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CONNECTICUT AUTOMOBILE INSURANCE LAW UPDATE

Recent Decisions Interpreting Underinsured Motorist and Automobile Liability Coverage

Jon A. Halaby, Esq.
The McCormack Firm, LLC
One International Place
Boston, MA 02110
Ph: (617) 951-2929
Fax: (617) 951-2672
E-Mail: jhalaby@mccormackfirm.com

UNDERINSURED MOTORIST PROTECTION

Strict time deadlines will be imposed on those seeking underinsured motorist benefits. In a recent decision from the Appellate Court- Voris v. Middlesex Mut. Assurance Co., 297 Conn. 589 (2010), the insured was barred from seeking underinsured motorist benefits for failure to comply with the notice of claim deadline. The policy mandated that the insured bring suit or demand arbitration for benefits within three years following the accident. The deadline could be extended if, before the end of the three year period, the insured gave written notice of his future intent to pursue the claim. The provision was designed to protect the insured in the circumstance where his liability claim remained open beyond the three year filing deadline - so long as the insured tendered the proper written notice he could bring his suit or arbitration demand any time within 180 days of resolving the liability claim. In Voris, the insured contacted his carrier the day after the accident to report the occurrence, without indicating he intended to pursue a claim for underinsured motorist benefits. Little or no discussion occurred between the insured and the carrier thereafter until his liability claim was resolved; by that time the three year cutoff had passed, and when the insured tried to pursue his claim for underinsured motorist benefits, it was denied. He brought suit against the carrier in the Superior Court, which found against him and in favor of the insurer, finding that the claim was time barred.

On appeal, the insured argued that his actions should have been excused given the severe consequence, and the fact that the insurer suffered no prejudice. The insured based his argument on a general (yet inapplicable) principle described in Aetna Casualty & Surety Co. v. Murphy, 206 Conn. 409 (1988). The insured added that insurance agreements are contracts of adhesion, and given their

nature should not be enforced to the letter when presented with a time bar issue. All arguments were rejected.

First, the court addressed the contract of adhesion argument, quickly dismissing it. The court noted that although insurance policies are considered contracts of adhesion (meaning that the terms are written by the insurer without input from the policyholder) this fact only becomes relevant when examining an ambiguous provision. The rules of contract construction dictate that an ambiguous provision be construed against the drafter when examining a contract of adhesion. Given that the policy's written notice of claim requirement was clear and unambiguous, the normal rules of construction apply, and the argument fell short.

Thereafter the court spent great effort distinguishing the notice of claim provision, from a notice of occurrence provision. A notice of occurrence provision requires the insured to give notice of the accident to the insurer, and it was that type of provision which was the subject of the Aetna Casualty case. Although the plaintiff in Aetna Casualty failed to provide notice of the accident, the court denied the insurer's demand for a coverage declination, given that the insured's neglectful actions did not prejudice the insurer. The Voris court differentiated the holding, and carefully explained the distinction between this provision, and a limitations, or notice of claim provision. The latter commands the insured to file suit or demand arbitration by a sum date certain. Absent compliance, the claim is barred, and it is designed to provide a specific and exacting deadline for certain action to be taken. By contrast, the insurance policy's notice of occurrence requirement is less of a deadline than a request for certain information to avoid prejudice to the insurer when adjusting the claim. A notice of occurrence provision - which typically requires the insured to notify his insurer of the loss "as soon as practicable"- does not dictate a sum date certain to take action or

forfeit certain rights under the policy. Courts have forgiven an insured for failing to notify his carrier of an accident where his actions did not prejudice the insurer, since the purpose of the provision is in fact solely to avoid prejudicing the insurance carrier.

The insured's final argument - also rejected - was that the policy should be reformed to waive the notice of claim provision. The insured argued that he was mislead about the written notice of claim requirement when he reported the accident to the carrier's representative, and that equity dictated that it be waived. His argument was dismissed on the facts. The insured had submitted an affidavit indicating that after his conversation with the representative he was led to believe that the statements he made during the call provided sufficient notice of his intentions, and that his right to make a future claim on the policy was preserved. However, the affidavit spoke only to what the insured believed and not to what he was actually told by the representative during the call. Lacking any actual evidence of misrepresentation the court refused to reform the policy.

The decision reaffirms the fact that an insured must timely file suit or demand arbitration for underinsured (and for that matter uninsured) motorist benefits within the required time period. An insurer has an effective tool in disclaiming coverage when its insured fails to duly comply with this deadline. The element of prejudice may be required for other policy provisions- however, an insurer can mandate strict adherence to the notice of claim provision.

Contrasting the decision by the Connecticut Supreme Court in Voris, is the decision of June 8th by the Appellate Court in Todd v. Nationwide Mut. Ins. Co., 121 Conn. App. 597 (2010). Todd involved the insured's claim for underinsured motorist benefits following an accident involving his

car and the tortfeasor's leased vehicle. The leased vehicle had its own liability policy providing coverage for authorized drivers of $1 million. The tortfeasor had a personal liability policy of $100,000 and its carrier- GEICO paid the coverage limits in settlement of the liability claim. Upon receiving the GEICO proceeds, the insured pursued the lessor's policy and obtained an additional $275,000 settlement, but at no point was it specifically determined that the tortfeasor was authorized to drive the leased vehicle, so as to qualify him as an insured. After collecting the second settlement, the insured brought his underinsured motorist claim.

In accordance with General Statutes, Section 38(a)-336(a), a insured must exhaust all bodily injury liability bonds or insurance policies applicable at the time of the accident before pursuing a claim for underinsured motorist benefits. In denying the underinsured motorist claim, the carrier pointed out that the insured had failed to exhaust the lessor's policy, leaving $725,000 yet to be tapped of the $1 million coverage. The insured disagreed, arguing that questions remained whether the tortfeasor was an authorized driver and that therefore the lessor's insurer had not fully accepted coverage. Given the situation, the insured argued there was no need to exhaust the lessor's policy before pursuing underinsured motorist benefits. The insured thereafter brought suit, and prevailed. The court held that the plaintiff adequately exhausted all applicable liability policies when he collected the $100,000 GEICO settlement, with the money from the lessor's policy offered in settlement solely to resolve uncertainties over coverage. The Appeals Court agreed, and noted the lack of firm evidence that the tortfeasor was actually covered under the large policy. The Appeals Court examined an affidavit from an affiliate of the insurer which simply indicated that the settlement was paid out of the "available" $1 million coverage, with another affidavit stating that the leased "vehicle" (as opposed to the operator) was covered by the policy. No evidence was submitted

that the tortfeasor was an authorized driver of the leased vehicle, and the court implored the insurer that it needed to make this "quite clear" before it would accept the proposition that the lessor's policy provided actual coverage for the loss.

Insurers should take note of the decision. When reviewing a claim for underinsured motorist benefits, it is necessary to discover whether there was actual coverage under all policies affording liability protection. Coverage duties under all liability policies need to be clearly established before an insured's claim for underinsured motorist benefits can be properly adjusted. It is often the case (especially with policies in which there are large limits) that liability protection may be afforded under a reservation of rights, or under questionable circumstances where factual disagreements exist, simply to avoid outcome uncertainty to both concerned parties. These circumstances should be thoroughly investigated, and if possible evidence developed to establish that there was in fact an insuring obligation for the at fault party. If not, an insurer's attempt to deny underinsured motorist benefits because of a Section 38(a)-336(a) failure to exhaust liability coverage could face obstacles.

LIABILITY PROTECTION

A trial court decision on summary judgment held that separate limits of insurance applied to a loss that occurred on Route 8 in Waterbury, Connecticut. In the case of Progressive Casualty Ins. Co. v. Farkas, 2010 WL 2927174 (Conn. Super. 2010), the insurer issued a $50,000 / $100,000 policy to the operator of a vehicle who, while under the influence of alcohol, proceeded southbound on Route 8 with her lights off. She drifted into the northbound lane and caused an oncoming vehicle to swerve to the right, lose control and crash into the guardrail injuring the operator. The insured continued to travel in the northbound lane, and approximately two minutes later, came upon a string

of three vehicles, colliding with the second head on. This collision occurred 1.95 miles south of the location where the earlier incident had happened. Both the driver of the oncoming vehicle and one of its passengers were injured in the collision.

The insurer argued that injuries caused to the occupants of the two vehicles resulted from one event- the insured's negligent driving south in the northbound lane- and that all three injured claimants would have to share the $100,000 in per accident coverage. The insurer brought a declaratory judgment action seeking such a determination. The defendants argued that there were two occurrences on the night of the subject loss, and that the per accident limits of $100,000 should apply to each. Both sides submitted motions for summary judgment, and the Superior Court for the Judicial District of Waterbury found in favor of the defendants, thus leaving a total of $200,000 available in coverage, $100,000 for each incident. In its analysis, the court noted that Connecticut primarily uses the "event" test to determine whether there was one (or more than one) accident. The court concluded there were two events, and rejected the carrier's argument that the insured's negligent driving was what was needed to be considered. The court stated that the "event" is the point in the causal chain at which time liability is triggered. The court stated that the insured became liable for damages on two different occasions, the first time when she caused a vehicle to lose control and hit the guardrail, and the second when she crashed into a vehicle further down the roadway.

Adding to the event test, the court also applied three factors relevant to the issues at hand, which included the 1) temporal, and 2) spacial proximity between the two collisions, and 3) whether the two collisions were part of the same "causal continum" unbroken by intervening factors. The court held that each of the three factors militated against finding the existence of a single occurrence.

The court noted the two minute difference between the two incidents, the 1.95 mile distance from the points where each occurred, and the lack of any causal relationship between them. (According to the court, this meant that as the first incident did not involve a collision between the two vehicles, the second incident would still have happened irrespective of the preceding events.)

The facts of this dispute were not particularly favorable to the insurer, given that there was a very distinct stop and starting point from one incident to the next and as they occurred nearly two miles apart. There was no evidence that there was any effect from the insured's involvement in the first incident on the later collision. This decision indicates that courts are willing to apply several tests to determine whether related events or those happening close in time constitute a single accident. Simply put, the issue is highly fact dependent. If the reader has a claim where this type of question may arise, I would invite the reader to contact me to discuss it, so that the loss can be fully analyzed and an appropriate claim handling decision reached.

Finally, the question of whether injuries caused by carbon monoxide fumes arose out of the use of a motor vehicle was addressed in New London County Mutual Ins. Co. v. Nantes, 2010 WL 210592 (Conn. Super. 2010).

In this matter, a Connecticut Superior Court evaluated the applicability of the auto exclusion in a homeowners policy, to personal injuries suffered by three women when the insured left her car idling in the garage under her residence.

The background facts are as follows: one day after work, the insured provided transportation to two visiting physicians who were boarding at her home. She pulled her vehicle into her garage which was located under the living quarters of her raised ranch home. When she and her visitors exited the vehicle to go upstairs to the living quarters for the night, she failed to turn off the vehicle's engine, and it continued to run. All three individuals suffered personal injuries as a result of exposure to the carbon monoxide. The homeowner's insurer denied coverage for the personal injury claims, on the basis of the motor vehicle exclusion in the homeowner's policy, which precluded coverage for "bodily injury . . . arising out of the ownership, maintenance, use, loading or unloading of a motor vehicle. . . owned by an insured."

The insurer filed a declaratory relief action seeking a determination that it had no duty to defend or indemnify the insured in connection with the carbon monoxide related injuries. The defendants argued that the exclusion did not apply in part because the term "use" was undefined rendering the exclusion ambiguous, and further because the carbon monoxide injuries were caused by a combination of factors including the insured's failure to turn off the engine, her closing the garage door trapping the fumes, and her failure to have carbon monoxide detectors in her home. The court disagreed, and held that the motor vehicle exclusion barred coverage under the homeowners policy for the bodily injury claims. It found that the term "arising out of the use of an auto" was not ambiguous, and had been consistently interpreted by Connecticut courts to mean "was connected with," "had its origins in," "grew out of," "flowed from" or "was incident to" even in the context of motor vehicle exclusions. The court explained that although the insured may not have been "using" the motor vehicle at the time the injuries were sustained, the injuries "arose out of the use of a motor vehicle," because they were "connected with," "had their origins in," "grew out of," "flowed from" or

"were incident to" the insured's use of the vehicle when she drove the vehicle home. Finally, the court rejected the defendants' invitation to find that the concurrent cause doctrine applied, thereby avoiding the effect of the motor vehicle exclusion, as Connecticut had not adopted the concurrent cause doctrine.

The decision enhances the case law already in existence concerning the homeowners exclusion for injuries sustained in the use of a motor vehicle. It represents the willingness of a court to create auto liability insurance protection under a given set of facts. Given that the particular circumstances of the loss were deemed to fall within the homeowner's exclusion, the damages for the guest's injuries would presumably qualify for coverage under the insured's personal auto policy, and auto insurers should take note of this decision.

ABOUT THE AUTHOR

JON A. HALABY is an attorney practicing with The McCormack Firm, LLC located in Boston, Massachusetts. Throughout the northeast, he represents insurers, corporations and governmental entities in a wide variety of matters including automobile liability, premises liability, insurance bad faith, construction disputes and general litigation. From 1995-2006, he practiced in Denver, Colorado with the law firms Seaman, Giometti and Murphy, P.C., Godfrey and Lapuyade, P.C. and Halaby, Cross and Schluter. His experience primarily involved automobile, tort, general liability, fraud and insurance coverage matters. Mr. Halaby has been practicing in Massachusetts since 2006 with The McCormack Firm, LLC and continues his focus on these areas as well as others. Throughout his career Mr. Halaby has tried and arbitrated cases involving negligence, automobile, premises liability, uninsured motorist coverage and insurance bad faith. He has represented insurers in appeals concerning uninsured motorist and PIP coverage, as well as insurance claim handling practices. Outside of his law practice he has served as a panelist for Continuing Legal Education seminars on automobile liability, premises liability, insurance bad faith and wrongful death in Colorado and Massachusetts and is a former officer of the Colorado Defense Lawyers Association. He presently serves on the insurance and bad faith law committee for the Massachusetts Defense Lawyers Association. He has contributed to authoritative works published by the Colorado State Bar Association concerning automobile and insurance law. Mr. Halaby is a graduate of Denison University and the Case Western Reserve University School of Law.

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