

DELAWARE CLAIMS ASSOCIATION LEGAL UPDATE – FEBRUARY 2011

FORUM NON CONVENIENS

Ward v. Tishman Hotel & Realty, L.P., et. al., [C.A. No. 10C-10-170 WCC](#) (Del. Super. Nov. 30, 2010)

In *Ward*, the plaintiff fell at a resort located in Puerto Rico. He alleged that his injuries were caused by the defendants' negligence in maintaining the property. Delaware's only connection to the litigation is the fact that the defendants are Delaware corporations. The defendants filed a motion to dismiss on the grounds of *forum non conveniens*. The court held that the defendants had met their burden of establishing that this was the "rare case" where litigating in Delaware would present an overwhelming hardship to the defendants. Thus, the court dismissed the plaintiff's complaint.

INSURANCE COVERAGE – PERSONAL INJURY PROTECTION

Campbell v. State Farm Mut. Auto. Ins. Co., [No. 349, 2010](#) (Del. Jan 18, 2011)

In this case, a pedestrian was struck by a garage door that was closed when the driver of a vehicle pressed a button activating the door from the inside of her vehicle. The Court addressed the question of whether the pedestrian, pursuant to 21 *Del. C.* § 2118, was entitled to Personal Injury Protection (PIP) benefits from the driver's automobile insurance policy. The Court held that the pedestrian was not entitled to PIP benefits because the vehicle was not an active accessory in causing her injuries. As the court noted, the injury was caused by the garage door, not the insured vehicle.

INSURANCE COVERAGE – UNDERINSURED MOTORIST

Sivakoff v. Nationwide Mut. Ins. Co., [C.A. No. 09C-02-248 MJB](#) (Del. Super. Dec. 6, 2010)

The plaintiff in *Sivakoff* sought underinsured (UIM) benefits from her insurance carrier, Nationwide, after collecting \$15,000 from the insurance carrier - Travelers - providing coverage for the vehicle that hit her. After the plaintiff settled with Travelers, she discovered that the driver of the Travelers vehicle had other insurance available, from Progressive. However, because of the release she signed with Travelers, the plaintiff could not recover from Progressive. Despite not being able to recover from Progressive, the plaintiff sued Nationwide, her carrier, for UIM benefits. Nationwide denied coverage because the plaintiff failed to exhaust all available insurance. The plaintiff argued that she could recover because the vehicle that hit

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her was underinsured. The court disagreed, holding that *Dunlap v. State Farm Fire and Casualty Co.*, 878 A.2d 434 (2005) clearly states that to recover UIM benefits, the vehicle must be both “underinsured” - as that term is defined in the statute - and the insured must meet the statutory exhaustion requirement. Because the plaintiff did not exhaust all insurance coverage available, the court held that she was not entitled to UIM benefits from Nationwide.

INSURANCE COVERAGE – UNINSURED MOTORIST

State Farm Auto. Ins. Co. v. Patterson, [No. 32, 2010](#) (Del. Nov. 8, 2010)

In *State Farm*, the Supreme Court of Delaware addressed the question of whether a Delaware resident, who was injured while driving her Delaware-registered and insured automobile in New Jersey, could recover uninsured motorist (UM) benefits under Delaware law. Title 18, § 3902(a) of the Delaware Code requires automobile policies to provide insurance to insureds who are “legally entitled to recover damages from owners or operators of uninsured . . . vehicles” The tortfeasor’s carrier denied coverage on the basis that the plaintiff had not pierced the “verbal threshold” under the New Jersey Verbal Tort Threshold Statute. State Farm, the plaintiff’s UM carrier, denied coverage on the ground that the plaintiff was not “legally entitled to recover” from the tortfeasor under New Jersey law. The Court performed a choice of law analysis and determined that Delaware law applied because Delaware had a more significant relationship to the occurrence and the parties. Thus, the Court held that the plaintiff could recover UM benefits from State Farm. Two Justices disagreed with the majority’s “most significant relationship” analysis and issued a dissenting opinion.

INSURANCE COVERAGE – UNINSURED/UNDERINSURED

Castillo v. Clearwater Ins. Co., [No. 136, 2010](#) (Del. Nov. 22, 2010)

In *Castillo*, the Supreme Court of Delaware addressed a claim for uninsured/underinsured (UM/UIM) motorist benefits and the validity of an endorsement in a non-trucking automobile liability insurance policy that excluded coverage for the transportation of property for commercial benefit. In discussing the validity of the endorsement, the court clarified and reinforced its prior case law interpreting Delaware’s UM/UIM statute, 18 *Del. C.* § 3902, stating:

1. UM/UIM is mandatory for all vehicles registered in Delaware, unless rejected in writing;
2. Policy provisions that reduce or eliminate UM/UIM coverage are void, unless the exclusion is specifically authorized; and
3. UM/UIM is personal to the insured and not dependent on the vehicle the insured was occupying when he or she was insured.

In addition, the Court held that because the General Assembly has not specifically authorized an exclusion for transporting business property and the insured did not reject UM/UIM coverage in writing, the exclusion in the policy was invalid. (November 22, 2010)

STATUTE OF LIMITATIONS – MEDICAL MALPRACTICE

Farmer v. Brosch, [No. 230, 2010](#) (Del. Dec. 1, 2010)

In *Farmer*, the plaintiffs filed a medical malpractice complaint after the standard two-year statute of limitations, but within the additional 90-day period granted to plaintiffs by 18 *Del. C.* § 6856(4). Section 6856(4) grants plaintiffs an additional 90 days if they timely-serve a Notice of Intent to investigate on the defendant(s). Although the plaintiffs timely-served Notice of Intent to investigate letters on the defendants, they failed to attached a copy of the notices to the complaint. The Court addressed whether attaching a notice of intent to investigate letter to a medical malpractice complaint – as required by 18 *Del. C.* § 6856(4) - is a condition precedent to securing a 90-day extension of the statute of limitations, or a special rule of pleading. The Court held that the requirement is a special rule of pleading. Thus, the Court held that the plaintiffs could remedy the failure to attach the notices to the complaint by filing a motion to amend for the purpose of attaching the notices.

DEPARTMENT OF INSURANCE REGULATIONS

On November 5, 2010, the insurance commissioner issued final regulations related to licensing for insurance adjusters who adjust Workers' Compensation claims. The regulations apply to all adjusters acting as Workers' Compensation adjusters in Delaware. The requirements for the license include passing a proficiency test. The licensing regulations are currently in effect. The regulations can be found at:

http://regulations.delaware.gov/register/december2010/final/14%20DE%20Reg%20575%2012-01-10.htm#P7_117

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