Monday, December 31, 2007

A Year in the Life

Insurance issues and judicial elections dominated 2007

By Daniel E. Cummins
Special to the Law Weekly

As another year of civil litigation winds down to a close, a review of the decisions handed down by the various Pennsylvania courts in 2007 in this arena reveals that while some ongoing issues have been clarified, others remain in a state of flux, particularly in the UM/UIM context.

The End of Bad Faith Letters?

Two cases handed down this year may signal the end of the routine bad faith letter typically sent out in automobile cases in the third party, UM, and UIM contexts.

In the bad faith litigation of *Zappile v. Amex*, 928 A.2d 251 (Pa. Super. 2007), the Superior Court rejected many of the allegations bad faith conduct routinely asserted by claimants in UM/UIM cases. The court noted that it was not bad faith for the UIM carrier to refuse to issue partial payments to the claimant on undisputed parts of the claim, to investigate the facts of a subsequent accident sustained by the claimant, or to increase its settlement offers where the claimant refused to officially negotiate off of his repeated policy limits demands. The *Zappile* court also noted that delays in moving the case to arbitration were also not per se acts of bad faith, particularly where some of the delays were attributable to the claimant

In another case that may affect the practice of sending out bad faith letters, the state Supreme Court handed down a decision on Oct. 11 in which it held that a claim under the bad faith insurance statute was subject to a two year statute of limitations. *Ash v. Continental Insurance Co.*, 932 A.2d 877 (Pa. 2007). Questions may now arise as to when the statute would begin to run. As such, one ripple effect of this decision may be that plaintiff's counsel may be less likely now to routinely issue obligatory "bad faith" letters as such letters may start the statute of limitations running under the discovery rule and thereby give rise to a later statute of limitations defense.

More UM/UIM

The four year statute of limitations for UIM claims was also reaffirmed this year. In *State Farm Mutual Automobile Insurance Co. v. Rosenthal*, 484 F.3d 251 (3rd Cir. April 20, 2007), the 3rd U.S. Circuit Court of Appeals, predicting how the state Supreme Court might rule, clarified that the four year statute of limitations on a UIM case should not be deemed to begin to run until after the insured settles with, or obtains an award from, the tortfeasor.

Otherwise, in 2007, the UM/UIM arena has been dominated by the Sackett, Schneider, and Koken cases.

In its original April 17 opinion, the state Supreme Court in *Sackett v. Nationwide*, 919 A.2d 194 (Pa. 2007) held that an insurer should have provided its insured an opportunity to waive stacked UM/UIM limits when the insured added a vehicle to policy and, by failing to do so, the insured was thereby entitled to stacked limits.

Yet in a recent order handed down on Oct. 16, 2007, which can be found at ___ A.2d ___, 2007 WL 3005656, the *Sackett* court surprisingly agreed to reconsider its original decision. According to the Order, the issues presented will be re-decided based upon the existing briefs, the re-argument pleadings, and a response to be filed on behalf of *Sackett*. It also anticipated that, because the justices who originally decided

the case may have to be on the bench to decide a re-argument, the high court's decision may come down before the end of the year, i.e. before three seats change on the bench.

In the case of *Nationwide Insurance Co. v. Schneider*, 906 A.2d 586 (Pa. Super. 2006) allocatur granted 916 A.2d 529 (Pa. Feb. 5, 2007), an en banc Superior Court ruled that a claimant who failed to exhaust a primary level of UIM coverage was not barred from thereafter recovering from a secondary UIM policy, but rather, needed to only provide a credit to the secondary carrier in the amount of the policy limits for the first level of coverage.

The Supreme Court in *Schneider* granted allocatur limited to two questions: (1) whether the Superior Court properly applied the exhaustion rule of UIM litigation to the primary UIM – excess UIM context, and (2) whether the Superior Court properly applied the consent to settle rule of UIM litigation in the less-than-policy-limits-settlement context.

In terms of the 2005 Supreme Court decision in *Insurance Federation of Pennsylvania, Inc. v. Commonwealth of Pennsylvania, Dept. of Insurance (Koken)*, 889 A.2d 550 (Pa. 2005), in which the Court held that the Department of Insurance could not mandate that insurance policies contain UM/UIM arbitration clauses, Pennsylvania courts, litigators, insurance companies, and claimants continue to await the fallout. Over the past year, various insurance companies rolled out and put into effect new policies of insurance that eliminate or curtail the right of claimants to pursue an arbitration on UM/UIM claims and instead require the claimants to proceed to and flood the courts of common pleas with new lawsuits seeking UM/UIM recoveries. Currently, the first few claims arising under the new policies are beginning to come to light. Most likely, in the year 2008 and beyond, a myriad of issues will have to be raised, litigated, decided, appealed, and decided again before the dust settles on this whole new area of practice.

Limited Tort

In the case of *Newell v. Gibson*, (C.P. Fayette Feb. 20, 2007) PICS Case No. 07-0520, the court confronted the rarely addressed issue of how to evaluate a claim for permanent serious disfigurement. In Newell, the court granted summary judgment on limited tort issue with respect to physical injuries. However, summary judgment was denied on the plaintiff's scarring/disfigurement claim where the plaintiff had a facial laceration requiring 15 stitches. The court held that the standard for determining the existence of a permanent serious disfigurement was that, in order to be serious, the disfigurement had to be more than a trifling mark discernable only upon close inspection.

Subrogation

In the case of *Tannenbaum v. Nationwide*, 919 A.2d 267 (Pa. Super. 2007) allocatur granted ___ A.2d ___, 2007 WL 3015612 (Pa. 2007), the Superior Court held that benefits from a disability policy paid for by the Claimant do not duplicate benefits payable under UIM policy and, therefore, such benefits may be recovered at the arbitration. This decision of the court may have implications on whether a claimant may recover such benefits at arbitration in order that they may be paid back to a disability carrier on that carrier's subrogation claim.

On Oct. 17, the state Supreme Court granted allocatur in *Tannenbaum* limited to the two following issues: (1) whether the Superior Court ignored the mandates of the Legislature in judicially repealing Section 1722 of the MVFRL, thereby reinstituting double recovery and the collateral source rule in the system of automobile accident litigation in Pennsylvania? and (2) whether the Superior Court departed from judicial precedent and ignore prior decisions by this Supreme Court by allowing a claimant to recover the same damages twice under the MVFRL?

With respect to subrogation against recoveries realized on behalf of minor plaintiffs, in the case of *Bowmaster ex rel. v. Clair*, 933 A.2d 86 (Pa. Super. Aug. 15, 2007), the Superior Court rejected the argument by the Department of Public Welfare (DPW) that, since the minor was the beneficiary of a settlement, the minor was required under the provision of the Fraud and Abuse Act to reimburse the DPW the amount of medical benefits paid out by DPW.

In denying DPW the right to seek a reimbursement, the court rationalized that the medical expenses incurred during the minor's treatment were the responsibility of the parent and not the child. Thus, the true beneficiaries of the DPW payments sought to be recovered by the department were the parents and not the minor. The court went on to additionally note that a parent's claim arising from an injury to a child was not a derivative claim. Therefore, since the minor essentially could not recover medical expenses herself during the time of her minority under the above rationale, neither the minor nor the parents were required to reimburse the DPW for payments received.

Note, however, that on Sept. 8, 2007, the DPW issued a statement of policy which included Section 259.2(b)(1) [see 55 Pa.Code 259]. This section, in direct contravention of the Superior Court's decision in Bowmaster still requires that at least a portion of DPW benefits paid out for treatment of a minor be paid back. It remains to be seen how this code provision will be litigated and addressed by the courts.

Service of Process

In 2007, the Superior Court in *Englert v. Fazio Mechanical Services*, 932 A.2d 122 (Pa. Super. 2007) also reaffirmed the *Lamp v. Heyman* standard for reviewing efforts to complete service of original process upon a defendant. That is, a plaintiff must initiate good faith efforts and avoid any conduct that "serves to stall in its tracks the legal machinery he has just set in motion" when completing service.

In Englert, the plaintiff's action was properly dismissed as untimely where, although the sheriff's return indicated that the defendant had moved and provided a new address, the plaintiff's attorney neglected to reissue the writ and attempt service until after the statute had expired.

Under this case it was also reiterated that simple neglect and mistake in failing to meet the requirements for service may be sufficient to implicate the rule in Lamp. Thus, even unintentional conduct that works to delay the defendant's notice of the action may be found to be a lack of good faith on the part of the plaintiff.

Coverage

Federal and state courts in Pennsylvania also handed down a few decisions this past year that served to clarify the definition of a "resident relative" commonly found in insurance policies.

In the case of *Nationwide v. Kuentzler*, slip copy, 2007 WL 1726512 (M.D. Pa. June 14, 2007), the court held that in determining whether an emancipated son was "regularly living with" his named insured parents at the time of an accident so as to qualify as a "relative" under the named insured's policies, the most significant factor was the claimant's physical presence in the parent's household.

In *Hugendubler v. State Farm*, slip copy, 2007 WL 2043045 (E.D. Pa. July 12, 2007), the court found that the claimant was not a resident relative under her brother and sister-in-law's policy even though the claimant lived in the same building. In that case, the court noted that the building was separated into apartments and that the claimant lived in an apartment separate from her brother and sister-in-law. It was also noted that, although there was a door connecting the apartments, each apartment had its own mailbox, phone service, and utilities. The court held that the claimant could not benefit from her brother and sister-in-law's State Farm policies because she did not live in their household.

Shortly after the *Kuentler* and *Hugendubler* decisions were handed down in the Federal courts, the Pennsylvania Superior court issued its opinion in a residency case involving a fatally injured child of parents who were separated but had joint custody. In *Erie Insurance Exchange v. Weryha*, 931 A.2d 739 (Pa. Super. 2007), the child was living with his mother at the time of the accident and the separated father lived some 60 miles away.

The *Weryha* court noted that whether a child living under a joint custody order can be deemed a resident of both parents' households as a matter of law is "unsettled in this Commonwealth," but, relying in part on the child's lack of sustained physical presence at the father's home, found that the trial court's conclusion that the child was not living with his father prior to his death was strongly supported by the evidence.

Expert Discovery

Over this past year, the rift between how expert discovery is handled in the Federal courts versus the state courts widened. For example, although Fed.R.C.P. 26 requires the voluntary disclosure of present and past compensation a party may have paid a trial expert, no such companion rule exists under the Pennsylvania rules of Civil Procedure.

Additionally, the Superior Court held in the case of *Feldman v. Ide*, 915 A.2d 1208 (Pa. Super. 2007), PICS Case No. 07-0048, that parties in personal injury cases are not entitled to financial background information on opposing experts unless the party first makes a threshold showing that expert is a professional witness or might slant his or her testimony in light of substantial financial incentives. Where that showing is made, discovery in this regard may only be allowed dating three years back.

In another rift, although the Pennsylvania state courts have generally prohibited parties from calling opposing experts as their own witnesses unless the expert witness agrees to so testify, the Eastern District federal court in *Penn National Insurance Co. v. Traveler's Property and Casualty Insurance Co. of America*, ___ F.Supp.3d ___ (E.D. Pa. 2007), PICS Case No. 07-1420, held that under the Federal Rules of Civil Procedure, where one party designates an expert and produces that expert's report, the other party may indeed call that expert as a witness at trial over the objection of the party who retained the expert.

Judicial Elections

The recently completed 2007 judicial elections represented the public's outright rejection of calls by advocacy groups for a widespread "no" vote for all judges up for retention as a continuing consequence of the pay raise debacle. Election results show that only one judge from Bradford County was denied retention by the voters and that rejection did not appear to be in any way related to the pay raise issue. Also, as this year comes to a close two newly elected Justices will take seats on the Supreme Court, Seamus P. McCaffery and Debra Todd, both of whom are experienced, former Superior Court Judges. Additionally, Gov. Edward G. Rendell faces the political task of filling the seat vacated by former Chief Justice Ralph J. Cappy. Until then, the Supreme Court will continue to function with six justices under its new chief justice, Ronald D. Castille. How this new court will address upcoming civil litigation issues remains to be seen. •