

Insurance Coverage Update Pennsylvania

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**PSMN Wins Decision Finding TCPA Claims Not Covered
Under General Liability Policy**

In the first decision under Pennsylvania law, the United States District Court for the Eastern District of Pennsylvania has held that claims involving the sending of unsolicited fax advertisements in violation of the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227, are not covered under either the “property damage” or “advertising injury” coverages contained within a comprehensive general liability insurance policy. Melrose Hotel Co. v. St. Paul Fire & Marine Ins. Co., 2006 U.S. Dist. LEXIS 21112 (April 19, 2006). In a thorough opinion, the district court sided with those decisions throughout the country which have found that the advertising injury coverage protects rights of secrecy, not seclusion, and that the transmission of fax advertisements is not an accident.

Melrose Hotel Company entered into an agreement with Captaris MediaLinq, whereby Captaris would broadcast faxes to travel agents in locations selected by Melrose. Under the agreement, Melrose warranted that it would “comply with all applicable laws and regulations relating to its use of the Services, including . . . laws and regulations relating to sending unsolicited communications.” Captaris sent 270,958 faxes on behalf of Melrose which provided room rates for the Melrose Hotel. The Travel 100 Group filed a class action lawsuit in the Circuit Court of Cook County, Illinois, against Melrose alleging that it caused an advertisement to be faxed to Travel 100 as part of a mass broadcast of unauthorized faxes without prior express invitation or permission. The Travel 100 Complaint alleged that the faxes shifted the cost of advertising Melrose’s products onto class members and converted the toner and paper belonging to class members to Melrose’s use in violation of the TCPA, which makes it unlawful for any person to “use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine.” The Travel 100 Complaint maintained that Melrose knew or should have known that its appropriation of the paper and toner was wrongful and without authorization. The Travel 100 Complaint also contained claims for common law conversion and trespass to chattels.

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**Superior Court Reverses Bad Faith Finding In Bench Trial
After Previously Reversing Grant of Summary Judgment In
Favor of Insurer and Remanding For Trial**

In Condio v. Erie Ins. Exchange, 2006 PA Super 92, 2006 Pa. Super. LEXIS 611 (2006), the Superior Court reversed a trial judge’s finding that Erie Insurance had acted in bad faith in denying a UIM claim. The estate of the deceased owner (Breen) of the vehicle involved in the one-car crash sought underinsured motorist benefits from his mother’s auto policy with Erie. The Erie policy excluded UIM coverage for Breen if he was the driver of the car. Another individual survived the crash, but had limited memory regarding the night of the accident and the police report was inconclusive as to who was driving the car at the time of the accident. The UIM arbitration found that Breen was the passenger, not the driver. Thereafter,

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At issue was whether the allegations in the Travel 100 Complaint triggered either the “advertising injury coverage” or the “property damage” coverages in the St. Paul Policy. Under Pennsylvania law, the duty to defend is assessed by comparing the complaint to the policy. The duty to defend arises whenever the underlying complaint potentially comes within the scope of the insurance policy.

The Court first held that Melrose’s alleged violations of the TCPA would not be covered under the advertising injury coverage of the policy. At the outset, the Court noted that the Complaint failed to allege a single reference to an invasion of privacy, instead relying on claims that the unsolicited faxes converted toner and paper and shifted Melrose’s advertising costs to class members. The Court noted that while the TCPA aims, in part, to protect privacy, there was no indication that Congress passed the TCPA to allay concerns regarding private material being communicated by a fax. Instead, Congress took aim at the intrusive nature of unsolicited faxes. Accordingly, the TCPA seeks to protect privacy interests of seclusion, not secrecy.

The Court noted that it “need not wade too deeply into the murky waters of congressional intent,” for it was required to uncover the intentions of the parties as demonstrated by the insurance contract. The Court noted that it was doubtful that either Melrose or St. Paul considered congressional intention, and therefore the Court rejected the reasoning of those courts which had found that TCPA violations are covered under “advertising injury” provisions because the TCPA protects some form of privacy interest. *Id.* at *34 (rejecting the reasoning of Western Rim Investment Advisors, Inc. v. Gulf Ins. Co., 269 F.Supp. 2d 836 (N.D. Tex. 2003) and Park Univ. Enters. v. Am. Cs. Co. of Redding, PA., 314 F.Supp. 2d 1094 (D. Kan. 2004), *aff’d*, 2006 U.S. App. LEXIS 7458 (10th Cir. Mar. 27, 2006)).

The Court then turned to the language of the advertising injury coverage. The policy defined “advertising injury offense” to include “making known to any person or organization covered material that violates a person’s right to privacy.” First, the Court held that although the term privacy could imply multiple meanings, that fact alone could not suffice to create ambiguity. As the Court noted, if multiple definitions alone created ambiguity, “insurance

policies would either lose all meaning or would devolve into epic tomes.” *Id.* at *35. Second, the Court noted that although the term “privacy” was not defined in the policy, as used it was clear and unambiguously confined to interests in secrecy.

Third, when considered in the context of the advertising injury coverage, the definition of privacy was clearly confined to matters of secrecy, and not seclusion. The Court rejected Melrose’s attempt to read particular words alone in a vacuum as inconsistent with Pennsylvania law, which requires that provisions in a policy be read as a whole. The Court noted that the “violation of a person’s right of privacy” advertising injury offense was one of several enumerated offenses, all of which clearly related to the content of the covered material. “All of these offenses address the message conveyed rather than the method of conveyance.” *Id.* at *38.

The Court rejected Melrose’s argument that in the context of the privacy right of seclusion protected by the TCPA, it is the content of the fax material that gives rise to the violation. Congress was concerned with the intrusive nature of unsolicited faxes and the inappropriate shifting of advertising costs onto businesses whose fax machines were jammed with junk faxes; Congress took aim at unsolicited advertisements, not the content of those advertisements.

Finally, the Court agreed with the analysis of Resource Bankshares Corp. v. St. Paul Mercury Ins. Co., 407 F.3d 631 (4th Cir. 2005), and Hooters of Augusta, Inc. v. Am. Global Ins., 157 Fed. Appx. 201 (11th Cir. 2005), that the phrase “making known” in St. Paul’s policy suggested a focus on secrecy not present in those policies which define advertising injury offense to include “oral or written publication of material that violates a person’s right of privacy.” The Court held that “making known to any person or organization” implies a disclosure to a third party or divulging of a secret. Furthermore, by requiring that the covered material be made known to any person or organization but insisting that covered material violate a person’s right of privacy, “the policy makes clear that the ‘making known’ can be to a person or a company, but the covered material made known must be violative of an individual’s privacy rights.” According to the Court, that language “further highlights that the Policy covers Melrose for the content of its ads and requires the privacy-invading information be made known to a third party.” *Id.* at *41.

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The Court next considered and rejected Melrose’s argument that St. Paul’s duty to defend was triggered under the policy’s “property damage” provisions, which cover a “loss of use of tangible property of others that isn’t physically damaged.” Melrose contended that the Travel 100 Complaint alleged that Melrose had appropriated to its own use the fax paper and toner and used those items in such a manner as to make them unusable by their owners. Thus, Melrose claimed that the TCPA is “inherently a claim for property damage” because it sought to prevent the appropriation of paper and costs related to operating a fax machine.

The Court held that the key issue involved the nature of Melrose’s conduct. The policy covered property damage that is “caused by an event,” defined as “an accident.” Melrose argued that the language in the Travel 100 Complaint alleging that Melrose “should have known” that the faxes sent were unauthorized alleged unintentional conduct falling within the policy. Melrose also argued that while it intended to send faxes, it did not intend to send faxes to recipients who did not consent to receive those faxes, and also did not intend to violate the TCPA, and therefore its conduct was accidental.

The Court turned to the meaning of the phrase accident under Pennsylvania law.

Everyone knows what an accident is until the word comes up in court. Then it becomes a mysterious phenomenon, and, in order to resolve the enigma, witnesses are summoned, experts testify, lawyers argue, treatises are consulted and even when a conclave of 12 world-knowledgeable individuals agree as to whether a certain set of facts made out an accident, the question may not yet be settled, and it must be reheard in an appellate court.

Id. at *50-51 (quoting Breneman v. St. Paul Fire & Marine Ins. Co., 192 A.2d 745, 747 (Pa. 1963) as quoted in Resource Bankshares). Pennsylvania courts use a subjective standard to determine whether an insured intended an injury and must decide whether the insured “desired to cause the consequences of his act or acted knowing that such consequences were substantially certain to result.” Thus, it is not sufficient that the insured intends his actions; rather, for the

resulting injury to be excluded from coverage, the insured must have specifically intended to cause harm.

The Court then embarked upon a reasoned analysis of a string of Pennsylvania cases evaluating the concept of “accident” from the Pennsylvania Supreme Court’s decision in Gene’s Restaurant, Inc. v. Nationwide Ins. Co., 548 A.2d 246 (Pa. 1988), to the Pennsylvania Superior Court’s recent *en banc* decision in Donegal Mut. Ins. Co. v. Baumhammers, 893 A.2d 797 (Pa. Super. 2006). In Baumhammers, the Superior Court held that where the alleged negligence of an insured leads to an intentional act by another, the intentional act does not preclude a determination that the preceding negligence was an accident warranting coverage.

Guided by Pennsylvania law, the Court found that the allegations in the Travel 100 Complaint would not constitute an “accident.” The Complaint did not assert that Melrose accidentally sent faxes and it did not allege that it was Melrose’s negligence which made possible any intentional act harming the class members. The Complaint made it clear that Melrose, through its third-party vendor, intentionally sent faxes to class members who had not given prior express consent to receive those faxes. Melrose clearly intended to fax its advertisements to the class members. It paid the third-party vendor only for those faxes that reached their intended destination. The Court noted that Melrose’s argument was not that its negligent conduct led to an intentional act that violated the TCPA, but rather that it was ignorant that its own intentional acts violated the TCPA. According to the Court, ignorance is not synonymous with negligence, and Melrose’s lack of intent to violate the TCPA was irrelevant to whether it intended to cause the harm that befell the class members - - use of the recipients’ toner and paper. According to the Court, “Melrose knew that its actions would cause the very harm that the TCPA aims to prevent.” Id. at *64. Thus, the Court rejected Melrose’s focus on whether it intended to violate the law, and instead focused on the policy language and Pennsylvania law which focuses on whether the policyholder intended to cause the property damage that resulted. ♦

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the estate sued Erie for bad faith. According to one of the trial court’s conclusions of law, all evidence except the position of the occupants indicated that Breen was

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the driver, thus Erie did not act in bad faith by proceeding to arbitration. The trial judge initially granted summary judgment to Erie Insurance, but was reversed on appeal in an unpublished decision from the Superior Court. After a bench trial, the court held that Erie had acted in bad faith in treating its insured as an adversary, denying the claim without investigating beyond review of the inconclusive police report, in taking the position it could do nothing until the estate moved the case forward, in working with its attorney for the sole purpose of defending its interests at arbitration and in failing to keep its insured informed of progress. “Erie’s conduct was outrageous because of its reckless indifference to the rights of its insured.”

In reversing and granting judgment notwithstanding the verdict, Judge Hudock wrote a comprehensive opinion applying Pennsylvania law to the facts of this case. First, the Court discussed what types of conduct constitute bad faith and what types do not, quoting extensively from Brown v. Progressive Ins. Co., 860 A.2d 493 (Pa. Super. 2004), and noted the proof requirement: “a plaintiff must show by clear and convincing evidence that the insurer (1) did not have a reasonable basis for denying benefits under the policy and (2) knew or recklessly disregarded its lack of a reasonable basis in denying the claim.” Id. at ¶ 14 (citing Terletsky v. Prudential Prop. and Cas. Ins. Co., 649 A.2d 680, 688 (Pa. Super. 1999)). The Court also noted that UIM claims have aspects of both first-party and third-party claims, but the standard is same for all three—an insurer has a duty of good faith and fair dealing toward its insured. Id. at ¶ 17. The court further articulated the meaning of this standard:

It goes without saying that this duty does not allow an insurer to protect its own interests at the expense of its insured’s interests. Nor does it require an insurer to sacrifice its own interests by blindly paying each and every claim submitted by an insured in order to avoid a bad faith lawsuit.

. . . Erie was not obligated to pay the Estate’s claim on demand, no questions asked. While Erie could take a stand and protect its interests in the normal course of litigation, it could not withhold payment of the UIM claim absent a reasonable basis for doing so.

Id. at ¶¶ 17-18. The insurer must also reconsider its position if presented with additional evidence that calls into question its original decision. Id. at ¶ 19 (citations omitted).

Substantively, the Court stated that the trial court’s factual findings were not supported by the record and/or did not support a finding of bad faith. First, the communications prior to the insured actually submitting a UIM claim could not be considered because Erie did not have a duty to respond to notice of a *potential* claim and its responsive letter could not properly be characterized as a denial since there was no claim to deny. Therefore, the position set forth in the letter responding to the notice of potential claim could not be a denial lacking reasonable basis for want of investigation.

The Court further held that the extent of Erie’s investigation, or lack thereof, did not amount to bad faith because Erie was expecting the issue of who was driving the car to be decided in the litigations involving the surviving occupant, and when those proceedings terminated without a finding on that issue, Erie’s investigation was handled predominantly by the attorney Erie hired.¹ “Given the Estate’s demand for UIM arbitration and Attorney Murphy’s investigative efforts on Erie’s behalf, we cannot say as a matter of law that Erie acted in bad faith by not pursuing a thorough independent investigation.” Id. at ¶ 50.

The Court also commented on additional findings of fact made by the trial judge. One additional comment was that Erie’s counsel’s procrastination was not attributable to Erie. Another was that a statement made by one of Erie’s employees that was critical of the estate’s attorney “was unprofessional and regrettable, [but] it did not rise to the level of bad faith.” Finally, the Court noted that the trial judge

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¹ A third basis for the Court’s holding is unlikely to be used in the future due to a change in the law. The Court held that Erie’s lack of pursuing an investigation was not bad faith given that the UIM claim was not ripe under the policy until other coverage was exhausted and other coverage was still available for nearly two years. The Court noted that the change in the law regarding enforceability of such exhaustion clauses did not change until after the coverage litigation with the other occupant’s insurance carrier was over and thus Erie’s reliance on the exhaustion clause was permissible under the state of the law at the time of Erie’s conduct.

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“used an incorrect standard for bad faith in describing Erie’s conduct as ‘outrageous because of its reckless indifference to the rights of its insured’ and ‘reprehensible.’” Id. at ¶59. ♦

En Banc Superior Court Panel Raises UM/UIM Limits to be Equal to Liability Limits Where Insured Changed Liability Limits After Requesting Lower UM/UIM Limits

In Blood v. Old Guard Ins. Co., 894 A.2d 795 (Pa. Super. 2006), an *en banc* panel of the Superior Court held that a prior election of UM/UIM limits below liability limits was unenforceable after a change in bodily injury liability limits without a new election form as to UM/UIM limits, thus reforming the policy to make the UM/UIM limits equal to the liability limits. There, the insureds’ initial liability limits were \$500,000 and they chose UM/UIM limits of \$35,000 stacked. Later, they decreased their bodily injury liability limits to \$300,000, but did not check any boxes relative to the amount of limits for UM/UIM coverage. The majority opinion distinguished Smith v. Hartford Ins. Co., 849 A.2d 277 (Pa. Super. 2004) (holding previous waiver enforceable where insureds originally waived UM/UIM coverage in writing and later increased their liability coverage without executing a new waiver form), on the basis that the Smiths had originally waived UM/UIM coverage in total and the relevant statutes regarding rejection versus lower limits impose different requirements and serve different purposes:

The subsequent purchase of higher liability policy coverage does not act to obviate a previous rejection of UIM coverage. Smith, 849 A.2d at 280-81. However “when the liability limits change[,] a new request for lower limits must also be submitted or the statutorily mandated equal limits will apply.” Id. at 281 (citation omitted). The disparate treatment of an outright rejection of UIM coverage as compared to a selection of a lower level of UIM coverage is derived from the legislative intent in creating the two separate requirements. Id. The requirement of a written waiver was intended to serve the purpose of providing notice to the insured that UIM benefits were available. Lewis [v.

Erie Ins. Exchange], 568 Pa. at 123, 793 A.2d at 153-154. In contrast, the requirement of a written selection of specific UIM limits serves a different, more directed purpose. Id. This purpose is to avoid confusion and litigation by providing a presumption that in the absence of an explicit written election, the UIM coverage limit is equivalent to the liability coverage limit. Smith, 849 A.2d at 281.

Blood, 2006 PA Super 44 at ¶ 12.

Judge Orié Melvin dissented, finding that the prior election was enforceable and that the quoted material from Smith, relied upon by the majority, requiring a new request for lower limits to be submitted was merely dicta. Judge Orié Melvin further noted that the case relied upon by the Smith court in making that statement (Cebula v. Royal & Sun/Alliance Ins. Co., 158 F. Supp.2d 455 (M.D. Pa. 2001), was distinguishable because the insureds in that case had never signed a written request for lower limits. Id. at ¶ 5 of the dissenting opinion. Finally, Judge Orié Melvin stated that since the Bloods’ reduction of liability limits was a modification of an existing policy like the Smiths, a new election to reduce the UM/UIM limits should not be required. Id. at ¶ 6 of the dissenting opinion. ♦

ABOUT THE FIRM

Picadio Sneath Miller & Norton, P.C. is a well-known litigation law firm with its principal office in Pittsburgh, Pennsylvania. We appear in *The Bar Register for Preeminent Lawyers*, which lists only those law firms that have been designated as outstanding in their field. We also have maintained a firm rating of AV in Martindale-Hubbell for many years. The firm’s insurance coverage practice encompasses first-party and third-party insurance coverage and bad faith claims. In recent years, the firm has represented insurance companies in federal and state insurance coverage and bad faith litigation involving a wide variety of matters arising under numerous types of policies, including commercial general liability policies, directors and officers liability policies, property and casualty policies, professional errors and omissions policies, special manuscripted policies and life and disability insurance policies. The firm’s attorneys provide insurance coverage opinions on all types of insurance.

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For a more complete description of the firm, as well as representative matters and articles, please visit our website at www.pennsylvaniabusinesslitigation.com or www.psmn.com.

Lynette Norton, one of the founders of the firm, wrote **Insurance Coverage in Pennsylvania**, published by PBI in 1997 with a supplement in 1998. Since Ms. Norton's death, Anthony P. Picadio, Esq. and Bridget M. Gillespie, Esq. have edited and revised the book and the second edition, now titled **Norton on Insurance Coverage in Pennsylvania**, is due for publication in 2006.

For any questions on the topics addressed in this newsletter, please call Alan S. Miller at 412-288-4004 or Bridget M. Gillespie at 412-288-4017. ♦



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