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Pennsylvania Supreme Court Permits Insurer To Offset Disability Benefits In Determining UM/UIM Benefits

In *Tannebaum v. Nationwide Ins. Co.*, 992 A.2d 859 (Pa. 2010), the Pennsylvania Supreme Court addressed whether Section 1722 of the Motor Vehicle Financial Responsibility Law ("MVFRL") allows an insured's recovery under uninsured ("UM") and/or underinsured motorist ("UIM") policies to be offset by group/program/arrangement benefits, including disability benefits.

The insured sustained permanently disabling injures as a result of a motor vehicle accident in December of 2000. He received income-loss benefits pursuant to a group plan provided by his employer and a substantial settlement in a civil action against the other driver and the driver's employer. The insured also sought income-loss benefits under the UIM provisions of his own vehicle policy issued by Nationwide Insurance Company ("Nationwide"). An arbitration panel awarded approximately $1.9 million to the insured, but also decided that Nationwide was entitled to an offset of approximately one million dollars in disability benefit payments received by the insured from his group plan and personal policies.

The Pennsylvania Supreme Court determined that the disability benefits fell within Section 1722's classification for group/program/arrangement benefits. Section 1722 provides that "a person who is eligible to receive benefits under . . . any program, group contract or other arrangement for payment of benefits . . . shall be precluded from recovering the amount of benefits paid or payable [thereunder]." The Court reasoned that once it is determined that the income-loss benefits received by the insured fall under the group/program/arrangement classification, those benefits are subject to the specified statutory offset. The Court held that an insured's recovery under UM/UIM policies may be offset by group/program/arrangement benefits, including disability benefits purchased in whole or in part, by the insured pursuant to Section 1722 of the MVFRL, as long as those benefits are not subject to subrogation.

Tortfeasor's Umbrella Policy Must Be Considered In Offsetting UIM Award

In *D'Adamo v. Erie Ins. Exchange*, 2010 Pa. Super. 77 (Pa. Super. 2010), the Pennsylvania Superior Court held that an insurer was entitled to a credit equal to the full liability coverage recovered from a tortfeasor, including the tortfeasor's umbrella policy.

While proceedings were still pending against the tortfeasor relating to an October 2002 car accident, the insureds made a claim for UIM coverage against Erie Insurance Exchange ("Erie"). An arbitration panel awarded the insureds gross awards of $850,000 each but further found that Erie was entitled to a setoff of $250,000 for coverage by the tortfeasor's primary automobile insurance policy and $500,000 from the tortfeasor's umbrella policy.

The Superior Court upheld the set off of the tortfeasor's excess liability limits. The Court reasoned that the driving force behind the enactment of the MVFRL and UIM coverage was to ensure that an injured party is made whole, not to allow an injured party to recover twice for the same injury and thereby realize a financial windfall. The Court further explained that:

> The MVFRL and the Erie policy both broadly define an underinsured motor vehicle as a motor vehicle for which the limits of all **available liability insurance** are insufficient to pay the injured parties' losses and damages. Contrary to Appellants' assertions, the tortfeasor's liability insurance for compensation included his personal umbrella policy limits and must be considered when defining the tortfeasor's "underinsured status." In other words, "available liability insurance" under both the MVFRL and Erie's policy provisions must take into account the tortfeasor's motor vehicle insurance and his personal umbrella policy limits, before the tortfeasor can be deemed underinsured.

No Duty To Defend Where Policy Uses Elective Language

In *Genaeya Corp. v. Harco Nat'l Ins. Co.*, 991 A.2d 342 (Pa. Super. 2010), the Pennsylvania Superior Court held that an insurer had no duty to defend where the policy contained language that the insurer "may elect to defend." Harco National Insurance Company ("Harco") issued a motor truck cargo liability policy which provided that Harco "may elect to defend you against suits arising from claims of owners of property." The insured filed a declaratory judgment action after Harco refused to defend or indemnify the insured. Since the duty to defend is contractual in nature, the Superior Court examined the plain language of the policy to determine an insurer's defense obligations. According to the Court, an insurer has no duty to defend unless the policy explicitly set forth such duty. The Court held that the language in Harco's policy was clear and unambiguous. The policy language created only a right on the part of Harco to defend and not a duty to defend. The Court also found that Harco owed no duty to indemnify.

Recovery By Third Party Who Sustains No Injury In Single Vehicle Accident Barred

In *Safe Auto Ins. Co. v. Berlin*, 991 A.2d 327 (Pa. Super. 2010), the Pennsylvania Superior Court held that a third party who failed to suffer any personal injury or property damage in a single-vehicle car accident cannot recover consequential damages under the driver's personal automobile policy. Following a single vehicle car accident, McKean Hose Company ("McKean") used certain emergency equipment in responding to the accident. McKean billed the cost of the equipment to the driver's insurer, Safe Auto Insurance Company ("Safe Auto"),

under the driver's policy. Safe Auto did not respond to the reimbursement requests but rather filed a declaratory judgment against the driver and McKean.

The Superior Court recognized that McKean was not a party to the contract between the driver and Safe Auto. As a result, McKean was not entitled to first party coverage under the Safe Auto policy but rather was limited to third party benefits to the extent that the use of equipment constituted "damages," "loss," or "property damage" incurred as consequential damages. The policy defined "damages" as "the cost of compensating those who suffer bodily injury or property damage from an auto accident." Thus, McKean needed to demonstrate it sustained personal injury or property damage in order to succeed on its claim for consequential damages under the Safe Auto policy. The Court concluded that McKean failed to suffer any property damage and, therefore, was not entitled to consequential damages under the Safe Auto personal automobile policy. The Court refused to construe the policy's definition of "property damage" to apply to ruination of property not involved in the accident.

Third Circuit Applies Kvaerner Holding No Accident From Faulty Work Where Damages Are Reasonably Foreseeable

In *Specialty Surfaces Int'l, Inc. v. Continental Casualty Co.*, 2010 U.S. App. LEXIS 11620 (3d Cir. June 8, 2010), the Third Circuit held that damages which are a reasonably foreseeable result of faulty workmanship are not covered under a commercial general liability policy even where the damage results to another contractor's work.

After being sued for breach of warranty and negligence, an insured filed an action against Continental Casualty Company ("Continental") seeking a declaration that Continental had a duty to defend and indemnify. The Court began by examining Pennsylvania law as set forth in *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.*, 908 A.2d 888 (Pa. 2006), *Miller Capital Ins. Co. v. Gambone Bros. Dev. Co.*, 941 A.2d 706 (Pa. Super. 2007) and *Nationwide Mutual Ins. Co. v. CPB Int'l*, Inc., 562 F.3d 591 (3d Cir. 2009). Based on these cases, the Court determined that a causal nexus must exist between the property damage and an "occurrence," i.e. a fortuitous event, in order for a claim to be triggered. Furthermore, the Court concluded that faulty workmanship as well as natural and foreseeable events such as rainfall, even when set forth as a negligence claim, fail to represent an event triggering coverage. Water damage to the subgrade of a field "is an entirely foreseeable, if not predictable, result of the failure to supply a 'suitable' impermeable liner or properly install the drainage system."

The Court also engaged in a lengthy discussion of choice of law principles in Pennsylvania, noting that courts look to Section 188(2) of the Restatement (Second) of Conflict of Laws rather than Section 193 when there is no principal place of insured risk. As a result, the Court evaluated which state had the greater contacts with the casualty insurance policy at issue and determined that Pennsylvania law applied.

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. ♦