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DELAWARE CLAIMS ASSOCIATION
LEGAL UPDATE – NOVEMBER 2010

DISCOVERY – CONFIDENTIAL SETTLEMENT AGREEMENT

Gruwell v. Allstate Ins. Co., et. al., C.A. No. 07C-12-190 JTV, 2010 WL 3528900 (Del. Super. Sept. 9, 2010)

In *Gruwell*, the Superior Court considered whether the terms of a confidential settlement agreement entered in a related matter should be disclosed. Noting that "[p]arties to litigation do not have an absolute right to deny access to the terms of their settlement to the non-settling parties," the court balanced the interests of the parties – both in terms of facilitating the settlement of litigation, on the one hand, and allowing access to the discovery of admissible evidence on the other – and held that the terms of the settlement agreement should be disclosed. However, the court ordered that the disclosure was subject to a mutually agreed upon confidentiality agreement between the parties to the instant litigation.

DISCOVERY – EXPERT FEES – REFERRAL AGENCIES

Neal v. Scaffidi, C.A. No. S09C-02-004 RFS, 2010 WL 3747977 (Del. Super. Sept. 14, 2010)

In *Neal*, the Superior Court considered whether the fees charged by a medical expert for his deposition were reasonable. Of note, the expert was retained by the plaintiff through a referral agency. The referral agency charged a $650 per hour surcharge over the expert's usual hourly rate of $500 per hour. The court held that the surcharge was unreasonable. Discussing surcharges by referral agencies, the court indicated that "[c]ase law suggests that expenses of up to 20 percent can be reasonable, and up to $80 per hour has been allowed for advisory services when an expert is deposed." Ultimately, the court awarded a fee of $475 per hour for the physician, and $80 per hour for the referral agency.

EVIDENCE – PHOTOGRAPHS OF DAMAGED AUTOMOBILES

State Farm Mutual Auto. Ins. Co. v. Enrique, No. 144, 2010, 2010 WL 3448534 (Del. Sept. 3, 2010)

In *State Farm*, the plaintiff sought payment of the uninsured motorist coverage limits provided by her policy. The issues before the Supreme Court of Delaware were whether the trial

court: 1) properly admitted photographs of the vehicles damaged in the accident at issue; and 2) gave a proper curative instruction to the jury. The court held that the Superior Court did not abuse its discretion by admitting the photographs because the insured had the burden of establishing a prima facie basis for recovery as to all elements of her claim, and the photographs were relevant because they were offered to prove that there was an accident and that the plaintiff's knees struck the dashboard during the crash. The court further held that the limiting instruction given by the court – that the jury was only to consider the photographs as evidence that the insured's knees hit the dashboard in the accident, and not for determining the correlating severity of the insured's injuries – was sufficient to prevent the jury from considering the photographs for any improper purpose.

HEALTHCARE – STATUTE OF LIMITATIONS

Taylor v. Pontell, No. 214,2010, 2010 WL 3432605 (Del. Sept. 2, 2010)

In *Taylor*, the Supreme Court of Delaware addressed the question of whether Delaware's Savings Statute, 10 *Del. C.* § 8818(a), applies to toll the statute of limitations in medical malpractice cases governed by the Health Care Act, 18 *Del. C.* § 6856. The court held that the Savings Statute does not apply to cases brought under the Health Care Act because the General Assembly expressly restricted the time period for initiating a claim for medical negligence to the time period proscribed in the Health Care Act.

INSURANCE COVERAGE – EXCLUDED DRIVERS

Santiago v. Nationwide Property & Casualty Ins. Co., C.A. No. 09C-12-027 JTV, 2010 WL 4188301 (Del. Super. Sept. 30, 2010)

In *Santiago*, a declaratory judgment action, the plaintiff sought liability coverage under an automobile insurance policy issued by Nationwide. The plaintiff, whose vehicle was insured by Allstate, resided with her mother and stepfather, Fern and Richard Graven. The Gravens were insured by Nationwide. However, the plaintiff was an excluded driver on the Graven's policy. The plaintiff alleged that she was covered under the Nationwide policy for liability in excess of her Allstate coverage. Her claim was based on 18 *Del. C.* § 3909(c), which provides, in pertinent part: "With respect to any person excluded from coverage . . . the policy may provide that the insurer shall not be liable for damages, losses or claims arising out of the operation or use of the insured motor vehicle." The plaintiff argued that § 3909(c) does not apply to damages arising from the operation of an unlisted vehicle, and that since she was not operating a vehicle insured on the policy, her excluded driver status did not apply. The court disagreed, holding that the plaintiff was excluded from liability coverage under the Nationwide policy. In so holding, the court held that the plaintiff's argument was not consistent with the purpose of the statute, and that the statute gives insurers the ability to create affordable automobile insurance policies by excluding certain named drivers.

INSURANCE COVERAGE – PERSONAL INJURY PROTECTION

Mohr v. Progressive Northern Ins. Co., C.A. No. 10C-02-040 WLW, 2010 WL 4061979 (Del. Super. Sept. 27, 2010)

In *Mohr*, the Superior Court addressed whether a pedestrian hit by a Delaware-insured vehicle could stack PIP benefits. The vehicle that hit the plaintiff was a Delaware-insured vehicle with $15,000 in PIP coverage. The plaintiff, who resided with his mother, was also an insured on his mother's Progressive policy. The Progressive policy had PIP benefits in the amount of $100,000. As written, the policy provided PIP coverage to pedestrians injured in an accident with a vehicle *other than* a Delaware-insured vehicle. After receiving the $15,000 in PIP benefits from the insurer of the vehicle that hit him, the plaintiff requested additional PIP coverage through the Progressive policy. Progressive denied coverage, and moved for summary judgment. The court found that it was "illogical" to conclude that PIP coverage paid for and available to an insured would be eliminated by the availability of lesser coverage from a separately insured, *Delaware* vehicle. Although the court did not grant judgment in favor of the Plaintiff, the court denied Progressive's motion and held that, at a minimum, the case law supported a finding that "[the p]laintiff may be entitled to the monetary difference in the two policies."

INSURANCE COVERAGE – UNDERINSURED MOTORIST

Banaszak v. Progressive Direct Ins. Co., No. 536, 2009, 2010 WL 3418351 (Del. Sept. 3, 2010)

In *Banaszak*, the Supreme Court of Delaware addressed the interplay between the written uninsured motorist ("UM") benefits rejection requirement in 18 *Del. C.*, § 3902(a) and the supplemental uninsured/underinsured ("UM/UIM") motorist coverage disclosure requirement in 18 *Del. C.* § 3902(b). The court found that, reading the statutes together, an insurer must (1) not deliver any insurance policy without the minimum uninsured coverage, unless rejected by the insured in writing; and must (2) make a meaningful offer supplying the insured with supplemental UM/UIM coverage up to the limits of the insureds' bodily injury liability insurance. In this case, Progressive's offer form, pre-filled-in by Progressive's agent noting a rejection of UM/UIM coverage – albeit signed, dated, and returned by the insured – was not a meaningful offer of supplemental underinsured motorist (UIM) coverage. Because § 3902(b) mandates that insurers offer their customers additional UIM coverage up to the insured's bodily injury liability limits and Progressive failed to demonstrate that it offered the insured UIM coverage, the Court remanded the case and ordered that the policy by reformed to increase his UIM coverage to his bodily injury liability limits.

INSURANCE COVERAGE – UNINSURED MOTORIST

Colbert v. Government Employees Ins. Co., C.A. No. N10C-03-245 JAP, 2010 WL 4226502 (Del. Super. Oct. 25, 2010)

In *Colbert*, the Superior Court addressed whether a reduction provision in GEICO's automobile policy was void under Delaware law. The provision – in the uninsured motorist ("UM") coverage portion of the policy – stated that the amount payable for uninsured motorist coverage would be reduced by all amounts paid "under the Bodily Injury and Property damage Coverage of [the] policy . . . ." The court held that the provision was void because it purportedly caused other insurance payments to reduce UM limits in the policy.

PERSONAL JURISDICTION

Goodyear Luxembourg Tires v. Brown, No. 10-0076 (U.S. Sept. 28, 2010), and *J. McIntyre Machinery, Ltd. v. Nicastro*, No. 09-1343 (U.S. Sept. 28, 2010)

In *Goodyear* and *J. McIntyre* the Supreme Court of the United States granted Petitions for Writ of *Certiorari* to decide two questions related to personal jurisdiction over foreign corporations. In *Goodyear,* the Court agreed to consider the following issue: "Whether a foreign corporation is subject to general personal jurisdiction, on causes of action not arising out of or related to any contacts between it and the forum state, merely because other entities distribute in the forum state products placed in the stream of commerce by the defendant." In *J.McIntyre,* the Court will consider the following question: "Does a 'new reality' of 'a contemporary international economy' permit a state to exercise, consonant with due process under the United States Constitution, *in personam* jurisdiction over a foreign manufacturer pursuant to the stream-of-commerce theory solely because the manufacturer targets the United States market for the sale of its product and the product is purchased by a forum state consumer?"

RELEASE – GENERAL/SPECIFIC

Singh v. Professional Underwriters Liability Ins. Co., C.A. No. 05C-04-228 WWC, 2010 WL 3708181 (Del. Super. Sept. 10, 2010)

In *Singh*, the court addressed whether Professional Underwriters Liability Ins. Co. ("PULIC") had a duty to defend Dr. Singh in a third-party action brought against Dr. Singh by his insurance broker. At issue was the scope of a release signed by Dr. Singh and PULIC to settle related declaratory judgment ("DJ") actions that arose from a medical malpractice claim – the Zakrzewski claim - filed against Dr. Singh. In those actions, PULIC sought to rescind its policy based on alleged misrepresentations made by Dr. Singh in his application. Dr. Singh, on the other hand, sought to reinstate the Policy. Ultimately, Dr. Singh and PULIC settled the DJ actions, and signed a release. In the release, PULIC agreed to reinstate the policy for one claim - the Zakrzewski malpractice claim – with a mid-term cancellation, and to pay the defense costs and attorney's fees associated with that claim. Thereafter, PULIC filed suit against Dr. Singh's

broker, claiming that the broker failed to provide true and correct information in relation to Dr. Singh's application. Dr. Singh argued that PULIC had a duty to defend him in the third-party action brought by the broker because the release was not a general release, but a specific release, and the third-party claim arose out of the Zakrzerwski malpractice claim. The court disagreed, holding that pursuant to the release, "PULIC was generally released by Dr. Singh of all claims, except those directly related to the Zakrzewski malpractice claim." Although the court noted that there was some relationship between the claims, the court held that there is a clear distinction between a claim for failure to meet one's standard of medical malpractice and a claim for providing false or misleading information on an application for insurance.

FINAL REGULATIONS

The Department of Insurance adopted final regulations related to the procedures for responding to Freedom of Information Act requests. The regulations, effective November 11, 2010, can be found at 14 DE Reg. 480.

White and Williams issues a weekly newsletter, Court Crier, that digests recent appellate decisions from state and federal appellate courts in Delaware, Pennsylvania and New Jersey, as well as the Supreme Court of the United States. If you would like to subscribe to Court Crier, please send me an e-mail at: doerlerw@whiteandwilliams.com.