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FINEMAN & BACH, P.C.

# INSURANCE LAW UPDATE

*Serving the Insurance Industry*

## IN THIS ISSUE



**FINEMAN & BACH, P.C.**

**1608 Walnut Street**
**19th Floor**
**Philadelphia, PA 19103**
**(215) 893-9300**
**Facsimile: (215) 893-8719**

**Montgomery County Office:**

**200 Four Falls Corporate Center**
**Suite 201**
**W. Conshohocken, PA 19428**
**(215) 893-9300**
**Facsimile: (610) 834-8550**

**New Jersey Address:**

**Fineman & Bach**
**3 South Haddon Ave.**
**Haddonfield, NJ 08033**
**(856) 795-1118**
**Facsimile: (856) 795-1110**

**www.finemanbach.com**



## PENNSYLVANIA RADICALLY ALTERS JOINT AND SEVERAL LIABILITY

In June 2002, the Pennsylvania Legislature passed a bill severely curtailing the applicability of joint and several liability. Under the previous law, if more than one defendant was found responsible for a plaintiff's injuries, any of the liable defendants could be required to pay the full amount of the judgment regardless of fault. Thus, a defendant which might have been found only one percent negligent could have been required to pay the entire judgment. If the co-defendant was uninsured, underinsured or insolvent, the "paying" defendant would undoubtedly be unable to exercise its right for contribution from the co-defendant to satisfy any overpayment.

Under the new law, joint and several liability would only apply when a defendant is deemed to be at least sixty percent responsible for causing an injury. If joint and several liability applies, then the defendant would be responsible to pay the entire judgment. Where a defendant is found less than 60% responsible, it would be responsible to pay only its proportionate share of any award.

The statute certainly addressed the unfair scenario where a defendant with "deep pockets" and only very limited liability could be compelled to pay the entire judgment regardless of its level of fault. Joint and several liability would not "kick-in" and make that defendant potentially responsible for the entire judgment until it was found at least 60% responsible.

Several exceptions to joint and several liability exist under the new law. Joint and several liability, as it existed before the new law, would apply where an injury was intentionally caused by the defendant, where an injury was caused due to fraud, for violations of the liquor liability law and the Hazardous Sites Cleanup Act.

By passing this law, the Pennsylvania Legislature severely curtailed the applicability of joint and several liability. The law, which is currently in effect, is one of the strictest restriction on joint and several liability in the United States.

*42 Pa.C.S.A. § 7102 (2002)*

## IN ADDITION TO PUNITIVE DAMAGES, AN INSURED, IN A BAD FAITH ACTION, CAN RECOUP ATTORNEY'S FEES

In June 1998, a severe windstorm caused extensive damage to the Willow Inn in Montgomery County, Pennsylvania. The Inn's owners filed a claim with Public Service Mutual Insurance Company ("Public"), its insurer, for repairs to the property and lost business income.

The trial judge found that the plaintiff insured acted reasonably in providing information about the claim and found that Public dragged its feet for months and delayed paying the claim. Under the circumstances, the trial judge found, as a matter of law, that Public's delays were unreasonable and that Public knowingly or recklessly disregarded the "lack of reasonable basis for its conduct." In reaching this decision, the judge cited numerous instances where Public failed to timely respond to the plaintiff's various requests and its failure to timely to respond to requests of its contractors. For example, the judge noted Public's unjustified delay in appointing an appraiser which prevented the appraisal from going forward for more than eight months.

Ultimately, the judge awarded the plaintiff compensatory damages, punitive damages and attorney's fees. The judge awarded the plaintiff punitive damages totaling $150,000. In making that award, the judge noted that Public had more than $500 million in assets and $100 million in capital surplus. Consequently, he concluded the plaintiff was entitled to an award of $150,000 in punitive damages.

The judge also awarded attorney's fees of more than $135,000. In documenting its claim for attorney's fees, plaintiff provided an affidavit from its attorney stating that the attorney worked 512 hours and requested that the court approve his $300 per hour rate. The defendant argued that the prevailing hourly rate in the Philadelphia area for prosecuting bad faith cases ranged from $125 to $200 per hour. The trial judge rejected the defendant's argument saying that it failed to account for cases taken on a contingent fee basis.

In determining that the plaintiff's attorney should be paid at a rate of $250 per hour, the trial judge referred to a Community Legal Services study which determined the range for the hourly rate for lawyers with 15 years experience at $220 to $270 per hour. The trial judge reasoned that an hourly rate of $250 fairly compensated the attorney for the contingent nature of plaintiff's counsel's representation.

*Willow Inn v. Public Service Mutual Insurance Co.*, *2002 U.S. DIST. LEXIS 8063*

## VIOLATIONS OF THE UNFAIR INSURANCE PRACTICES ACT OR THE UNFAIR CLAIMS SETTLEMENT PRACTICES REGULATIONS ARE NOT ADMISSIBLE TO ESTABLISH A STANDARD OF CONDUCT IN A BAD FAITH ACTION AGAINST AN INSURER

The United States Court of Appeals for the Third Circuit upheld the District Court judge who excluded evidence of the United Services Automobile Association ("USAA") alleged violations of the Unfair Insurance Practices Act and Unfair Claims Settlement Practices Regulations. This case involved an automobile accident in which the plaintiff sustained serious injuries. The day after the accident, the plaintiff notified USAA of a potential claim for underinsured motorist benefits.

Eventually, the tortfeasor's coverage and the UIM coverage of the rental car, in which the plaintiff was riding at the time of the accident, were exhausted. The plaintiff then settled her uninsured motorist claim with USAA.

Approximately two years after receiving her settlement check from USAA, plaintiff instituted a lawsuit in the United States District Court for the Eastern District of Pennsylvania alleging that USAA acted unreasonably thereby violating the Pennsylvania Bad Faith Statute. In support of her claim, plaintiff intended to offer expert testimony to support her contention that USAA acted in bad faith. Her expert proposed to testify that the Commonwealth of Pennsylvania, by adopting the Uniform Insurance Practices Act and also enacting the Unfair Claims Settlement Practices Regulations, set a standard of conduct that insurance companies must follow in handling claims. Any violation of the Unfair Insurance Practices Act and Unfair Claims Settlement Practices Regulations would be evidenced that the insurer's conduct fell below the state mandated behavior and evidence of bad faith. The expert intended to testify that USAA's handling of the

*continued on page 3*

## SUPERIOR COURT INVALIDATES PHILADELPHIA COUNTY LOCAL RULE IMPOSING SANCTIONS FOR FAILURE TO SETTLE

Under Philadelphia Local Rule 212.2, the court can impose sanctions upon any party for that party's failure to settle. This Rule allows a judge to tax costs to a party not accepting a judge's settlement recommendation. On appeal, the insurer argued that the Philadelphia Court System lacked the authority to adopt Local Rule 212.2 because the rule violated the equal protection and due process clauses of the Pennsylvania and United States Constitutions. The Superior Court adopted the insurer's argument and held that the Philadelphia Court system lacked the authority to adopt Local Rule 212.2. In reaching its decision, the Superior Court recognized the importance of promoting timely settlements. However, the Superior Court could find no authority under which the Philadelphia Court System could create a rule imposing sanctions upon a party for the failure to settle.

*Albert Stewart and Elizabeth Stewart v. Owens-Corning Fiberglass, et al.*
*2002 Pa. Super 262, 806 A.2d 34, 2002 Pa. Super. LEXIS 2446*

*continued from page 2*

plaintiff's claim violated numerous provisions of the statute and regulations.

Before trial, USAA filed a motion to prohibit the plaintiff's expert from testifying that its conduct violated the Unfair Insurance Practices Act and the Unfair Claims Settlement Practices Regulations. Ultimately, the District Court judge agreed and held that the expert could not testify that the Unfair Insurance Practices Act and Unfair Claims Settlement Practices Regulations established a standard or basis of conduct. Furthermore, the District Court judge stated if he were to admit evidence of violations of the act and/or regulations, there was no instruction he could give to the jury which would limit the applicability of those standards and therefore, the prejudice would outweigh any probative value of admitting those violations into evidence.

On appeal, the Third Circuit agreed. In reaching its decision, the Third Circuit reiterated the long standing law in the Commonwealth of Pennsylvania that to establish an action under the bad faith statute, a plaintiff must show that an insurer did not have a reasonable basis for denying benefits under its policy and that insurer knew or recklessly disregarded its lack of reasonable basis in denying the claim. To establish that an insurer acted unreasonably, the plaintiff must offer circumstantial evidence to prove the insurer's motive at the time the decisions were made.

The Third Circuit held that violations of the Unfair Insurance Practices Act or the Unfair Claims Settlement Practices Regulations could not be used to meet the burden to show circumstantial evidence to prove the insurer's motive. The Unfair Insurance Practices Act was designed to prohibit insurers from engaging in unfair methods of competition or deceptive acts or practices. The statute defines certain conduct as constituting unfair methods of competition and unfair or deceptive acts or practices. The Unfair Claims Settlement Practices Regulations further expound upon those principles.

For the most part, the conduct prohibited does not have any relevance to the question of whether an insurer had a reasonable basis for denying benefits under its policy or knew or recklessly disregarded its lack of reasonable basis in denying a claim. Rather, the purpose of the provisions in the Act and the regulations is to establish the timing of investigation and payments of claim. Thus, a violation of the Unfair Insurance Practices Act or Unfair Claims Settlement Practices Regulations is not a per se violation of the bad faith statute. In order to constitute a violation of the Unfair Insurance Practices Act or Unfair Claims Settlement Practices Regulations, an insurer has to commit or perform these acts "with such frequency as to indicate a business practice."

Since the alleged violations of the Unfair Insurance Practices Act and Unfair Claims Settlement Practices Regulations were, at most, tangentially related to the claim for unreasonable actions of the part of the insurer, the Third Circuit upheld the District Court finding that the potential for substantial, unfair prejudice to any insurer by the introduction of these alleged violations prohibits any plaintiff from referring to them in a bad faith trial. Moreover, the court held that any reference to the Unfair Insurance Practices Act and/or Unfair Claims Settlement Practices Regulations is not necessary to allow a jury to understand and apply the bad faith standard.

*Dinner v. United Services Automobile Association Casualty Insurance Company, 29 Fed. Appx. 823, 2002 U.S. App. LEXIS 3408*

## INSURER REQUIRED TO INDEMNIFY INSURED WHO PLEADED GUILTY TO INVOLUNTARY MANSLAUGHTER AND THEN WAS FOUND LIABLE IN A CIVIL ACTION FOR VIOLATING THE DECEDENT'S CIVIL RIGHTS

On Christmas Eve 1998, Scott Cameron was a police officer on the Easton Pennsylvania police force. That night he was on-duty as a K-9 patrol officer. When Officer Cameron drove his patrol car into Hackett's Park, to allow his dog a break, he noticed a parked truck with its engine running and its lights on and a man at the wheel who appeared to be unconscious. Officer Cameron roused the man who cursed at him and then struck Officer Cameron with his truck, knocking him to the ground. After Officer Cameron partially rose to his feet, the man allegedly struck him a second time with his truck. Officer Cameron then fired one shot in the direction of the truck, intending to stop it before the man injured Officer Cameron or anyone else. The bullet struck and killed John E. Rapp, the driver of the truck.

In November 1999, Officer Cameron pleaded guilty to involuntary manslaughter. John E. Rapp's estate filed a civil rights action. Officer Cameron's insurer, Titan Indemnity Company ("Titan"), agreed to defend but reserved its right to indemnify. At trial, the jury found that Officer Cameron violated Rapp's civil rights and awarded his estate $472,955 in damages and $163,218 in attorney's fees.

After the jury found in favor of the decedent, Titan filed a declaratory judgment action. Titan contended that it had no duty to indemnify because Officer Cameron intended to injure Rapp.

U.S. Magistrate Judge Thomas Rueter found that neither the guilty plea nor the civil rights verdict proved that Cameron intended to injure Rapp. With regard to the guilty plea, Judge Rueter concluded that Cameron entered the guilty plea "for the sake of his family and the police department." Judge Rueter believed Cameron's testimony that being recently married with a pregnant wife, he decided to plead guilty so that he could see his son grow up (avoiding a prison sentence of up to 20 years) and avoid paying an additional $30,000 in legal fees for the criminal trial.

Judge Rueter rejected the argument that the civil rights verdict established that Cameron acted with the intent to injure. The judge, in distinguishing the verdict, examined the jury instructions which he concluded made it clear to the jury that it did not need to find that Cameron intended to violate the decedent's civil rights in order to find that Cameron used excessive force.

Consequently, Judge Rueter held a non-jury trial on the issue of intent. At the conclusion of the trial, Judge Rueter decided that Cameron did not intend to shoot Rapp and therefore, did not intend to kill or injure him or violate his civil rights. Judge Rueter held that Titan was responsible to pay the verdict and the legal fees.

*Titan Indemnity Company v. Cameron, 2002 U.S. DIST. LEXIS 14156*

## POST-JUDGMENT ACTIONS OF INSURER NOT COVERED BY BAD FAITH STATUTE

Janet Ridgeway was the executrix of her husband's estate. Under a life insurance policy with U.S. Life Credit Life Insurance Company ("U.S. Life"), the husband was the insured, a mortgagee was the first beneficiary and Janet Ridgeway was the second beneficiary. After Ridgeway's husband died, U.S. Life refused to pay the policy proceeds.

Ridgeway field suit, alleging breach of contract and bad faith. U.S. Life paid $53,786 to the mortgage company without Ridgeway's knowledge. At the time of trial, U.S. Life agreed to pay Ridgeway all damages arising out of the breach of contract claim.

The case went to trial solely on the bad faith claim. After a bench trial, the court awarded Ridgeway $95,000. Ridgeway then filed a second bad faith action against U.S. Life. In that complaint, Ridgeway alleged that U.S. Life engaged in dilatory tactics to stall payment of the breach of contract damages and the bad faith verdict. One week after Ridgeway filed the complaint, U.S. Life paid the breach of contract damages and the bad faith verdict.

U.S. Life also filed preliminary objections asking the court to dismiss the second bad faith action. The trial court denied them. The insurer appealed arguing that its post-judgment conduct did not fall within the scope of the bad faith statute.

The Superior Court reversed the trial court holding that the bad faith statute did not apply. In making that decision, the Superior Court found that the statutory language "arising under an insurance policy" limited any bad faith action to any disputes arising out of the insurance contract. In this case, plaintiff was not a claimant but a judgment creditor. Consequently, Ridgeway was not bringing an action under the insurance policy. The Pennsylvania Rules of Civil Procedure provided Ridgeway's remedy for enforcement of her money judgments. The Court also held that U.S. Life, like any other insurer, owed a fiduciary duty to its insured but that fiduciary duty ceased at settlement or after judgment.

*Ridgeway v. U.S. Life Credit Life Insurance Company, 2002 Pa. Super. 54, 793 A.2d 972, 2002 Pa. Super. LEXIS 204*

# FINEMAN & BACH ATTORNEYS


**Lee Applebaum**
(215) 893-8702
lapplebaum@finemanbach.com

**Mitchell Bach**
(215) 893-8708
mbach@finemanbach.com

**Phinorice J. Boldin**
(215) 893-8735
pboldin@finemanbach.com

**Drew S. Dorfman**
(215) 893-8705
ddorfman @finemanbach.com

**June J. Essis**
(215) 893-8712
jessis@finemanbach.com

**S. David Fineman**
(215) 893-8701
sdfineman@finemanbach.com

**Krista Frankina Fiore**
(215) 893-8723
kfiore@finemanbach.com

**Michael F. Frisbie**
(215) 893-8734
mfrisbie@finemanbach.com

**Jay Barry Harris**
(215) 893-8704
jharris@finemanbach.com

**Emily Kaplan**
(215) 893-8731
ekaplan@finemanbach.com

**Sheldon Kivell**
(215) 893-8727
skivell@finemanbach.com

**Michael H. Krekstein**
(215) 893-8740
mkrekstein@finemanbach.com

**Gary A. Krimstock**
(215) 893-8722
gkrimstock@finemanbach.com

**Michelle K. Malloy**
(215) 893-8720
mmalloy@finemanbach.com

**Anita J. Murray**
(215) 893-8747
amurray@finemanbach.com

**Scott H . Mustin**
(215) 893-8741
smustin@finemanbach.com

**Hema B. Patel**
(215) 893-8743
hpatel@finemanbach.com

**Richard J. Perr**
(215) 893-8724
rperr@finemanbach.com

**Lowell F. Raeder**
(215) 893-8752
lraeder@finemanbach.com

**Richard A. Rubin**
(215) 893-8737
rrubin@finemanbach.com

**Michael S. Saltzman**
(215) 893-8730
msaltzman@finemanbach.com

**Diane Bernoff Sher**
(215) 893-8726
dsher@finemanbach.com

**Carol A. Tino**
(215) 893-8744
ctino@finemanbach.com

**Steven R. Waxman**
(215) 893-8714
swaxman@finemanbach.com

**David R.White, Jr.**
(215) 893-8742
dwhite@finemanbach.com

**OF COUNSEL:**

**Norman S. Berson**
(215) 893-8710
nberson@finemanbach.com

**Alan Morris Feldman**
(215) 893-8746
afeldman@finemanbach.com

**Robert J. Klein**
(215) 893-8729
rklein@finemanbach.com


## *THANK YOU*

Many thanks for your confidence in our firm. We will continue to work toward finding effective solutions to your insurance and business needs.

We also want to thank those who have referred new clients. Our relationships with long-term and new clients have enabled the firm to attract highly qualified professionals and expand our services to the insurance industry.

Please feel free to contact us if you have any questions regarding our services.

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