

# Insurance Coverage Update Pennsylvania

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INSURANCE COVERAGE

BAD FAITH

CIVIL LITIGATION

COMMERCIAL LITIGATION

ENVIRONMENTAL  
LITIGATION

ENVIRONMENTAL  
PERMITTING

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## Coverage

### Coverage Barred for Criminal Act as a Matter of Public Policy

The Pennsylvania Supreme Court refined prior precedent precluding coverage for criminal acts by holding in Minnesota Fire & Cas. Co. v. Greenfield, 855 A.2d 854 (Pa. 2004) that recovery under a homeowner's policy was precluded for damages that arose out of an insured's criminal acts regarding a Schedule I substance, heroin, as a matter of overriding public policy.

Homeowner Greenfield sold heroin to A. Smith, who voluntarily injected herself in Greenfield's home. She died later that night. Greenfield was charged criminally for Smith's death, pleaded guilty and was sentenced on counts of involuntary manslaughter and unlawful delivery of heroin.

Greenfield's homeowner's policy defined "occurrence" as "an accident," including exposure to conditions resulting in "bodily injury." The policy also excluded coverage for bodily injury "expected or intended by the insured." A wrongful death action was filed by Smith's parents against Greenfield. The complaint alleged that Greenfield sold heroin to Smith and knew of the consequences. The complaint also alleged negligence on the part of Greenfield. The insurer filed a declaratory judgment action arguing that the allegations in the wrongful death complaint did not constitute an accidental event. The insurer also argued that it had no obligation to defend Greenfield on public policy grounds.

The trial court found that the insurer had a duty to defend under United Services Auto Ass'n v. Elitzky, 517 A.2d 982 (Pa. Super. 1986) (injury is "expected and intended" only when insured intends to cause the resultant damage) because the averments of negligence did not contain any allegation that Greenfield intended to cause Smith's death.

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## Bad Faith

### Statute of Limitations for Bad Faith Claims

A long-standing question under Pennsylvania's bad faith statute—the proper statute of limitations—has finally been answered by the Superior Court, but still awaits decision by the Supreme Court. In Ash v. Continental Ins. Co., 861 A.2d 979 (Pa. Super. 2004), the Superior Court held that a bad faith action is subject to the two-year statute of limitations. In so holding, the court found persuasive the reasoning in a number of trial court and federal court decisions that applied the two-year statute and quoted from the lower court opinion:

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Miller is listed in *Best Lawyers in America* for 2005-2006 in the field of Environmental Law, and has been designated a Pennsylvania Super Lawyer and one of the top 50 lawyers in Pittsburgh for 2005 by *Law & Politics*. Mr. Miller's insurance coverage practice has involved handling multi-million dollar coverage disputes arising out of pollution claims, construction defects, tobacco liability and intellectual property. Mr. Miller received his J.D. (*cum laude*) from George Washington University.



### **BRIDGET M. GILLESPIE**

Ms. Gillespie received her J.D. degree, *cum laude*, in 1993 from the University of Pittsburgh School of Law, where she was a Managing Editor of the Law Review. She

is a former Captain in the Army Judge Advocate General's Corps and served as a Special Assistant U.S. Attorney in the Northern District of New York. Her current practice is concentrated in representation of insurance carriers in insurance coverage and bad faith matters and representation of clients in commercial and tort litigation. She is licensed in Pennsylvania.

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#### **Coverage Barred for Criminal Act - Continued from Page 1**

The Superior Court reversed and found that coverage was precluded on two grounds: (1) intent to cause the harm was inferred from the act of selling heroin, expanding the inferred intent rule beyond its limited application to sexual molestation of minors, and (2) it found compelling public policy reasons to deny coverage.

The Supreme Court affirmed on public policy grounds, yet also rejected the extension of the inferred intent rule. The Court relied heavily on

criminal statutes making the possession, use or sale of heroin a policy violation infringing on public health, safety, morals and welfare to find that public policy would not allow recovery under an insurance policy where a willing participant in the criminal activity dies.

The Court's discussion of whether the wrongful death complaint even alleged an "occurrence" in the first place is as important as its public policy rationale. In his concurring opinion, Justice Castille wrote that he would have decided the case on the contract construction grounds that the deliberate conduct at issue did not constitute an "accidental occurrence" necessary to trigger coverage. The majority appears to have agreed, although it concluded that the insurance company's failure to preserve that issue for appeal prevented the Court from deciding the case on those grounds. However, the majority proceeded to note that the Court had previously held that an "occurrence" requires an accidental event. Greenfield pleaded guilty to the crime of involuntary manslaughter, defined as death caused "as a direct result of the doing of an unlawful act in a reckless or grossly negligent manner." According to the majority, by pleading guilty to that crime, Greenfield acknowledged that Smith's death was the direct result of his unlawful act, which would preclude finding an accident.

In sum, there appear to be at least four justices who would have found that Greenfield's plea of guilty to the crime of involuntary manslaughter precluded coverage on the grounds there was no accidental occurrence. In the past, the Supreme Court has not allowed artful pleading of criminal acts in negligence terminology to avoid the accident requirement.

The Supreme Court's Greenfield decision thus calls into serious doubt the validity of the Superior Court's earlier disturbing decision in Erie Ins. Exchange v. Muff, 851 A.2d 919 (Pa. Super. 2004), which held that an insurer must defend against negligence claims stemming from the death of an infant in the insured's care, even though the insured was convicted of first degree murder in that death. The court found dispositive that the jury also found the insured guilty of aggravated assault and endangering the welfare of a child, both of which include elements of negligent conduct. In so holding, the court said that the criminal convictions did not conclusively establish the babysitter's intent

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regarding the specific negligent acts alleged in the parents' complaint. The insured dropped the baby twice during the day and failed to seek medical assistance. The Superior Court based its decision on the fact that the plaintiffs focused on Muff's alleged negligence before and after her intentional conduct. This decision seems to have been result-oriented. The policy provided that the insurer would pay for "damages because of **personal injury** . . . resulting from an **occurrence**" and excluded coverage for "expected or intended injuries by the insured" and, thus, focused on the injuries for which damages are sought. While the parents' complaint may have focused on Muff's negligent conduct, as opposed to her intentional conduct, they sought to recover for their daughter's death—the very injury held to be caused by Muff's intentional conduct in the criminal case and acknowledged by the parents and the Court:

Based on a reading of these statements, we agree with Appellant that Mrs. Muff's criminal convictions provide "independent" evidence that at some point on December 1, 1998, she intentionally caused the death of Madison. However, the Bierlings concede this point, instead focusing their complaint on the events leading up to, and occurring after, Mrs. Muff inflicted intentional harm on Madison. Essentially, the Bierlings allege Mrs. Muff was negligent both before and after she intentionally caused the death of Madison, and that these errors or omissions in her care of Madison contributed to Madison's death.

This holding is even more incredible because no second actor was involved, such as where one actor intentionally causes harm and a second actor is sued for negligently allowing it to happen. Erie did not appeal the decision and thus courts and insurers will be forced to distinguish this holding when dealing with intentional harm in the future. In light of Greenfield, however, Muff's position that an accident for purposes of coverage can exist for a crime which requires a finding of intent is of questionable continuing validity.♦

### **When an Employee Acts Within the Scope of Employment**

Another case construing coverage under an insurance policy independently of a prior judicial action is Leggett v. National Union Fire Ins. Co., 844 A.2d 575 (Pa. Super. 2004), appeal granted, 859 A.2d 769 (Pa. 2004). In Leggett, the Superior Court

held that an employee was an insured under the employer's policy and entitled to coverage for an automobile accident that occurred on a weekend with his kids in the car despite the fact that a workers' compensation judge held that the employee was not acting within the scope of his employment at the time of the accident. (The employee died in the accident.) The Superior Court primarily rested its decision on the difference in language involved. The insurance policy made employees insureds "only while acting within their duties" as opposed to when acting within the scope of their employment. The accident occurred on the way home after the employee had gone to different sites looking for the company-owned cell phone he lost and after going to various sites with his sons, including shopping. The Court held:

It is true that normally one is not acting within the course and scope of his employment commuting to and from work. However, the situation is different when one makes a separate trip on a normal day off to perform the obligation of finding lost property. . . . The fact that Leggett and the boys did a Scout project before leaving or made two casual, unplanned stops after lunch does not change the basic nature of the trip to Reading, namely, to look for the lost company-owned cell phone. The trip was job-related so the property could be recovered and used on the next work day. We agree with Judge Farina that it is therefore within the "duties" of employment.

The Court so held even though shopping with his sons was the employee's last event before heading home. This case turned on the general nature of the term "duties." The Court also noted that the standard used in the workers' compensation proceeding differed from the standard used in construing policy language; thus, the prior worker's compensation decision did not have the effect of collateral estoppel. The Pennsylvania Supreme Court has accepted the appeal of this case; thus, we will have to wait to see if the Supreme Court construes "duties" as broadly.♦

### **Discovery of Reinsurance Allowed, Reserves Denied**

The Superior Court has made a significant ruling regarding discovery in insurance litigation. In Peco

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Energy Co. v. Ins. Co. of N. Am., 852 A.2d 1230 (Pa. Super. 2004), the insured sought coverage for environmental claims and other damages for breach of contract. The insured sought discovery with respect to reinsurance, reserves and non-party claims evidence to which the insurers objected. The trial court granted the insured's motion to compel discovery. The Superior Court affirmed in part and reversed in part. The Superior Court allowed discovery of reinsurance information, finding it was relevant to rebut the insurers' late notice defenses and noting that the confidentiality agreement the parties executed would protect the insurers with respect to the sensitive nature of the information. The Superior Court reversed the ruling regarding reserve information because the insured's stated reason for wanting the information is proscribed by the rules protecting work product from discovery. Id. at 1234-35. The Superior Court allowed discovery with respect to non-party claims to determine whether the insurers had provided coverage in the past for the type of claims asserted in the instant action and to disprove certain defenses, but held that the requests must not be unduly burdensome, should be limited to environmental claims, and confidential and sensitive matter regarding non-party insureds must be redacted from any files to be produced.♦

### **D&O Derivative Suits Exception**

The plain language of a directors and officers policy exclusion was applied in TIG Specialty Ins. Co. v. Koken, 855 A.2d 900 (Pa. Commw. 2004). In the underlying action, the Insurance Commissioner, acting as liquidator of an insolvent insurer, brought an action against the directors and officers of the insolvent insurer alleging breach of fiduciary duty, conspiracy, professional negligence and statutory voidable transfers. The insolvent insurer's parent company had purchased a D&O policy from TIG Specialty that also covered the directors and officers of its subsidiary companies, including the insolvent insurer. TIG sought a declaratory judgment that its policy did not cover the insolvent insurers' directors and officers in the action brought by the liquidator based on an exclusion which provided that the insurance did not apply to

I. *Any Claim brought by, on behalf of or at the behest of the Company, its successor, its assignee, its trustee in bankruptcy, its debtor-in-possession, or its*

litigation trustee. . . . However, this exclusion shall not apply to:

\* \* \* \*

2) derivative suits brought or maintained on behalf of the Company by one or more persons who are not Insureds and who bring and maintain the Claim without solicitation, assistance or active participation of the Company or any Insured. . . .

TIG argued that the liquidator was a successor to the insurance company. The Court applied the plain meaning of the word "successor" and the statute providing that the liquidator takes title to the property and causes of action of the insolvent company to hold that the liquidator is a successor; thus, the exclusion barred coverage. The exception to the exclusion was inapplicable because the liquidator, as successor, brought the action effectively with the assistance and participation of the company.♦

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### **Statute of Limitations for Bad Faith Claims - Continued from Page 1**

It is compelling that the legislature created the cause of action as a response to the Pennsylvania Supreme Court's refusal to do so by judicial action in (*D'Ambrosio*), *supra*. Moreover, the action permits the insured to recover punitive damages, which remedy is typically only available in tort actions. The majority of states which have addressed a cause of action for bad faith have treated the action as a tort. The Pennsylvania Supreme Court has noted *Gruenberg v. Aetna Insurance Co.*, 9 Cal.3d 566, 108 Cal. Rptr. 480, 510 P.2d 1032 (1973), to be the leading case on the creation of the "new tort" of bad faith. Also supporting the position that a bad faith action is a tort is the concept that a bad faith action is based upon a standard of conduct imposed by society, which is consistent with a tort claim.

A Petition for Allowance of Appeal to the Supreme Court has been filed, but not yet decided.♦

### **Does a Common Law Claim Continue to Exist for Bad Faith?**

A judge of the Court of Common Pleas of Allegheny County held that a common law action for bad faith continues to exist despite the enactment of 42 Pa. C.S. § 8371, and it sounds in contract. Allen v. Allen, 152 P.L.J. 221 (2004) (Strassburger, J.). Because a right to a jury trial exists for breach of contract, a policyholder has a right to trial by jury for this common law bad faith action as opposed to an action under the bad faith statute which does not afford a right to a jury trial. Id. at 222. Although this decision was appealed along with another opinion in the case, the Superior Court dismissed this appeal as moot based on its decision in the appeal of the other opinion. T.A. v. Allen, 868 A.2d 594 (Pa. Super. 2005), which held that grandchildren's garnishment and bad faith actions against grandfather's insurer failed because the Court had previously ruled that the insurer had no duty to defend or indemnify the grandfather for acts of sexual molestation and insurer owed no duty to grandchildren or grandfather and thus could not have acted in bad faith in refusing to settle. ♦

### **Identity of Issuing Insurer For Bad Faith**

In Brown v. Progressive Ins. Co., 860 A.2d 493 (Pa. Super. 2004), the Superior Court addressed the common question of the proper company to sue for bad faith when the policy identifies more than one insurer's name. The declarations page listed "Mountain Laurel" and its address in the upper left hand corner. Mountain Laurel was not specifically labeled as the "insurer" or the "company providing this insurance." In the upper right hand corner of the declarations page, in more prominent type, was the phrase "Progressive Companies," followed by the telephone numbers for "24-hour policy service," "24-hour claims service" and "billing increase." The front page of the "Pennsylvania Family Car Policy" contained the word "PROGRESSIVE" standing alone in large, bolded, italicized type at the top. Further down the page, in much smaller type, "Progressive Casualty Insurance Company" and "Mountain Laurel Assurance Company" were listed with no further elaboration. The application for insurance contained the words "Mountain Laurel Assurance Company," but the word "Progressive" was adjacent to Mountain Laurel's name in even more prominent type.

The issue arose before the Court in the context of a bad faith claim under 42 Pa. C.S.A. §8371, which can only be brought against an "insurer." Of course, each entity fit the definition of "insurer" under the Insurance Department Act, 40 P.S. §221.3. However, that did not answer the question of how courts should decide which of two related insurance companies is the "insurer" for purposes of the bad faith statute, a determination not previously made by Pennsylvania's courts.

The Superior Court held that the question is one of fact to be determined by a review of the policy documents themselves and by considering the actions of the company involved. Thus, a court should look at two factors: (1) the extent to which the company was identified as the insurer on the policy documents; and (2) the extent to which the company acted as an insurer. The court noted that the second factor was significantly more important than the first, "because it focuses on the true actions of the parties rather than the vagaries of corporate structure and ownership."

Under the first factor, the court found that the policy lacked any clear statement as to the identity of the insurer. Unlike the situation at issue in Lockhart v. Federal Ins. Co., 1998 U.S. Dist. LEXIS 4046 (E.D. Pa. March 30, 1998), in which the policy clearly identified Federal Insurance Company as the insurer and Chubb's name was nowhere mentioned in the substantive terms of the insurance contract, the Progressive name appeared on all of the documents setting forth the terms of the contract. Thus, review of the policy documents supported the trial court's determination that Progressive was a proper party of the bad faith action.

In evaluating the second factor, the court focused on the duty of an insurer to act in good faith, which "arises because the insurance company assumes a fiduciary status by virtue of the policy's provisions which give the insurer the right to handle claims and control settlement." The insurer undertakes three obligations with respect to a policy of automobile insurance that give rise to the expectations of good faith dealings: to indemnify against liability, to defend the insured in suits arising under the policy, and to handle claims and control settlement.

The court noted that Progressive handled the medical payments and lost wages claim, approved the third party settlement, waived its subrogation

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rights, and handled all aspects of the claim. Thus, the evidence overwhelmingly established that Progressive was the policyholder’s insurance company. According to the court, to hold otherwise “would create a situation where insurers are judged not on their actions, but on their corporate structures.” ♦

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



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