of the MVFRL:

- "Whenever the mental or physical condition of a person is material to any claim for medical, income loss or catastrophic loss benefits, a court of competent jurisdiction…may order the person to submit to a mental or physical examination by a physician. The order may only be made upon motion for good cause shown[.]"
- Carrier scheduled an IME; insured denied that he was required to attend, but would consider three names of proposed examiners to be provided by the carrier.
- Carrier stopped payment of benefits; insured filed suit alleging bad faith and breach of contract.
- The court held that the "reasonably requires" policy provision conflicts with MVFRL and was unenforceable.

First Party Medical Examinations
Scott v. Travelers; Sayles v. Allstate

Sayles v. Allstate Ins. Co., 260 F. Supp. 3d 427 (M.D. Pa. 2017)

- Carrier requested an IME, cited the same language in its policy, and advised that the insured's medical bills would not be paid until the IME was completed.
- District court, citing and concurring with reasoning of *Scott,* predicted that the PA Supreme Court would hold that the IME requirement conflicts with §1796 and was void as against public policy.

The Supreme Court granted the 3d Circuit's Petition for Certification in both cases:

First Party Medical Examinations
Scott v. Travelers; Sayles v. Allstate

"Whether, under PA law, a contractual provision in a motor vehicle insurance policy that requires an insured to submit to a medical examination by a physician selected by the insurer, when and as often as the insurer may reasonably require, as a condition precedent to the payment of first-party medical benefits under that policy, conflicts with the [MVFRL] §1796(a), and is therefore void as against public policy."

The Supreme Court ordered briefing and oral argument (first brief due Nov. 26th)

Forum Selection Clause in UIM Provision
Pisanchyn v. Progressive (pp. 499-500)

Forum selection clause does not prevent insurance company from removing a suit against it to federal court where diversity jurisdiction exists.

UM/UIM provision included a forum selection clause: any suit by insured against insurer must be brought "in the county in which the person seeking benefits resides, or in the United States District Court serving that county."

Insured filed suit against UM/UIM carrier in Lackawanna County; carrier timely removed the action to federal court based on diversity.

Insured moved to remand:

- No diversity because suit was a "direct action" against carrier, so carrier should be deemed a citizen of PA under §1332(c)(1)
- Carrier waived the right to remove because forum selection clause constituted an agreement to "submit" to and stay in the forum chosen by the plaintiff.

Forum Selection Clause in UIM Provision
Pisanchyn v. Progressive (cont'd)

The district court rejected both arguments.

- "direct action" argument: every circuit that has considered this issue, including 3d Circuit, has held that an action by an insured against his or her own insurer is not a "direct action" within the meaning of §1331(c)(1)
- "waiver" argument: the policy language did not contain any agreement to "submit" to any chosen court or to "litigate" there.

Subrogation
Pa. State Police v. WCAB (Bushta) (pp. 488-89)

Employer argued that because the police officer was entitled to benefits under the WCA as well as the HLA, the employer should be entitled to subrogate against the 2/3 portion that would represent the officer's benefits if they had been paid under the WCA (as to which subrogation is allowed). Officer actually received the more-generous HLA benefits.

Supreme Court: Where HLA benefits were paid in a "concurrent" situation, the employee was not permitted to recover the amount of the benefits from tortfeasors under the MVFRL, and the employer was not permitted to subrogate against the tort recovery.

Same holding from Commonwealth Court:

- *City of Phila. v. Zampogna*, 177 A.3d 1027 (Pa. Cmwlth. 2017)
- *City of Phila. v. WCAB (Tucker)*, 2018 Pa. Cmwlth. Unpub. LEXIS 346 (Pa. Cmwlth. Jun. 26, 2018)
- *City of Phila. v. Hargraves*, 2018 Pa. Cmwlth. Unpub. LEXIS 118 (Pa. Cmwlth. Feb. 28, 2018)

Thank you!

Questions?

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