LEGAL NEWS IN BRIEF

News in a Flash for Subrogation and Insurance Professionals

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STEP-DOWN CLAUSE

Engrassia v. Uzcategui
NJ Appellate Division
2018 N.J. Super. Unpub. LEXIS 66
(January 11, 2018)

The Appellate Division upheld a "step-down clause" in auto dealer Hunterdon BMW's policy, which limited liability coverage for customers to the state minimum limits, to the extent that the customer did not have his own coverage. Hunterdon BMW had given a loaner car to Uzcategui while his car was being serviced; Uzcategui subsequently killed Plaintiff when operating the loaner while drunk. The step-down clause is valid as it ensures that all permissive users have at least the state minimum liability coverage. It therefore does not violate N.J.A.C. §13:21-15.2(l), which requires auto dealers to provide minimum liability coverage without exclusion, for licensing purposes. Hunterdon's umbrella policy, which excluded any coverage for customers, was not required, and so did not have to provide coverage to Uzcategui, and the Court found the policy to be valid based on its plain reading. ■

SOVEREIGN IMMUNITY

Lee v. Brown
NJ Supreme Court
A-7/8-16
(February 21, 2018)

A City-employed electrical inspector moved for summary judgment in an action arising out of a fire. Initially, the Fire Department responded to smoke coming from a boiler at a multi-unit home, upon which they discovered improper wiring in the basement's electrical panels. The inspector informed the homeowner that the wiring was extremely dangerous, and the City issued notices as to related statutory violations. Upon later re-inspection, one month before the fire, the inspector learned that the homeowner had not corrected the wiring; however, he failed to notify his supervisor, who would have discretion as to whether to shut off the power. The Tort Claims Act establishes absolute immunity for municipal employees' acts, so long as their "critical causative conduct" consists of non-action or the failure to act with respect to enforcement of the law. Here, the NJ Supreme Court held that such critical causative conduct entailed the inspector's failure to notify his supervisor and secure an emergency shut-off, rather than any affirmative action by the inspector to correct the problem. Thus, the City and its employee warrant absolute immunity. ■

SOL

Migliaro v. Fidelity
U.S. Court of Appeals, 3rd Cir.
No. 17-1434
(January 29, 2018)

Insured purchased a policy prescribed by the federal Standard Flood Insurance Program from Fidelity for his NJ property, which was damaged as a result of Hurricane Sandy. After Fidelity's adjuster assessed the damage, Fidelity sent a check for the recommended amount. Five months later, Insured submitted a proof of loss, claiming additional damage. In December 2013, Fidelity

sent Insured a "Rejection of Proof of Loss," stating that "[t]he amount claimed is not an accurate reflection of covered damage." Insured initially filed suit five months thereafter, only to then voluntarily dismiss the suit about nine months later. In July, 2015, Insured filed a second complaint for the insurance benefits. Fidelity invoked the policy's limitations, which runs one year "after the date of the written denial of all or part of the claim." Case law holds that the written rejection of a proof of loss constitutes a denial of the claim if based upon it, the insured files suit, thereby accepting the written rejection of a proof of loss as a written denial of a claim. Although the "Rejection" actually stated that "[t]his is not a denial of [the] claim," and invited Insured to submit additional documentation to support his initial proof of loss, Insured failed to seek an appraisal, file an amended proof of loss or submit additional documentation, thereby considering the Rejection to be a denial of his claim. ■

DEFECTIVE SERVICE

Martin v. Witkowski
NY Appellate Division (4th Dept.)
2017 NY Slip Op 09014
(December 22, 2017)

Plaintiff filed suit 13 days before SOL for automobile-related injuries, and had his pleadings served at an address where Defendant's father of the same name actually resided. Defendant filed an answer which included an affirmative defense that he was not properly served. Three days later, Plaintiff re-served the pleadings at Defendant's actual residence. Defendant moved to dismiss, arguing that Plaintiff had actually sued his father, and that he was not a party to the now time-barred action. The Court denied the motion on the grounds that Defendant was the only defendant in the action, and not his father, who was not involved in the underlying accident; Defendant's claim that Plaintiff had improperly joined Defendant without leave failed for similar reasons, and also because Defendant failed to timely move or to include a related defense in his answer. Plaintiff had 120 days from commencement of action to effectuate service on Defendant, so Defendant was ultimately served properly on the second attempt. ■

JOINT AND SEVERAL LIABILITY

Matter of Technology Ins. Co. v. Progressive Max Ins. Co.
NY County Supreme Court
2017 NY Slip Op 32566(U)
(December 5, 2017)

Petitioner, a worker's compensation carrier for a bus company, paid its insured's employee for injuries she sustained while riding on a bus operated by her co-worker, when the bus collided with another vehicle. Since the bus weighed more than 6,500 pounds and was a vehicle for hire, the accident qualified for loss transfer arbitration. The arbitrator held that each driver was 50% liable, and awarded Petitioner half of its damages, because Petitioner omitted to include its own liability carrier as a respondent, and joint and several liability is not available in loss transfer proceedings.

The Court denied Petitioner's motion to vacate, finding the arbitration decision to be rational. Joint and several liability in an action at law ensures that an injured person is fully compensated, and the burden is placed on a defendant to locate additional responsible parties in apportioning damages. Loss transfer arbitration, by contrast, is a statutory means of allowing an insurer the opportunity to recover expenses based on its insureds' liability, and joint and several liability does not apply in loss transfer arbitration. ■

OFFICE UPDATE

Steven G. Kraus merged his subrogation practice with our office, and became Senior Of Counsel to our firm. A founder of one of the first subrogation-focused law firms, Mr. Kraus has devoted his practice to insurance subrogation and related coverage issues for over 35 years. He has extensive experience with PIP reimbursement claims, worker's compensation liens, concurrent coverage issues, and auto, property and products liability subrogation. Mr. Kraus represented insurance carriers in two reported cases that continue to govern NJ subrogation law. *IFA Ins. Co. v. Waitt*, 270 N.J. Super. 621 (App. Div., 1994), *cert. den.* 136 N.J. 295 (1994) established the rule that PIP reimbursement claims are paid from a tortfeasor's liability policy limits, and not, as per NY law, a separate no-fault limit. *Continental Ins. Co. v. McClelland*, 288 N.J. Super. 185 (App. Div., 1996) established the principle that a worker's compensation carrier could only recover a worker's compensation lien when the injured worker's injuries met the threshold of that worker's personal auto policy.

Our office also welcomes **Joshua R. Edwards** to our office. Mr. Edwards is a graduate of Southern University Law Center. He will be part of our insurance subrogation practice group. ■

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