



Recent Maryland Court of Appeals Case and Its Impact on UM/UIM Insurance Carriers

On December 6, 2007, the Maryland Court of Appeals issued its opinion in Maurer v. Pennsylvania National Mutual Casualty Insurance Co., Opinion No. 131 of the September Term, 2006. This decision will have a major impact on the manner in which an underinsured/uninsured (hereinafter "UM/UIM") carrier should evaluate accepting a settlement offer from the insurer of the third party driver. The Court of Appeals ruled that "an uninsured/underinsured motorist carrier, which consents to the settlement of its insured's tort claim against an uninsured/underinsured tortfeasor, is bound by the settlement. The uninsured/underinsured carrier cannot thereafter contest tort liability and, under some circumstances, the amount of damages." *Id.* at pg. 13. This will significantly affect all UM/UIM insurers' ability to defend claims based on liability, including the defenses of contributory negligence, assumption of the risk, unavoidable accident, and/or lack of negligence of the allegedly at-fault driver.

Facts

In this case, the plaintiff was a passenger in a vehicle that was involved in a single car accident. Both the plaintiff and the driver of the vehicle had been drinking prior to the accident. The driver's insurance company offered its policy limits of \$25,000. Maryland Code, Insurance Article §19-511, requires an injured

person who receives a written offer to settle a claim of bodily injury or death for the applicable limits of liability insurance policies to submit a copy of the written offer to his own UM/UIM carrier. Here, the plaintiff gave notice to his carrier, Pennsylvania National Mutual Casualty (hereinafter "Penn National") of the offer pursuant to §19-511(a). Penn National was then required to either accept or refuse to accept this settlement offer, within 60 days. Md. Code, Insurance, 19-511(b). Penn National consented to the settlement and executed releases for the driver and his insurer.

The plaintiff then filed a lawsuit against Penn National for coverage under the UM/UIM motorist provisions of the policy which provided \$250,000 in UM/UIM coverage. Penn National's defense was based on the plaintiff's alleged contributory negligence and/or assumption of the risk. The jury found that the plaintiff was contributorily negligent and returned

a verdict for the carrier. The plaintiff appealed based on erroneous jury instructions and the case went directly to Maryland's highest court, the Court of Appeals, on a Writ of Certiorari.

The Decision of the Court of Appeals

After the Court of Appeals decided that the jury instructions in the case were erroneous and prejudicial, the court went on to discuss an issue that was neither raised by the parties nor considered by the lower court. The court looked to Penn National's acceptance of the settlement offer and held that Penn National was not allowed to contest the liability of the driver or the contributory negligence of the plaintiff. The court cited three cases for this proposition.

All three of the cases relied upon by the Court involved either a settlement or a judgment issued in excess of the limits of the third party's liability policy. The Court of Appeals focused on the fact that each case mentioned the validity of 'consent to settle' clauses. Consent to settle clauses generally state that settlements, consent judgments, releases, covenants not to sue, etc. between insureds and the third party are not binding upon UM/UIM insurers unless the insurers have given their consent. In each of these cases, the holding was not based on consent to settle clauses, but the clauses were discussed as a means for the insurance company to

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protect its rights. Nationwide Mutual Insurance Company v. Webb, 291 Md. 721 (Md. 1981)¹; Waters v. U.S. Fidelity & Guarantee, 328 Md. 700 (Md. 1992)²; West American Insurance Company v. Popa, 352 Md. 455 (Md. 1998)³. The cases all involved an amount in excess of a third party's policy limits that had previously been agreed to by the parties or decided by a court, which was not present in the Maurer case. The settlement or judgment had determined the amount of damages while considering issues of liability. In the Maurer decision, instead of having a settlement setting the amount

¹In Webb, there was a determination of liability and damages of the uninsured motorist in a prior case. The UM/UIM carrier had notice of the case but, relying on a consent to sue clause, did not intervene. The court held that the insurer could not later contest liability since it was previously determined by a court.

²In Waters, the insured and the uninsured parties agreed to a settlement while the case was pending. The consent judgment was in excess of the underinsured party's liability insurance limits. The Court found that the UM/UIM carrier did not defend on grounds of liability or damages. The only defense was to coverage. The insurer was bound by the settlement because he was a party to the suit and could protect his interest, but instead relied solely on coverage defenses.

³In Popa, the underinsured party was the state of Maryland. Even though there was a judgment of \$867,000, the state had only waived sovereign immunity up to \$50,000 for each incident. The state paid the \$50,000 and received an order of satisfaction. The UM/UIM carrier could not avoid payment of limits by relying on the order of satisfaction or relying on the sovereign immunity of Maryland.

of damages, the acceptance of a settlement of the third party's policy limits did not determine the amount of damages. It merely allowed the third party and his insurer to pay limits and owe no further liability to plaintiff.

What Does That Mean to Insurers?

The end result is that the decision in Maurer holds that when an UM/UIM carrier accepts a settlement offer for the liability policy limits of the alleged at-fault driver, the UM/UIM carrier is admitting liability of the third party and in essence, waiving any right to defend on liability or to raise any affirmative defenses which might be applicable to the facts of the accident. UM/UIM carriers that have accepted the settlement offer will not be able to argue contributory negligence or assumption of the risk of plaintiff in their defense of UM/UIM motorist claims. At this time it appears that the ability to defend on the basis of the amount of damages is not changed.

This decision is new law in Maryland and UM/UIM carriers must now factor in this issue when deciding whether they should accept or reject a settlement offer under these circumstances. By rejecting the offer, the insurer will have to pay the injured party the amount of the offer. The insurer will then be allowed to contest liability at trial and raise issues of contributory negligence on the part of the plaintiff. However, even that comes at a cost.

Earlier this year, the Maryland Court of Special Appeals decided the case of Ohio Casualty Insurance Co. v. Chamberlin, 172 Md. App. 229, 914 A.2d 160 (2007), which will also play a role in deciding whether to consent to an offer of settlement of the alleged at-fault driver. In that case, the UM/UIM carrier refused to consent to a \$20,000 offer of settlement by the primary carrier in order to preserve its subrogation rights against the tortfeasor. By statute, the UM/UIM

carrier was required to pay the plaintiff the \$20,000 amount offered by the liability carrier before defending on the UIM claim. The jury then heard the case, but only awarded \$5,445 in damages to the plaintiff. Ohio Casualty moved to force the plaintiff to reimburse the excess \$14,555 that it had paid to the plaintiff pursuant to the procedural requirement. The Court of Special Appeals rejected this demand, holding that the payment of \$20,000 was simply to preserve the subrogation rights if the verdict exceeded the primary limits and that the UM/UIM carrier was not entitled to receive reimbursement from the plaintiff for the amount paid prior to the jury decision.

An additional factor to be considered is the new Maryland "Good Faith" statute which allows first party bad faith claims under Maryland policies. It is not clear exactly how these claims will fit in with this current case. Since accepting the settlement is now considered an admission of liability, it will clearly be bad faith for an insurer who accepted the settlement offer to refuse to pay a claim or to litigate a claim based upon the issue of liability. What is unclear is how an insured would have to proceed with a claim against his UM/UIM carrier in order to preserve issues of first party bad faith. The statute only governs civil actions and only when those actions involve three issues: 1) coverage or the extent to which the insured is entitled to payment, 2) allegations that the insurer failed to act in good faith, and 3) possible recovery of expense, litigation costs, and interest. For actions that involve all three issues, there are specific procedures required. If the insured files in the Circuit Court to resolve coverage and/or extent of payment issues, then it may be a waiver of his rights to later file a bad faith claim. However, the statute does not directly address the issue and no cases have been decided using the statute. As the case law develops, these issues will need to be further analyzed.