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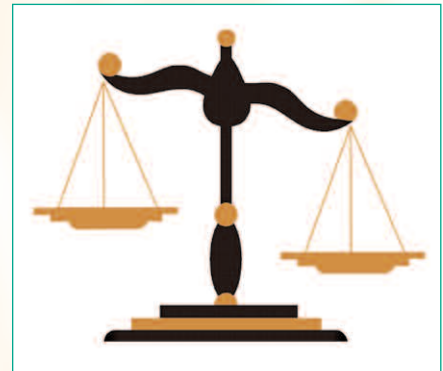
NOTABLE CASES AND VOICES FROM THE BENCH

PAYMENT OF FIRST PARTY BENEFITS DOES NOT PRECLUDE INSURER FROM DENYING UM/UIM BENEFITS

The Superior Court recently held that Insurance Companies are not barred from denying uninsured and underinsured motorist claims simply because they paid first party benefits to their insureds. Pantelis v. Erie Insurance Exchange, 2006 PA Super 1, (Pa.Super., 2006).

In this case, the insured was involved in two automobile accidents within three (3) months. The second of these accidents was caused by a stolen van that sideswiped her vehicle. The insured initially reported no injury and only minor property damage, but later filed a claim for first party benefits for treatment of a herniated disc. Erie Insurance paid the \$10,000 medical benefit limits. When the insured filed a UM claim based on the second accident, Erie Insurance denied coverage. The arbitration panel ruled in the Plaintiff's (insured) favor and awarded \$8,500. The insured then appealed the award, arguing that Erie Insurance was precluded from disputing her request for UM benefits.

Judge Lally-Green, writing for the 3-0 court, refused to alter the \$8,500 award. Judge Lally-Green made it clear that an "insurer's payment of first party benefits does not, without more, constitute a



binding admission of causation under either the statute or case law." Judge Lally-Green distinguished between first party benefits and UM benefits by explaining that first-party benefits under 1716 may be "triggered by something as simple as submission of a bill from a medical provider." Entitlement to UM/UIM benefits, however, is "based on the wrongful conduct of a third party." Therefore, as Erie Insurance did not admit causation when it paid their insured's first party benefits, they were not precluded from denying coverage. The insured is then free to challenge the denial of benefits.

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SUPREME COURT RULES NO MANDATORY BINDING ARBITRATION IN UM AND UIM DISPUTES

The Supreme Court of Pennsylvania recently ruled that the Insurance Department of Pennsylvania (“Department”) did not have the statutory authority to require all UM and UIM disputes be submitted to mandatory binding arbitration. Insurance Federation of Pennsylvania Inc. v. Koken, 898 A.2d 550 (Pa., 2005)

The action was brought as a petition for declaratory judgment by the Insurance Federation of Pennsylvania. After both the Insurance Commissioner and the Commonwealth Court held that the Department could disapprove automobile insurance policies which did not contain binding arbitration in UM and UIM matters, the Supreme Court granted allowance to answer two questions: (1) whether the Department had the statutory authority to require all UM and UIM disputes be submitted to mandatory binding arbitration and (2) whether imposing this type of arbitration violated the constitutional right to a jury trial. As the Supreme Court determined that the Department did not have the authority, the second issue was not addressed.

The 5-2 majority overruled a 1986 Commonwealth Court case upon which the courts had come to rely. Prudential Property and Casualty Insurance Co. v. Muir, 513 A.2d 1129 (Pa. Cmwlth. 1986). The majority opinion, written by Justice Michael Eakin, quickly determined that the General Assembly failed to grant the Department with express authority in either the UM Act or the Motor Vehicle Financial Responsibility Law (“MVFRL”) to require mandatory binding arbitration for UM and UIM disputes. Therefore, the remaining question was whether the Department had implied authority to force insurance contracts to contain an arbitration clause for UM and UIM claims.

The majority held that there was no implied legislative directive that allowed the Department to change the

normal course of judicial proceedings. The previously controlling case of *Muir* indicated that arbitration provided for the least expensive and quickest method to aid victims. Justice Eakin made it clear that the public policy which pushed through the MVFRL does not allow the Department to avoid the normal course of judicial proceedings just because arbitration is more cost effective and timely. The dissenting opinion, written by Justice Saylor, concluded that the public policy argument referenced above, along with the broad authority given to the Department under the governing statutes, was enough to uphold the Department’s regulation.

The majority concluded by stating that the Department’s regulation requiring mandatory binding arbitration in UM and UIM disputes exceeded its both express and implied legislative mandate. Authority can be given to an administrative agency, such as the Department, to make regulations which cover mere matters of detail for the application of a statute. The MVFRL and UM Act, however, contain no provisions requiring mandatory binding arbitration. In summation, Justice Eakin opined that the Department went above and beyond covering mere matters of detail when they enacted a regulation requiring mandatory binding arbitration in UM and UIM claims.

It is unclear what the impact of this decision will be. This decision may flood the courts with cases previously handled in the arbitration forum. Voluntary arbitration, however, is still a feasible alternative. The public policy arguments for arbitration referred to in the case are the same reasons it will continue to be used: less costly and less time-consuming.

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NJ WORKERS’ COMPENSATION INTOXICATION DEFENSE OVERRULED

The New Jersey Appellate Division recently affirmed a ruling that the statutory defense of intoxication pursuant to N.J.S.A. 34:15-7 does not apply where the employer is unable to prove that the intoxication is the sole and proximate cause of the injury. Tlumac v. High Bridge Stone, A-3635-04T2.

In *Tlumac*, the petitioner, Tlumac, was a truck driver who was injured when he fell asleep while driving and lost control of his truck at approximately four a.m. As there was evidence of petitioner’s intoxication at the time the accident occurred, the respondent employer attempted to deny compensability by relying on the statutory defense of intoxication pursuant to N.J.S.A. 34:15-7.

In order to defeat the claim, N.J.S.A. 34:15-7 requires an employer prove that the intoxication is the sole and proximate cause of the injury. The judge of compensation observed that the truck driver’s intoxication may have contributed to the accident, but that the truck driver’s fatigue, lack of sleep arising from his work schedule, and his activities at home may also have contributed. Therefore, the judge awarded compensation because the record supported the fact that petitioner’s intoxication was not the sole cause of the accident.

On appeal by the employer, the New Jersey Appellate Division affirmed the lower court’s decision.

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PA COMMONWEALTH COURT REAFFIRMS RULING THAT MCARE IS NOT RESPONSIBLE FOR “DROP DOWN” COVERAGE

The Pennsylvania Commonwealth Court, led by President Judge James Gardner Colins, recently held that MCARE is not responsible for providing “drop down” coverage in situations where the primary insurer has become insolvent. Gabroy v. Medical Professional Liability Catastrophe Loss Fund, 886 A.2d 716, (Pa.Cmwlt., 2005). In so holding, the Gabroy court reaffirmed the 2002 ruling in Elliot-Reese v. Medical Professional Liability Catastrophe Loss Fund, 574 Pa. 705, 833 A.2d 138 (Pa., 2003)

The Elliot-Reese holding relied heavily on the ruling in Storms v. O’Malley, 570 Pa. 688, 808 A.2d 573 (Pa. 2002). The Storms court came to their decision by analyzing the actual purpose of the MCARE fund (“The Fund”). The basic purpose of The Fund is to pay for claims that exceed the health care provider’s primary coverage. Accordingly, it should not be The Fund’s responsibility to “drop down” in order to satisfy a basic coverage obligation of the primary carrier, despite the primary carrier’s insolvency.

Also, in using the analysis provided by the decision, the Gabroy court held that the Property and Casualty Insurance Guaranty Association (“PPCIGA”) is not required to “pay up” to the insolvent insurer’s limits. Under the same reasoning, the purpose of the PPCIGA is to provide limited recovery after an insurer becomes insolvent, not to satisfy entire judgments entered against a now insolvent insurer.

It should be noted that Gabroy’s attorney, James McCarthy of McCarthy & McCarthy in Conshohocken, stated that he will be appealing the court’s ruling in this matter. Due to the potential impact of a reversal of this decision, we will continue to monitor this matter closely.

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LEGISLATIVE UPDATE

UPDATE ON JOINT AND SEVERAL LIABILITY

The Pennsylvania Senate recently passed Senate Bill No. 435, which addresses the issue of joint and several liability. Specifically, under the proposed statute, in situations where recovery is allowed against more than one person, including actions for strict liability, each Defendant will only be liable for that portion of the total dollar amount in the ratio of the amount of that Defendant’s liability.

However, this proposed apportionment is not without exceptions. Under SB 435, liability is one of several and not joint, EXCEPT in the following actions:

1. Intentional misrepresentation;
2. Intentional tort;
3. Where Defendant has been held liable for not less than 60% of the total liability apportioned to all parties;
4. An action under the Hazardous Sites Clean-up Act; and,
5. A civil action under the Liquor Code

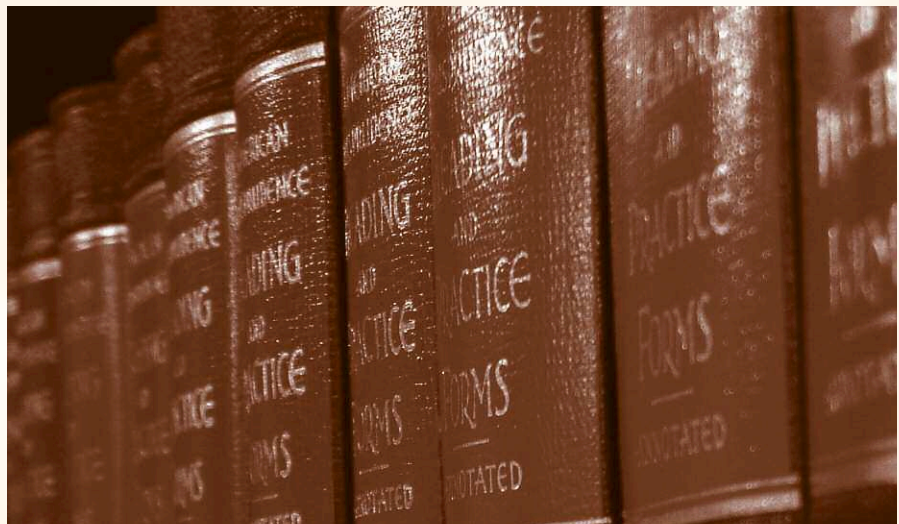
The Defendant’s liability in all of the above actions will be considered joint and several. The most important of these exceptions, or the one that will be most applied, is No. 3. In essence, where

there is more than one Defendant and liability has been apportioned against more than one Defendant, the Defendant will be considered joint and several if his portion of liability is equal to or greater than 60% of the total liability apportioned to all of the parties. If a Defendant’s liability is less than 60% of the total liability apportioned to all parties, then he will be considered several and would only be responsible for that proportion of the total dollar amount awarded as damages in a ratio of the amount of that Defendant’s liability to the amount of liability attributed to all Defendant’s and other persons.

If passed, this proposed bill will have a significant impact on future litigation. The next step for this proposal is the Pennsylvania House of Representatives. The House of Representatives is expected to pass a similar bill, and hopefully, a joint bill will be up for vote before the end of 2006.

As a side note, a similar bill was passed by the General Assembly in 2002. That bill was called the Fair Share Act; however, the Pennsylvania Commonwealth Court declared this Act unconstitutional on technical grounds.

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OFF THE RECORD

RISING STARS

We would like to Congratulate Shareholders, John P. Shea and Ernest (Ernie) F. Koschineg and Senior Associate, Jeffrey W. McDonnell for being selected as Pennsylvania Super Lawyers - Rising Stars. This achievement is a peer-selected honor and is awarded to those attorneys who are 40 years old or younger, or less than 10 years in practice. The honor recognizes one's achievement in their respective practice areas and also is a recognition by peers as being among the top up-and-coming attorneys. John, Ernie and Jeff join John F. Kent who was named a Pennsylvania Super Lawyer earlier in 2005.

John is a 1992 graduate from Villanova University School of Law and has been with Kent & McBride since 1994. John concentrates his practice in Professional Malpractice and Commercial Litigation.

Ernie is a 1998 graduate of Widener University Law School. Ernie concentrates his practice in Construction and Commercial Litigation.

Jeff is a 1993 graduate of Widener University Law School. Jeff's primary practice is in Professional Malpractice Litigation.

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