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Third Circuit Opinion Applies Sackett II to Single-Vehicle Policy

The Third Circuit predicted that the Pennsylvania Supreme Court would extend its *Sackett II* holding to single-vehicle policies. In *State Auto Prop. & Cas. Ins. Co. v. Pro Design, P.C.*, 2009 U.S. App. LEXIS 10195 (3d Cir. May 12, 2009), the insurer asked the court to declare the amount of UIM coverage owed where its insured had originally purchased a single-vehicle policy in 2001. At the time of original purchase, the insured signed a waiver of stacked UIM benefits. The business auto policy was renewed annually. During the June 2004-2005 policy period, a second vehicle was added to the policy and a third vehicle was added during the June 2005-2006 policy period. The accident at issue occurred during the June 2006-2007 policy period. The policies' after-acquired vehicle provision stated, in pertinent part:

> [I]f Symbol 7 is entered next to a coverage in Item Two of the Declarations, an "auto" you acquire will be a covered "auto" for that coverage only if: a. We already cover all "autos" you own for that coverage or it replaces an "auto" you previously owned that had that coverage; and b. You tell us within 30 days after you acquire it that you want us to cover it for that coverage."

Throughout the renewal periods, the insurer never provided another waiver of stacking form to the insured.

The district court held that a new waiver of stacking form was required when the new vehicles were added to the policy and granted summary judgment in favor of the insured. The Third Circuit reversed, holding that the Pennsylvania Supreme Court's decision in *Sackett v. Nationwide Mut. Ins. Co. (Sackett II)*, 940 A.2d 329, 331 (Pa. 2007), did not require a new waiver form. Although recognizing that *Sackett II* addressed the issue in the context of a policy that was originally a multi-vehicle policy, the Third Circuit predicted that the Pennsylvania Supreme Court would extend that holding to an originally-purchased single-vehicle policy. The court also noted that the Supreme Court, in dicta, stated its holding could be affected by the specific language of an after-acquired vehicle clause, but such policy language was not before the court in *Sackett II*. In making its prediction, the court relied on the Insurance Commissioner's position as reported in *Sackett II* and statutory construction.

> Section 1738(c) states that a named insured "purchasing uninsured or underinsured motorist coverage for more than one vehicle under a policy shall be provided the opportunity to waive" stacking. According to the Insurance Commissioner, as noted supra, the mere addition of a vehicle to an existing policy is not a purchase. Section 1738(c) thus did not require Appellant to provide

> Appellee with the opportunity to waive stacking upon the addition of the second and third vehicles to the policy; the waiver signed at the inception of the policy remained valid upon the addition of those vehicles and the subsequent renewals of the policy.

While this opinion is a victory for the insurance industry, whether it will be followed by Pennsylvania's state courts is another matter. The Third Circuit stated that its opinion was "consistent with the waiver executed by Appellee, in which he agreed that he was rejecting stacked UIM coverage in exchange for a lower premium," without addressing the fact that the insured had nothing to stack at the time that it signed that waiver. (Perhaps this is one reason the Pennsylvania Supreme Court was careful to state in *Sackett II* (which construed a policy that had multiple vehicles at the time of original purchase) that it was not deciding the issue in the context of single-vehicle policies.) The district court opinion recognized this anomaly and that the statute only applies to the purchase of UIM "coverage for more than one vehicle under a policy." Additionally, in *Sackett II,* the additional vehicle was added during the same policy period in which the accident took place. Here, on the other hand, the additional vehicles were added during earlier policy periods. The Third Circuit apparently presumed, without discussing, that "renewal" did not constitute a new purchase of coverage, even though *Sackett II* and the Insurance Commissioner only stated that addition of a vehicle to a policy did not constitute a new purchase of insurance during a policy period. Furthermore, *Sackett II* stated that "where coverage under an after-acquired-vehicle clause is expressly made finite by the terms of the policy, *Sackett I* controls and requires the execution of a new UM/UIM stacking waiver upon the expiration of the automatic coverage in order for the unstacked coverage option to continue in effect subsequent to such expiration." The provision at issue before the Third Circuit did not have an expiration, whereas the majority of after-acquired provisions limit coverage to a finite period or until the end of the policy period.

Pa. Superior Court Applies Kvaerner and the Gist of the Action Doctrine to Case of Active Malfunction and Harm to Property other than the Insured's Work

In a May 13, 2009 opinion in *Erie Ins. Exch. v. Abbott Furnace Co.*, 2009 Pa Super 88, the Pennsylvania Superior Court held that an insurer had no duty to defend or indemnify its insured against an allegation that an annealing furnace was defectively designed, "actively malfunctioned" and caused physical injury to property other than the annealing furnace itself. The insured, Abbott Furnace, contracted with Innovative Magnetics to design and construct an annealing furnace to complete the manufacture of metallic magnetic laminations. Innovative sued Abbott after the furnace failed, stating claims for breach of contract, breach of warranty and negligence alleging the cost of damaged laminations in addition to the cost of repairing and partially replacing the furnace. Of course, claims of faulty workmanship and damage to the insured's work do not constitute an "accident" under *Kvaerner Metals Div. of Kvaerner v. Commercial Union Ins. Co.*, 908 A.2d 888 (Pa. 2006). Abbott argued that Innovative's complaint also alleged negligence and damage to property other than the furnace. The court closely examined the allegations of the underlying complaint to determine whether a viable claim of negligence was stated. Under the "gist of the action" doctrine, the question is whether the gravamen of the action involves duties imposed by mutual consensus of the parties (contract) or arises out of duties imposed by law as a matter of social policy (negligence). The court held that the damage to the laminations resulted from Abbott's breach of it contractual obligations, and the tortious conduct was collateral. Since the underlying claim was limited to contract remedies, *Kvaerner* applied, i.e. there was not accident or "occurrence."

Asbestos Exclusion and Defense Obligation of Excess Insurer Addressed by Third Circuit

In construing an "asbestosis exclusion," the Third Circuit addressed several coverage issues in *Asten Johnson, Inc. v. Columbia Cas. Co.*, No. 07-2305 (3d Cir. April 2, 2009).

- In considering an exclusion for "any claim alleging an exposure to or the contracting of asbestosis or any liability resulting therefrom," it was proper for the district court to consider other aids to contract interpretation, including trade usage, to determine whether parties intended to exclude coverage for all claims deriving from exposure to Asten's asbestos-containing products. Although parol evidence cannot contradict the provisions of a contract, the text of the contract must be interpreted in light of any evidence of trade usage and the performance of the parties to determine whether contradiction would occur.
- Although the district court found that the term "asbestosis" was used to mean not only the medical disease, but all asbestos-related diseases, the Circuit held that the insured was entitled to a jury trial on that issue. As to a declaratory judgment claim based on a contract, "which would otherwise clearly be a legal claim entitling the plaintiff to a jury," that claim does not become an equitable claim when filed in anticipation of harm but before harm is suffered. Thus, the insured was entitled to have a jury resolve the conflicting evidence of custom and trade usage and the meaning of the term "asbestosis."
- Because the insured failed to establish any damages for claims it had paid due to insurer's alleged refusal to pay where other insurers had paid to defend and settle those claims, the insured's demand for jury trial for breach of contract was properly stricken.
- An excess insurer did not owe any obligation to defend under policy language in an excess policy that "The Company shall not . . . be called upon to assume charge of the settlement or defense of any claims made or suits brought, or proceedings instituted against the Insured, but shall have the right and opportunity to be associated with the Insured in the defense and trial of any such claims . . ." Other language incorporating the terms and conditions of an underlying policy that contained an obligation to defend did not impose such an obligation on the excess insurer because the excess policy stated that underlying language would be incorporated "except as otherwise provided in this policy . . ." including "the obligation to investigate and defend."

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. ♦