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I N S U R A N C E L A W

Coverage for Emotional Distress Claims in Pennsylvania

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Commercial general liability insurance policies typically cover those sums an insured becomes legally obligated to pay as damages because of “bodily injury.” That term is usually defined as: “bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.” Coverage for tort claims where the plaintiff has sustained a physical impact to his body or suffers from a physical disease is well accepted. Similarly, claims for emotional distress or mental injury resulting from physical injury to the body are generally understood to be covered under liability insurance policies. What is less clear is whether purely emotional injury, such as claims for psychological injury not precipitated by a physical impact or injury to the body or a physical disease is “bodily injury” within the meaning of a liability insurance policy. The Pennsylvania Supreme Court has not yet

addressed this question. As a result, for at least the past 20 years state and federal courts have wrestled with the issue.

Many courts have held that emotional distress is not bodily injury unless the emotional distress is caused by physical impact or injury to the body, as in *Kline v. Kemper Group*, 826 F. Supp. 123, 129 (M.D. Pa. 1993), *aff’d* 22 F.3d 301 (3rd Cir. 1994); *Zerr v. Erie Insurance Exchange*, 446 Pa. Super. 451, 667 A.2d 237 (1995); and *Philadelphia Contributionship Insurance v. Shapiro*, 798 A.2d 781 (Pa. Super. 2002). In 2007, however, the Superior Court held in *Glikman v. Progressive Casualty Insurance*, 917 A.2d 872 (Pa. Super. 2007), that a claim for post-traumatic stress disorder (PTSD) asserted by a woman who had seen her husband struck and killed by an automobile while crossing the street stated a claim for “bodily injury” even though the plaintiff herself had not been physically injured. The *Glikman*



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court observed that the definition of bodily injury included “disease” and that since there was no dispute that PTSD was a “disease,” the claim was covered as bodily injury. No physical impact or injury was required.

In 2011, the Superior Court decided *Lipsky v. State Farm Mutual Automobile Insurance*, No. 565 EDA 2010, 2011 Pa. Super. LEXIS 4299, at *2 (Super. Ct., Sept. 1, 2011), in which the plaintiffs filed claims for negligent infliction of emotional distress (NIED) as the result of witnessing their brother/son killed by a drunk driver when the four were crossing the street. The court

held that even though the underlying complaints alleged no physical injury to the plaintiffs' bodies and no specific physical manifestations of their emotional distress that they still asserted a claim for "bodily injury." In so holding, the court concluded that the definition of "bodily injury" in the policy conformed to previously settled Pennsylvania NIED jurisprudence that permits recovery for physical injuries manifesting from negligence based emotional distress. According to the court, the policy's "bodily injury" definition was broadly inclusive of more persons than merely the impact victim. Lipsky, an unpublished decision, was affirmed per curiam by an equally divided Supreme Court, *Lipsky v. State Farm Mutual Automobile Insurance*, 624 Pa. 224, 84 A.3d 1056 (2014).

Glikman and the unpublished decision in Lipsky have led some to speculate that the Superior Court was moving toward a complete abandonment of the physical impact/injury requirement for "bodily injury." The Superior Court's most recent decision on the subject suggests that the rumors of the physical impact/injury requirement's demise may be greatly exaggerated, as in *Steadfast Insurance v. Tomei*, 2016 Pa. Super. Unpub. LEXIS 1864, *2 (Pa. Super. Ct. May 24, 2016).

In Tomei, the insured, a tanning salon, was the defendant in a lawsuit brought by 37 patrons. The patrons alleged that a third party surreptitiously videotaped them

as they undressed and were unclothed during tanning sessions at the salon. The plaintiffs alleged that the videotapes were then posted for public viewing on the internet. The plaintiffs allegedly suffered humiliation, embarrassment, shame, mental anguish and mental trauma as a result of discovering nude images of themselves on the internet. It was also alleged that many of the patrons' emotional injuries were accompanied by physical components. The tanning salon sought a defense from its insurers claiming, among other things, that the claims were for "bodily injury." The insurers denied coverage, taking the position that "bodily injury" did not include emotional distress unless caused by an antecedent physical injury to the body. Relying on Glikman and Lipsky the insured argued the claims were covered despite the lack of physical impact or injury.

The Superior Court found Glikman to be distinguishable. Although the bodily injury definition at issue was similar to that in Glikman, the claims were not the same: Glikman suffered from a recognized psychological disease, PTSD, after watching her husband get struck and killed by a motor vehicle. Glikman was crossing the street with her husband when he was run over. Here, by contrast, some of the underlying plaintiffs alleged vague physical symptoms brought on by their emotional distress after learning that offensive videos had been posted to the internet. Even the

12 plaintiffs who at least alleged some physical symptoms associated with emotional distress did not allege any antecedent physical injury or impact, to themselves or anyone else. Nor did they allege anything resembling a "disease" as in Glikman.

The court also distinguished Lipsky, commenting that Lipsky involved a bystander NIED claim in which the plaintiffs witnessed the vehicular homicide of a family member and was factually distinguishable. The court also chided the insured for relying on Lipsky, which was unpublished and nonprecedential and cited in violation of the Court's internal operating procedures.

Glikman and Lipsky signaled a retreat from the antecedent physical impact/injury requirement. Perhaps Tomei suggests a retrenchment. The final word will, of course, come from the Pennsylvania Supreme Court. •

Special to the Law Weekly **Kenneth M. Portner**, a partner at *Weber Gallagher Simpson Stapleton Fires & Newby*, advises, counsels and represents insurance companies in coverage and bad-faith avoidance matters. He also represents lenders/creditors in collection, workout and bankruptcy. He frequently appears in state and federal courts in Pennsylvania, New Jersey and New York.