ELION, WAYNE, GRIECO, CARLUCCI, SHIPMAN & IRWIN, PC
125 East Third Street
Williamsport, PA 17701

ROBERT B. ELION, ESQUIRE

Phone: 570-326-2443 **Fax: 570-326-1585**

LUNCH & LEARN – LYCOMING LAW ASSOCIATION
WEDNESDAY, OCTOBER 17, 2007

LIMITED TORT, UNDERINSURANCE, UNINSURANCE WITH A SMATTERING OF STACKING AND SUBROGATION

REFERENCES

The Bible for motor vehicle cases is *Pennsylvania Motor Vehicle Insurance an Analysis of the Financial Responsibility Law* by James R. Ronca, Leonard A. Sloane, David L. Lutz, Timothy A. Shollenberger and James F. Mundy. It can be purchased through the Pennsylvania Trial Lawyers Association.

Personal Injury Subrogation Handbook 2006 EditionSubrogation Handbook 2006 Edition by Timothy A. Shollenberger and Wilhelm H. Mabius. It can also be purchased through Pennsylvania Trial Lawyers Association.

PaTLA Auto Listserv (autolaw@listmgr.patla.org) You must be a PaTLA member to participate. There are over 700 participants.

MANDATORY INSURANCE

$15,000 Liability
$5,000 Medicals

All other automobile insurance is elected.

TORT COMMON LAW

Everyone has a responsibility to drive their motor vehicle in a safe and reasonable manner. If they breach that duty they become liable, they become at fault and negligent and therefore they are responsible for all the damages that flow from that

breach of duty. If the tortfeasor did not breach the duty then the damages would not have occurred and there would be no claim. Therefore the innocent, injured victim is entitled under the law to be fully compensated for all the damages which flow from the breach of the duty.

STATUTORY CHANGE TO COMMON LAW
LIMITED TORT

Limited Tort, otherwise known as Optional Verbal Threshold, was part of the 1990 amendments to the Motor Vehicle Financial Responsibility Law (also known as the Act 6 Amendments). 75 C. Pa. C.S. § 1701 et seq. The purpose was to curtail the cost of rising automobile insurance by giving the consumers a choice. Previous to 1990 every insured had full tort rights.

ELECTION OF LIMITED TORT

You must elect limited tort option by signing a specific form contained at 75 § 1705. This form must contain the annual premium for the limited tort option and must contain the annual premium for the full tort option.

If this form is not signed by a named insured then full tort applies. It is the insurance company's obligation under the law to provide a valid signed and dated election of tort option. If they do not then full tort applies.

WHO MAKES THE ELECTION

A named insured makes the election and that election binds all insureds under the policy. If there was more than one named insured, any named insured can make the election for all the named insured.

EFFECT

Once the option is put into effect it is binding until another option is signed and will apply to all renewal policies. The election of limited tort prevents all insureds from recovering non-economic damages, i.e. pain and suffering unless they have sustained a serious injury. They can still recover non-compensated or subrogable medical expenses, consequential damages and lost wages. With a validly executed limited tort election, the spouse is prohibited from proceeding with a loss of consortium claim.

SERIOUS INJURY

Serious injury is defined as a personal injury resulting in death, serious impairment of bodily function, or permanent serious disfigurement. 75 § 1702.

SERIOUS IMPAIRMENT OF BODILY FUNCTION

Initially Pennsylvania Courts looked to Michigan for guidance in defining serious impairment of bodily function because the Act 6 Amendment was identical to Michigan. The factors to be considered are:

1. The particular bodily function impaired.
2. The extent of the impairment.
3. The length of time the impairment lasted.
4. The treatment required to correct the impairment.
5. Any other relative factors.

It is not so much the injury, but how the injury has impacted this person's life over a period of time. The plaintiff must prove (and it is the affirmative burden of the plaintiff) that he/she has not just sustained an injury, but that it was a serious injury which seriously impaired a bodily function. Washington v. Baxter, 719 A.2d 733 (1998). The impairment does not have to be permanent to be serious and the court must consider the totality of the circumstances. Leonelli v. McMullen, 700 A.2d 525 (Pa. Super. 1997).

WHO MAKES THE CALL?

If the plaintiff is bound by the limited tort election in all but the clearest of cases it will be a jury question. Initially there was a flurry of summary judgment motions filed primarily by defense and they asked the court to decide as a matter of law that the injuries are not serious. However, the courts were reluctant to hold as a matter of law that the injuries were not serious and instead decided it was a jury question.

Some examples where the insurance company did not concede serious injury that was submitted to the jury:

1. Fractured forearm requiring two operations, work duties affected, muscle fatigue, jarring, feeling in wrist and decreased wrist strength.

2. Bulging disc, three years post crash, plaintiff still cannot walk more than a block at a time, cannot lift heavy objects and had to reduce her employment status from full time to part time.

3. Neck and Knee pain, two bulging discs, physical therapy and chiropractic care, no longer able to hunt, ride a mountain bike or motorcycle, return to work with minor limitations.

4. Fractured leg, partial loss of use of big toe, off work for two months, continued pain in leg, no medical restrictions as to type of work, can fish and hunt, but gave up jogging.

5. Back injury with radiating pain, treating doctor opined that the injuries caused by the crash and it chronic, lifting restrictions were imposed and still has pain two years post crash.

6. Plaintiff missed six weeks of work sustained a herniated disc lumbar radiculopathy, had pain and numbness and gave up hobbies and limited some others.

REALITY

The reality in virtually all but the most serious cases is that the election of limited tort devalues the settlement value of the case.

PERMANENT SERIOUS DISFIGUREMENT

1. How noticeable is the scarring after the healing period?
2. Is there medical evidence that the scarring is permanent after some time?

My experience is that in most situations the value of the scarring case decreases with time.

PRIVATE PASSENGER VEHICLE

Limited tort applies only to private passenger motor vehicle liability insurance polices of the named insured. Private passenger is (a) A four wheeled motor vehicle (except recreational vehicles not intended for highway use), (b) Which is insured by a natural person, (c) Is a passenger car neither used as a public or livery conveyance, (d) Is not rented to others, (e) Has a gross weight of 9,000 pounds or less, (f) Is not used for commercial purposes other than farming, (g) is not a recreational vehicle not intended for highway use, and (h) Is not a vehicle insured exclusively under a policy covering a garage, auto sales, agency, repair shop, service station or public parking place.

In sum, it doesn't apply to heavy trucks, vehicles owned by a business entity, government vehicle or transportation authority buses, and rental vehicles.

THE INTENT WAS FOR LIMITED TORT TO APPLY FOR THE FAMILY CAR.

EXCEPTIONS

Section 1705(d) - Under the following facts, even if one elects limited tort, it does not apply if:

1. The tortfeasor is convicted or accepts ARD for driving under the influence.
2. The tortfeasor is operating a vehicle registered in another State.
3. The tortfeasor intentionally injures the person.

4. The tortfeasor is the owner of a currently registered motor vehicle and has not maintained financial responsibility as required.

UNINSURANCE

Uninsurance is insurance that is purchased by you on your liability insurance policy which is applicable when the tortfeasor has no insurance.

LIMIT

You can purchase uninsurance up to the level of your liability coverage. i.e. if you have $100,000 of liability coverage you can get up to $100,000 of uninsurance.

STATUTE OF LIMITATIONS ON UNINSURANCE

Statute of limitations on uninsurance is contractual and therefore four years. It begins when three events occur:

1. A motor vehicle collision
2. Bodily injury
3. The injured knew or reasonably should have known of the uninsured status of the tortfeasor.

UNDERINSURANCE

Underinsurance is insurance available to an insured who was injured by a tortfeasor who had some insurance but not enough to adequately compensate the injured insured policy.

For example, if an insured sustained $100,000 of damages and the tortfeasor only had $15,000 of liability insurance (which is the minimum mandatory in Pennsylvania) then the tortfeasor is underinsured to the tune of $85,000. If the injured insured had sufficient underinsurance then it would be added to the $15,000 of liability coverage of the tortfeasor to fully compensate the injured insured to $100,000.

STATUTE OF LIMITATIONS ON UNDERINSURANCE

The statute of limitations on underinsurance begins when the third party settlement for policy limits or verdict exceeds the limits and is four years from that date because it is contractual in nature.

LAW APPLICATION TO BOTH UNINSURANCE AND UNDERINSURANCE

BUFFER

You have no control over whether or a tortfeasor has purchased uninsurance or uninsurance. Purchase of these insurances is a way that you can make certain that any insured in your vehicle is protected up to whatever amount you want to purchase.

OFFER TO PURCHASE

The insured must be offered underinsurance equal to the limits of liability. The insured has the option of rejecting it or electing less, but the insurance company has the obligation providing that the insured elected less than liability coverage or rejecting under and uninsurance in its entirety. If they don't provide the sign down or rejection then the insured is deemed to have underinsurance and uninsurance equal to the liability coverage.

PRIORITY OF RECOVERY

1. Basic policy on the vehicle.
2. Insured's own policy
3. Relative policy

MANDATORY AVAILABILITY

$100,000 per person/$300,000 in the aggregate, $300,000 single limit.

If one purchases the mandatory availability, they have to purchase liability coverage equal to their uninsurance and underinsurance.

ADD-ONS

Underinsurance and uninsurance are basically add-ons to the availability of liability insurance of the tortfeasor. One still has to prove damages in order to get the under and uninsurance.

STACKING

Stacking is the right of an insured to take coverage for each vehicle for which a separate premium has been paid as a cumulative benefit, i.e. adding together the benefit of each vehicle and additional policies.

For example if you have a $50,000 under and uninsurance and you have five vehicles and you elect stacking, you have $250,000 of available insurance. Recently we had a client with $50,000 of underinsurance with five vehicles for $250,000 plus

a relative living in the household on another policy for $25,000. Since he elected stacking he gets the $250,000 plus the $25,000.

MANDATORY

Under 1990 Amendments, stacking becomes mandatory and must be offered and if not specifically rejected then you are deemed to have stacking.

WAIVER

The named insured can waive stacking by signing a separate form for both under and uninsurance. The form has to be signed and dated. Any rejection form that does not comply is void, thus putting the insured back to having stacking.

SACKETT

In a recent Supreme Court Case, Sackett v Nationwide Insurance Company, 919 A.2d 194 Pa 2007, the Pennsylvania Supreme Court held that if you add another vehicle on to the same policy you must sign an additional wavier of stacking. For instance, if the policy became in effect January 1, 2000 and you added a vehicle to have three vehicles on January 1, 2006 and you did not execute a new waiver of stacking – and the crash occurred on January 1, 2007 you would have stacking for three vehicles. The initial coverage is $25,000 – so now it would be $75,000.

THINGS TO DO

When you do your notice of representation to the first party carrier always request:

1. A copy of the insurance policy
2. A copy of the rejection of limited tort
3. A copy of any sign downs, i.e. under and uninsurance less than the liability coverage
4. Whether or not any vehicles were added after the initial waiver of subrogation
5. Any waiver of subrogation after the last vehicle was added.

PRIORITIES

1. The vehicle in which you are occupying
2. Your own vehicle
3. Any other vehicles to which you are an insured, i.e. resident relative

SUBROGATION

Subrogation is substitution of one party in place of another with reference to a lawful claim. Basically it's the right to receive back monies paid to an insured when the insured received those monies from another source.

Under most situations the Motor Vehicle Financial Responsibility Law prohibits subrogation. For instance, under your first party medical coverage there is no subrogation. If Allstate pays out $20,000 under your medical coverage, when you resolve the personal injury matter you do not have to pay Allstate back the $20,000. On the other hand, if you try the case you cannot put the $20,000 paid by Allstate up as medical damages. The basic principal is that if you can't recover the damages then you do not have to subrogate.

Some examples of subrogation:

WORKERS' COMP

There is no subrogation for loss of consortium or under or uninsurance of your own vehicle. There is subrogation for under and uninsurance on your employer's vehicle. There is NO subrogation for your own uninsurance and underinsurance coverage.

SELF-FUNDED ERISA

There is subrogation for a self-funded ERISA plan. Generally always write for a copy of the ERISA plan and look to the subrogation language. Some plans do not include the language and if you don't have the subrogation language then you don't have to pay it. Look to the plan for the availability of attorneys' fees and costs.

MEDICARE

Medicare is not bound by the Motor Vehicle Financial Responsibility Law under the doctrine of preemption. The lawyer has the responsibility of subrogation and never makes distribution without first getting the clearance of Medicare. You can subtract your attorneys' fees from a Medicare lien.

MEDICAL ASSISTANCE

DPW (Medicaid) has an absolute right to subrogation and a lawyer must notify DPW and reimburse DPW prior to distribution. Attorneys' fees and costs on a pro rata basis are available.

HMO

Wirth v. AETNA US Health Care recently held that an HMO has the right of subrogation.

Subrogation is a double edge sword. If there is insufficient coverage then that hurts the plaintiff; however, if there is sufficient coverage then it increases the value of the claim. Attorneys' fees and costs on a pro rata basis are available.

In short, subrogation is very tricky and in a number of cases the lawyer has personal exposure so be extremely careful.