Walsh, Barnes, Collis & Zumpella, P.C.

We are a full-service Civil Litigation Defense firm serving Western/Central Pennsylvania and West Virginia December 2019

The Gulf Tower
14th Floor
707 Grant Street
Pittsburgh, PA 15219

Telephone: 412-258-2255
Fax: 412-263-5632

www.walshlegal.net

Walsh, Barnes, Collis & Zumpella, P.C. represents insurance carriers, their insureds, and corporations in actions encompassing the entire civil litigation spectrum. We provide defense of wrongful death and personal injury claims in addition to property losses resulting from:

- **Automobile and Tractor Trailer Accidents**
- **Catastrophic Fire Losses**
- **Construction Accidents**
- **Employment Practices Liability**
- **Executive Liability**
- **Insurance Coverage**
- **Premises Liability**
- **Product Liability**
- **Professional Liability**

IN THIS ISSUE:

Western District of Pennsylvania Addresses Enforceability of the Regular Use Exclusion in Light of the *Gallagher* Decision

In *Barnhart v. Travelers Home & Marine Ins. Co.*, 2019 WL 5557374 (W.D. Pa. 2019), the Western District of Pennsylvania addressed the enforceability of a "regular use exclusion" in light of the recent decision by the Pennsylvania Supreme Court in *Gallagher v. GEICO*, 201 A.3d 131 (Pa. 2019), which held that the "household exclusion" is not enforceable as an impermissible attempt to preclude the recovery of stacked UM/UIM benefits.

Barnhart was injured while a passenger on a motorcycle operated by her husband. Mr. Barnhart owned the motorcycle and insured it through Progressive. Barnhart insured her passenger vehicle with Travelers. After recovering the liability limits from the tortfeasor, Barnhart applied for UIM benefits under her personal auto policy. Travelers denied the UIM claim based upon the "regular use exclusion," which barred coverage for "bodily injury" sustained by Barnhart while "occupying" any motor vehicle she owned or that was furnished or available for her regular use which was not insured for UM/UIM coverage under the Travelers policy.

The District Court enforced the exclusion, rejecting Barnhart's argument that the "regular use exclusion" was not enforceable in light of the *Gallagher* decision (i.e., an impermissible attempt to bar the stacking of UIM benefits in violation of 75 Pa.C.S.A. §1738). The court observed that Pennsylvania Supreme Court rulings as to the enforceability of the "household exclusion" and the "regular use exclusion" are distinguishable.

In *Gallagher*, GEICO knew of the risks of stacked UIM coverage as it insured both the motorcycle and automobile at-issue in that case, albeit under separate policies. GEICO charged its insured for stacked coverage on both policies and then subsequently refused to provide stacked UIM coverage.

In *Williams v. GEICO*, 32 A.3D 1195 (Pa. 2011), GEICO did not know or have reason to know about any other vehicles the insured would drive or occupy and as such, did not charge for UIM coverage for any such unknown additional vehicles and the denial of UIM benefits under a "regular use" scenario was proper. The District Court observed that the *Williams* decision was not overturned by the *Gallagher* decision and, in fact, the Pennsylvania Supreme Court has continued to cite to *Williams* when ruling in other decisions addressing policy exclusions, including as recently as August 20, 2019, several months after the *Gallagher* decision was issued.

(Continued on page 2)

(Continued from previous page)

The "regular use exclusion" remains valid and enforceable; however, in light of the *Gallagher* decision this issue should be monitored as undoubtedly the appellate courts will be asked to revisit the "regular use exclusion" when the claim involves only one insurer issuing the policy that insured the regular use vehicle and the policy under which UM/UIM benefits are requested.

Eastern District of Pennsylvania Holds that the Failure to Accept the Policy Limits Demand on a UIM Claim is not Bad Faith Standing

In *Doyle v. Liberty Mutual Insurance*, 2019 WL 4917123 (E.D. Pa. 2019), the Eastern District of Pennsylvania considered a Motion to Dismiss a cause of action for Bad Faith that was asserted as part of a lawsuit to recover UIM benefits.

Doyle was injured when he was struck by a vehicle as he was crossing the street. The tortfeasor had liability limits of $15,000, which were tendered. At the time of the accident, Doyle held a UIM policy with Liberty Mutual with a $300,000 limit. Doyle demanded the UIM policy limits and provided Liberty Mutual the same documents he submitted to the tortfeasor's liability insurer that resulted in the tender of the tortfeasor's liability limits. Liberty Mutual did not pay the policy limits and a lawsuit followed for Breach of Contract and Bad Faith.

Liberty Mutual sought dismissal of the Bad Faith cause of action on the grounds that Doyle failed to allege any facts sufficient to sustain the claim, and the court agreed. The court concluded that allegations that Liberty Mutual failed to evaluate the claim objectively; failed to complete a prompt and thorough investigation of the claim; and unreasonably withheld policy benefits were nothing more than conclusory allegations unsupported by specific facts sufficient to state a plausible claim that Liberty Mutual did not have a reasonable basis for denying benefits under the policy and Liberty Mutual knew or recklessly disregarded its lack of a reasonable basis for denying the claim. The court observed that in federal court Doyle had to plead specific facts as evidence of bad faith and could not rely on conclusory statements. Doyle failed to plead any facts related to the allegedly unfair and unreasonable investigation. The Court stated that "the failure to immediately accede to a demand for the policy limit cannot, without more, amount bad faith". Doyle was granted leave to try to cure this defect.

This decision is one of many recent decisions issued by the Pennsylvania federal courts dismissing bad faith claims at the Motion to Dismiss stage due to the insured failing to allege specific facts to support the various theories of bad faith conduct. As such, for any bad faith case filed in federal court consideration should be made to moving to dismiss the bad faith claim for failing to specifically identify the bad faith conduct at issue.

Partner Contact Information

Paul J. Walsh III
412-263-5237
pwalsh@walshlegal.net

Adam M. Barnes
412-261-3268
abarnes@walshlegal.net

Pamela V. Collis
412-263-5238
pcollis@walshlegal.net

Gina M. Zumpella
412-263-5221
gzumpella@walshlegal.net

Susan A. Kostkas
412-261-3389
skostkas@walshlegal.net

Edward A. Yurcon
412-263-5218
eyurcon@walshlegal.net

John M. Polena
412-261-3278
jpolena@walshlegal.net

Pennsylvania Supreme Court Holds that Insurance Policy Requirements that First-Party Medical Benefits Claimants Undergo an Independent Medical Examination to Recover Benefits Conflicts with 75 Pa.C.S.A. §1796(a) and is Void Against Public Policy

In *Sayles v. Allstate Ins. Co.*, 2019 WL 6138049 (Pa. 2019), the Pennsylvania Supreme Court resolved a certified question from the United States Court of Appeals for the Third Circuit and held that an automobile insurance policy provision, which requires an insured seeking first-party medical benefits under the policy to submit to an independent medical exam ("IME") whenever the insurer requires and with a doctor selected by the insurer conflicts with 75 Pa.C.S.A. §1796(a) of the MVFRL and is void as against public policy.

The court reviewed two first-party medical benefits claims, one presented under an Allstate policy and another presented under a Travelers policy. Each policy contained a provision requiring the claimant to submit to physical exams by physicians that the insurer selects. Each insurer directed that the claimant undergo an IME to be performed by a doctor of the insurer's choosing.

Both claimants refused to undergo the examination. Neither insurer obtained an order of court to have the claimant undergo a physical examination by a physician pursuant to the provisions of §1796(a), which states in pertinent part:

"Whenever the mental or physical condition of a person is material to any claim for medical, income loss or catastrophic loss benefits, a court of competent jurisdiction… may order the person to submit to a mental or physical examination by a physician. The order may only be made upon motion for good cause shown. The order shall give the person to be examined adequate notice of the time and date of the examination and shall state the manner, conditions and scope of the examination and the physician by whom it is to be performed. If a person fails to comply with an order to be examined, the court or the administrator may order that the person be denied benefits until compliance."

When the insurers failed to make first-party medical payments, the claimants filed suit and argued that the insurance policy provisions that compelled the claimants to undergo an IME were void against public policy.

The court rejected the argument that §1796(a) did not impose a mandatory duty upon the insurers as to how the insurers may compel a claimant who has filed a claim for first-party benefits to submit to an IME after the claimant has refused the insurer's request to voluntarily do so.

The court also rejected the argument that §1796(a) only applied to automobile policies that did not contain any language specific to conducting IMEs of claimants seeking first-party medical benefits.

The court compared the language of §1796(a) to the policy provisions in question and concluded that the provisions were in irreconcilable conflict with §1796(a) and void as against public policy for failing to afford claimants any of the protections set forth in §1796(a): putting the burden on the insurer to establish good cause for requesting the examination; providing adequate advance notice of the request for the examination; setting parameters on how the examination will be conducted and by whom; providing the insured the ability to challenge the request before a neutral judicial decision-maker; and leaving it up to the court to determine whether the failure to submit to the IME should result in benefits being terminated. The court was not persuaded by the argument that the provisions had been approved by the Insurance Department as the Insurance Department does not have authority to legally approve an insurer's use of policy language which conflicts with the express requirements of the MVFRL.

The take away from this decision is that if a first party benefits claimant refuses to voluntarily undergo an IME with a physician of the insurer's choosing, the insurer must petition a court of competent jurisdiction and demonstrate good cause for having the claimant undergo the IME, and the insurer cannot terminate first party benefits without an order of court based upon the failure to voluntarily agree to undergo the IME.

Course of Employment for Work-Related Injuries— Two Recent Cases Confirm Appellate Courts are Divided on Proper Application of the Law

Hot off the presses is the Supreme Court of Pennsylvania's decision in *US Airways, Inc. v. Workers' Compensation Appeal Board (Bockelman)*, 2019 WL 6139022 (Pa. 2019). A flight attendant employed by US Airways, who worked out of Philadelphia International Airport, was injured while placing her luggage on a rack in a shuttle bus that ran between the airport and the employee parking lot. The Supreme Court majority held the flight attendant was within the course of her employment, despite the fact US Airways had no control over either the shuttle service or the parking lot, both of which were maintained/operated by the Philadelphia Division of Aviation. Further, the City of Philadelphia owned the shuttle buses that operated between the airport and the employee parking lot. US Airways, however, was required by a collective bargaining agreement to provide free parking or reimbursement to its employees, and also undertook to obtain security badges for its employees. The badges gave employees access to secure areas of the airport.

The ruling is based on § 301(c)(1) of the Workers' Compensation Act, 77 P.S. 411(1), which sets forth two ways for an employee to establish an injury arising in the course of employment. First, when an employee is injured while furthering the employer's business interests, regardless of whether the injury occurs on the employer's premises or elsewhere, the injury arises in the course of employment. Alternatively, when an employee is injured while on the employer's premises, although not furthering the employer's business interests, the injury is nonetheless compensable if the employee shows the following:

1. She was on premises occupied, owned, or under the control of the employer; and
2. She was required by the nature of her employment to be present on the employer's premises; and
3. Her injuries were caused by the condition of the premises or by operation of the employer's business affairs on the premises.

The Supreme Court held the flight attendant met all these conditions. Thus, while the flight attendant was not furthering US Airways' interests while using the shuttle bus, she was in the course of employment because the court concluded the shuttle bus constituted premises occupied, owned, or under the control of US Airways. As to this first criterion, the majority dismissed the significance of US Airways' lack of ownership and control over the shuttle service and parking lot, and distinguished several prior appellate cases. The majority focused instead on prior cases in which the phrase 'premises occupied, owned, or under the control of the employer' was broadly construed to include areas that were "integral to the employer's workspace or constitute a reasonable means of ingress to or egress from the workplace."* As to the second criterion, the court dismissed the fact that US Airways did not require its employees to park in the parking lot or use the shuttle. Instead, the court focused on US Airways' obligation to provide parking or reimburse for it, and its obtaining of security badges for employees. As to the third criterion, the parties did not dispute the flight attendant's injury was caused by a puddle on the floor of the shuttle bus, and was therefore "caused by the condition of the premises." Thus, the court affirmed an award of benefits to the employee.

*The justices did not agree on all components of the majority opinion analysis, and one justice did not participate. The six justices who participated agreed with the result to award benefits. Not all agreed with the majority's broad interpretation of 'premises occupied, owned, or under the control of the employer.' This split decision from the Supreme Court indicates that issues involving the phrase will continue to be a source of dispute.

In the second recent decision, *Peters v. Workers' Compensation Appeal Board (Cintas)*, 214 A.3d 738 (Pa. Cmwlth. 2019), the Commonwealth Court addressed several recurring issues regarding employees who are injured after hours while driving home from a work-related event. The case demonstrates the numerous factual issues in these cases. In addition, there were both concurring and dissenting opinions amongst the seven judges who heard the case, with the final tally of 4-3 in favor of denying benefits.

In *Peters*, the employee was a salesman who worked from a branch office in Allentown, and also worked from home as necessary. He cold-called potential customers, and also met with customers to present products, close sales, and negotiate contracts. He had a work schedule that included some days in the office, with the remaining time in the field.

(Continued on page 5)

Course of Employment for Work-Related Injuries—Two Recent Cases Confirm Appellate Courts are Divided on Proper Application of the Law

(Continued from page 4)

On the day he was injured, the employee spent the entire day in the field, traversing the northern portion of his territory operating a work van. After his last appointment, he drove to Allentown and met his work colleagues at a bar. The court noted the employee drove past the exit for his home while traveling to the bar. The gathering at the bar was described variously as "a celebration with co-workers," a "social event," and "happy hour." There was a factual dispute about how long the event lasted. The employee was injured while driving home from the bar when he was involved in a motor vehicle accident.

The primary issue in the case was whether the employee was in the course of his employment at the time of the accident. The court agreed the employee was a "traveling employee." Traveling employees, unlike stationary employees, are considered to be in the course of employment when traveling to and from work. Under this broader "course of employment," traveling employees often qualify for benefits for injuries that occur while they are commuting. (Ironically, the flight attendant in the *US Airways* case, whose job was to travel, was not a traveling employee and was awarded benefits, while the traveling employee in *Peters* was denied benefits).

In *Peters*, the court reviewed prior cases on traveling employees, and decided geographical considerations were significant. With this geographic-focused framework, the court held the employee had abandoned his employment. He had left his sales territory and driven past his home; thus, his post-happy hour "homeward trip" was not in the course of employment, even for a traveling employee. The strong dissent relied on conflicting prior cases to support an argument the employee was in the course of employment, as he was on his way home at the time of the accident, and had engaged in a work-related social event in the interim between sales activities and driving toward his home. The dissent pointed out the employer sponsored the social event and invited the employee to attend, although also noted the event was not mandatory. It is almost certain benefits would have been awarded if the employer had mandated attendance at the social event, either explicitly or implicitly.

US Airways and *Peters* highlight the intensive factual and legal analysis required for evaluation of whether an injury occurred in the course of employment. Further, as the divided decisions from the Supreme Court and the Commonwealth Court indicate, even those who carefully and thoughtfully analyze the issues can come to contrary conclusions.

NOTICE REMAINS KEY ISSUE IN SERIES OF SUPERIOR COURT CASES AFFIRMING SUMMARY JUDGMENTS INVOLVING FALLS ON PROPERTY

In the past year, two separate Superior Court panels have issued non-precedential opinions affirming dismissals of slip and fall/trip and fall premises liability lawsuits at businesses based upon Motions for Summary Judgment due to the plaintiffs' failures to prove the defendants had notice of a dangerous condition.

Generally, in premises liability actions involving business invitees, i.e. customers, a possessor of land is subject to physical harm caused to his invitees by a condition on the land if, but only if, he:

a) knows or by exercise of reasonable case would discover the condition, and shoulder realize that it involves an unreasonable risk of harm to such invitees. and,
b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it. and,
c) fails to exercise reasonable care to protect them against the danger.

See Porro v. Century III Associates, 846 A.2d 1282, 1285 (Pa. Super. 2004).

In *Boukassi v. Wal-Mart Stores, Inc., 3449 EDA 2018 (Pa. Super. 2019)* the plaintiff brought a negligence action after she slipped and fell on an unknown substance in the middle of an aisle in the defendant's store. The trial court entered summary judgment for the defendant based on a lack of proof of notice. A three judge panel of the Superior Court affirmed holding that there was no evidence the defendant knew of the spill and there was no evidence presented on how long the spill existed to establish constructive notice that the Defendant knew or should have known of the harmful condition.

Similarly, in *Barrios v. Giant Food Stores, LLC., 83 MDA 2018 (Pa. Super. 2018)* a plaintiff brought a negligence action against the defendant grocery store after she slipped and fell on a small puddle of water in the store. The trial court granted summary judgment in favor of the defendant based upon a lack of notice. A three judge panel of the Superior Court affirmed holding that the plaintiff had failed to provide evidence of the source of the water or that the defendant had actual or constructive notice of the spill.

In both cases the opinions of the Superior Court reiterated that an owner of a store is not an insurer of the safety of its customers and that it remained important to establish that a dangerous condition existed and that the store owner had actual or construction notice before liability could attach.

Announcements

■ **Gina Zumpella** was elected to the Allegheny County Academy of Trial Attorneys. This is a peer organization, invitation only, limited to 250 trial attorneys in Allegheny County, Pennsylvania. It is an honor to be nominated as the Academy is comprised of experienced litigators, both plaintiff and defense, with a proven trial record. Our firm is well represented as Gina joins Paul Walsh, Pam Collis and Ed Yurcon who are members as well.

■ In December 2019, **Adam Barnes** served as an author and presenter for a Continuing Legal Education program conducted by the National Business Institute titled *"Bad Faith Insurance Claims in Pennsylvania"*, presenting on the topic of tactics used to set up insurance companies for bad faith claims and how to respond to the same.

■ In November 2019, **Gina Zumpella** served as a panelist for the Bridge the Gap program, which is a Continuing Legal Education program for newly admitted Pennsylvania lawyers addressing professional ethics.

Results

■ In November 2019, **Adam Barnes** secured a defense verdict in a trial conducted in Indiana County involving a motor vehicle accident wherein the client's tractor-trailer was struck by a dump truck while the tractor-trailer was making a right turn at an intersection. The owner of the dump truck initiated the lawsuit to recover the cost to repair the dump truck and lost income under the theory that the accident was caused by the tractor-trailer entering the dump truck's lane of travel during the turn. In addition to the defense verdict, Adam obtained a verdict for reimbursement of the cost to repair the client's damaged trailer.

■ In November 2019, **Gina Zumpella** successfully obtained voluntary dismissal from a negligence lawsuit involving injuries caused by a slip and fall on snow and ice based on the theory that the client was not the entity responsible for maintaining the area in question.

■ **Gretchen Fitzer and Susan Kostkas** successfully challenged, on Preliminary Objections, a claim of direct corporate liability in a professional liability suit. The firm was also successful with its Preliminary Objections to the plaintiff's claim for punitive damages. Both the direct corporate liability claim and the punitive damages were stricken from the Complaint.

■ In October 2019, **John Polena** obtained a dismissal of a Complaint based upon Preliminary Objections for a restaurant involving a breach of contract action filed by a lender based upon a mandatory arbitration provision in the commercial financing agreement.

■ In August 2019, **Gina Zumpella** successfully tendered the defense of a landlord to a tenant based upon a contractual agreement for maintaining a cart retrieval station in parking lot.

■ **Susan Kostkas** was successful in arguing Preliminary Objections in a negligence case brought by an adult son and his mother arising from a paralyzing injury he sustained following a fall from a tree. All mother's claims were dismissed. The court agreed with our client that she could not pursue a loss of consortium claim. Additionally, mother was unable to satisfy the elements of her negligent infliction of emotional distress claim based upon the facts plead. Concerning the adult son's claims, the court rejected his argument that, although not pursuing an attractive nuisance claim, he could plead legal terms of art associated with the attractive nuisance doctrine.

Top Ten Moments in Pittsburgh Sports History

10. 5 Goals 5 Different Ways – On December 31, 1988, Mario Lemieux managed to perform a feat which has never been replicated when he scored 5 goals in a single game 5 different ways. He scored an even-strength goal, a shorthanded goal, a power play goal, a penalty shot and an empty net goal.

9. The Save – In 1991, with the Penguins down 3-2 in division semi-final series against the New Jersey Devils, Frank Pietrangelo robbed Hall of Famer Peter Stastny with a flash of his glove. The Penguins would go on to win the series in 7 games, and eventually claim the team's first Stanley Cup.

8. Super Bowl 43 – Super Bowl 43 held many special moments for Steelers fans. Just before halftime, with the Arizona Cardinals trailing 10-7, linebacker James Harrison intercepted a pass at the goal line and made an incredible 100 yard run to score a defensive touchdown. Then, with less than a minute left on the clock and down by 3 points, Ben Roethlisberger connected with a pass to Santonio Holmes in triple coverage. Holmes took the pass and managed to keep his feet on the ground for the eventual game winning touchdown.

7. Johnny Miller's 63 at Oakmont – In the 1973 U.S. Open, Johnny Miller posted the lowest round in U.S. Open history, shooting a 63 at Pittsburgh's own Oakmont Country Club, to defeat John Schlee, Jack Nicklaus, and hometown favorite Arnold Palmer.

6. Sweetest Sugar Bowl – On January 1, 1977, Pitt Football went on to win its last National Championship after Pitt defeated 5th ranked Georgia in the Sugar Bowl 27-3. Led by Tony Dorsett, the team put together a 12-0 season.

5. Mr. 3000 – On September 30, 1972, in his last regular season at-bat before his tragic and untimely death, Roberto "Sweetness" Clemente achieved his 3000th hit, a feat which few have been able to achieve.

4. Penguins First Stanley Cup Victory – In 1991, the Penguins won their first Stanley Cup. Led by Mario Lemieux, Ron Francis, Jaromir Jagr and Paul Coffey, this stacked team took Game 6 over the Minnesota North Stars 8-0, etching the team and Lemieux's name on the Cup for the first time.

3. Steelers' First Super Bowl Victory – In 1975 the Steelers made their first appearance in the big game, and took home a win over the Minnesota Vikings. The final score of the game was 16-6.

2. The Immaculate Reception – In their first ever playoff game on December 23, 1972, the Steelers were down 7-6 against the Oakland Raiders. With less than 30 seconds on the clock, Terry Bradshaw, dodging tackles, threw the ball to John Fuqua. The ball was knocked backwards, and just inches off the ground fullback Franco Harris caught the ball and ran it in for the game winning touchdown.

1. Mazeroski's Miracle – In Game 7 of the World Series, the Pirates and New York Yankees were tied 9-9 in the 9th inning. Bill Mazeroski, the Pirates' second baseman, led off against Ralph Terry in the bottom of the 9th. After one ball, Mazeroski slammed a home run over the left field wall, ending the Series and clinching the Pirates third World Series title.