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NOTABLE CASES AND VOICES FROM THE BENCH

SUPREME COURT OF PENNSYLVANIA HOLDS THAT INSURERS ARE REQUIRED TO PROVIDE FIRST NAMED INSURED AN OPPORTUNITY TO WAIVE STACKING OF UM/UIM COVERAGE EACH TIME A NEW VEHICLE IS ADDED TO THE POLICY

In reversing the Superior Court ruling, the Pennsylvania Supreme Court held that each time a new vehicle is added to an auto policy, the insured must be given the opportunity to decide on the stacking waiver anew. Sackett v. Nationwide Mutual Insurance Company, 919 A.2d 194 (Pa. 2007).

In this case, Mr. Sackett initially insured two vehicles under a policy issued by Nationwide. He had waived stacking of his uninsured/underinsured ("UM/UIM") coverage at the outset of the policy. At some point in time the insured added a third vehicle to the policy, but Nationwide never provided him with a new waiver form relative to the stacking of UM/UIM coverage. The insured was subsequently injured in a motor vehicle accident when he was struck by an underinsured motorist. He then filed a claim for UIM coverage asserting stacked benefits for all three vehicles under the policy. After the claim was denied, the insured filed a Declaratory Judgment action.

Both the trial court and Superior Court held that a waiver of stacked UM/UIM coverage, once properly executed, is binding even when the insured adds new vehicles to the policy. Therefore, no new waiver is required every time a vehicle is added to a policy. Plaintiff appealed the ruling and the Supreme Court of Pennsylvania granted a Petition for Allowance of Appeal limited solely to this issue.

In the Supreme Court's Opinion, the Honorable Justice Baldwin, writing for the 4-2 majority, stated that had the legislature intended to require a stacking waiver only at the inception of a policy, they could have easily done so within Section 1738 of the Motor Vehicle Financial Responsibility Law ("MVFRL"). Therefore, that section can only be read to mandate that when a new car is added to an existing policy and UM/UIM coverage is purchased, an insurer must provide new stacking waivers. The majority briefly addressed the cost containment issue by stating that this policy objective can only be looked at when the words of the statute are not explicit. Here, where Section 1738 is clear, this policy objective is not an issue.

In writing for the dissent, Justice Castille, who was joined by Justice Eakin, argued that there is nothing in the MVFRL which requires a new waiver form be completed each time a vehicle is added to the policy. They opined that the majority opinion will result in persons, such as Mr. Sackett, receiving UM/UIM benefits for which they did not pay. The dissent further speculated that this decision would violate the intent of Act 6's amendments to the MVFRL relative to cost containment by increasing the costs to administer and provide such coverage.

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SETOFFS IN AUTO INSURANCE POLICIES AFFECTING UIM COVERAGE DO NOT OFFEND PENNSYLVANIA PUBLIC POLICY

In a recent decision, the Pennsylvania State Supreme Court held that in an auto insurance policy, the inclusion of a setoff provision affecting its underinsured motorist coverage does not necessarily offend Pennsylvania public policy. Pennsylvania National Mutual Casualty Co. v. Black, 916 A.2d 569 (Pa. 2007). The Black Court reasoned that concluding the opposite would result in higher premiums.

In *Black*, Eric Black was involved in a motor vehicle accident in May of 1999. At the time of the accident, Eric was a front-seat passenger in a vehicle owned by Diane Myers, but being operated by her son, John Myers. While traveling along Route 233 in Franklin County, the Myers vehicle was involved in a collision with another vehicle being driven by Todd Jamison. Neither Eric nor John Myers survived the accident. Eric's parents, Ellen and Randy Black, filed wrongful death and survival claims against Todd Jamison and the Myers estate. Todd Jamison's insurance carrier tendered its liability limits of \$15,000 to the Blacks. The Blacks also recovered the \$60,000 coverage limits under their own auto insurance policy's UIM provision.

In September of 1999, the Myers' family carrier, Penn National, indicated that it was prepared to pay the Blacks \$100,000 to satisfy the bodily injury liability limit on the policy. However, the Blacks believed they were entitled to the \$100,000 under the bodily injury liability as well as \$100,000 under the policy's UIM provision. The Myers' Penn National Policy, however, expressly prohibits "duplicate" payments under its UIM Coverage if a claim had also been filed seeking remuneration under its bodily injury liability provision. The Penn National policy also included a setoff provision that specifically contemplated attempts to recover under both its general liability and UIM Coverages.

In December of 2003, the Adams County Court of Common Pleas granted Penn

National's Declaratory Judgment Complaint and concluded that Penn National's policy expressly provided that no one is entitled to receive duplicate payments. The Court believed that the policy unequivocally provided that underinsured motorist coverage would not be available in instances where the claimant also pursues liability coverage under the policy.

In early 2005, the Superior Court overturned the Court of Common Pleas' ruling and held that the Penn National policy's setoff provision violated the public policy underlying the Pennsylvania Motor Vehicle Financial Responsibility Law ("MVFRL"). 75. Pa.C.S.A. § 1701, et seq. The Superior Court panel, when rendering this decision, relied on the Third US Circuit Court of Appeals 2001 decision in Nationwide Mutual Insurance Company v. Cosenza, in which an auto insurance policy's dual recovery provision was deemed void as against public policy. Nationwide Mutual Insurance Company v. Cosenza, 258 F.3d 197 (3d Cir. 2001).

When reviewing the decision of the Superior Court on appeal, the Pennsylvania Supreme Court majority in *Black* stated that the Superior Court failed to specify what public policy or what section of the MVFRL the setoff provision violated. The Supreme Court stated that "[a]lthough we will not speak to the merit of the decision in *Cosenza*, we note that the setoff provision at issue is readily distinguishable from the dual recovery prohibition in that case. Under the dual recovery prohibition, insureds cannot recover anything under the underinsured motorist coverage if they have received even \$1.00 under the liability provision, despite paying underinsured motorist coverage. In contrast, the setoff provision allows for some recovery under the underinsured motorist coverage in addition to the liability provision." The Majority went on to state that if the Myers had desired \$200,000 of total coverage, they could have purchased

that amount of bodily injury liability coverage and the commensurate amount of UIM coverage for a higher premium. The Court elected to enforce the setoff provision as written consistently with the policy of the MVFRL to allow individuals to balance the benefits of added coverage against the resulting increase in premiums.

In its dissent, the Pennsylvania Supreme Court argued that enforcing the Penn National policy's setoff provision would frustrate the General Assembly's clear goal of insuring that Pennsylvania's insureds enjoy maximum UIM coverage. The Dissent explained that "...permitting the use of such setoff clauses eliminates the UIM insurance the Generally Assembly gave the Myers [family] the right to buy for their passengers; it precludes the Blacks from recovering for the negligence of Jamison, the second and underinsured driver; it prevents UIM coverage from having its desired statutory effect of compensating the Blacks as fully as possible; and it affords the Blacks with less UIM coverage the MVFRL intends them to have." As such, the Dissent was under the belief that the setoff provision violated Pennsylvania public policy and should not be enforced.

Despite the Dissents' arguments, the majority remained convinced that the inclusion in an auto insurance policy of a setoff provision affecting its underinsured motorist coverage does not necessarily offend Pennsylvania public policy.

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PENNSYLVANIA COURT ORDERS NEW TRIAL TO APPORTION LIABILITY AMONG SETTling DEFENDANTS

The Honorable Frederica A. Massiah-Jackson recently granted a Motion for New Trial based on mistakes of law made by the trial court, particularly the Court's failure to include settling Defendants' names on the verdict sheet. Glass v. Continuing Care Nursing and Rehabilitation Center, et al., PICS No. 07-0077(11).

This case involves a medical malpractice action brought by Rosyln Glass, the Administratrix of the Estate of her aunt, Imogene Stockton. Ms. Stockton died in February 2003 following anoxic brain injury caused when she dislodged her tracheotomy tube. Ms. Stockton pulled the tube out while she was a patient at a nursing facility in Philadelphia. Most of the named Defendants, including the nursing home, nurses and respiratory therapists, settled their portion of the claim in April of 2006. The trial proceeded solely against Dr. Divaker. The jury returned a verdict against Dr. Divaker.

Dr. Divaker moved for a new trial based on mistakes of law by the Court. Specifically, Dr. Divaker took issue with the Court's failure to place the settling Defendants' names on the verdict sheet, arguing that the jury should have been permitted to decide if certain other Defendants contributed to Ms. Stockton's injuries. Throughout the trial, Dr. Divaker presented three defenses: 1) he provided appropriate care to Ms. Stockton; 2) the nursing staff and respiratory therapists did not comply with standard protocol; and 3) the occurrence was "harmless error" because Ms. Stockton's illness left her with a limited lifespan. Dr. Divaker presented expert testimony to support some of those defenses and cross-examined Plaintiff's expert witness to bolster his defense that the nursing staff and respiratory therapists were negligent.

The Superior Court in Herbert v. Parkview Hospital, 854 A.2d 1285 (Pa.

Super. 2004) articulated the standard for determining whether settling Defendants should be listed on the jury verdict sheet in a medical malpractice case. The Herbert Court held that "under certain circumstances, a profound lack of evidence regarding settling defendant may preclude the inclusion of those defendants on the jury verdict sheet." Judge Massiah-Jackson recognized the heavy burden articulated in the Herbert decision and reasoned that given the evidence and testimony presented by Dr. Divaker, the record below did not demonstrate a "profound lack of evidence" against the settling Defendants. Thus, the motion for new trial was granted so that a jury may apportion liability among the settling Defendants.

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LEGISLATIVE UPDATE

NEW NJ WORKERS' COMPENSATION LEGISLATION

The New Jersey Legislature has recently approved amendments to New Jersey Workers' Compensation Statutes. First, N.J.S.A. 37:1-28 et seq., permits same-sex couples to enter into legally sanctioned civil unions. While the law does not specifically amend the language of the Workers' Compensation Act, this statute does state that civil union couples must be provided the same benefits as married couples with respect to workers' compensation benefits "including but not limited to survivors' benefits and payment of back wages." As required by this provision, dependency issues under N.J.S.A. 34:15-13, and any other workers' compensation statutory or regulatory section that makes reference to marriage or

spouses, would be read to include legally sanctioned civil unions and individuals in civil unions. A civil union would be evidenced by a civil union license.

Additionally, N.J.S.A. 34:15-28 was amended to allow, at the discretion of the workers' compensation judge, interest on awards that have not been paid within 60 days. The law previously provided for a three (3) month period before interest could be assessed.

Finally, N.J.S.A. 34:15-40 was amended to allow, from the amount reimbursed to an employer, a reduction of up to \$750.00 for a petitioner's expenses where a petitioner has recovered monies in a third party action in matters related to the workers' compensation injuries. The law previously limited the reduction to \$200.00.

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RECENT VERDICTS

DEFENSE VERDICT IN FOOD POISONING CASE

Theresa Mullaney, Esquire, of the law offices of Kent & McBride, P.C., recently obtained a defense verdict on behalf of a food market in a breach of warranty action.

Plaintiffs alleged that they were injured as a result of the purchase and consumption of a package of meat purchased from a leading natural and organic food market. Plaintiffs claimed that after cooking and eating the meat, they became ill and sought medical treatment. In their initial Complaint, Plaintiffs alleged that the Defendants were negligent and breached expressed and implied warranties.

Ms. Mullaney filed Motions for Summary Judgment in this matter seeking dismissal of various counts of Plaintiffs' Complaint. The Court granted some of the motions, dismissing

Plaintiffs' claims for negligence and breach of implied warranty of fitness for a particular purpose. The only remaining cause of action at the time of trial was the breach of implied warranty of merchantability.

Plaintiffs alleged that the Defendants sold meat that was contaminated and not fit for consumption. The Defense argued that Plaintiffs failed to produce any evidence establishing that they purchased the alleged meat from Defendants and that the meat was unfit at the time that it left Defendants' possession. The Defense further argued that both Plaintiffs were diagnosed with Gastroenteritis and that none of Plaintiffs' treating physicians ever diagnosed Plaintiffs with food poisoning. After less than an hour of deliberations, the jury returned a verdict for the Defendants. Plaintiffs' Post Trial Motions are pending in this matter.

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OFF THE RECORD

JACK RIBBLE SERVES ON FACULTY OF CLE

Kent & McBride Partner Jack T. Ribble, Jr. recently served on the faculty of a PBI sponsored CLE presentation "Tough Problems in Workers' Compensation 2007." The conference was held in Philadelphia on March 27, 2007. Through his presentation, Jack addressed the interaction between

workers' compensation and end of employment issues, including retirement and pension offsets. Jack works primarily out of K&M's Philadelphia office, where he directs the firm's Workers' Compensation Practice Group representing employers and insurers.



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