The Legal Intelligencer
THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2016
PHILADELPHIA, FRIDAY, NOVEMBER 4, 2016
An ALM Publication

INSURANCE LAW

Waiver of Uninsured/Underinsured Motorist Benefit Stacking

BY KENNETH M. PORTNER

Every motor vehicle liability insurance policy delivered or issued for delivery in Pennsylvania must offer the option to purchase uninsured and underinsured motorist coverages, 75 Pa.C.S. Section 1731(a). If an insured purchases the UM/UIM coverage, the limits of coverage available for an insured is by default the sum of the limits of each motor vehicle as to which the injured person is an insured, as in 75 Pa.C.S. Section 1738(a). This is referred to as "stacking." However, an insured purchasing UM/UIM coverage must be offered the opportunity to waive stacked limits in return for a reduced premium, 75 Pa.C.S. Section 1738(c). The waiver is effected by executing a statutorily prescribed written stacking rejection form, 75 Pa. C.S. Section 1738(d).

When a named insured purchases a new policy, the process is straightforward. The insurer advises the named insured of his right to waive stacking and provides him with the statutorily prescribed waiver form. If the named insured executes the form, stacking is waived.

But motor vehicle insurance policies are often not static. They change over time as vehicles are added or deleted from the policy. This is especially true of policies covering fleets of commercial vehicles. These practical realities have given rise to questions of how often a named insured must be offered the opportunity to waive stacking.

Insureds contend that a new stacking waiver must be offered each time a new vehicle is added to the policy since, according to the insured, addition of a vehicle constitutes a "purchase" of UM/UIM coverage. In the absence of a new waiver, the insured contends stacking has not been effectively waived and that therefore the sum of the limits applicable to each vehicle insured under the policy is available to address his claim. Not surprisingly, insurers contend that a stacking waiver obtained upon issuance of the policy is sufficient, no matter how many vehicles are later added or deleted from coverage.

Kenneth Portner

Pennsylvania courts have issued a number of not completely consistent decisions addressing the issue.

The seminal cases are the Supreme Court's decisions in Sackett v. Nationwide Mutual Insurance, 919 A.2d 194 (2007) (Sackett I). In that case the insured purchased a policy insuring two vehicles and executed a stacking waiver. He later acquired third vehicle and added it to the existing policy. The court held that a new stacking waiver must be obtained each time an insured "purchases" UM/UIM coverage and that the insured had "purchased" coverage when he added an additional vehicle to the policy. The court stated its holding did not apply to

a scenario where a new vehicle replaced an existing vehicle so that the potentially stacked limits did not increase.

The Supreme Court agreed to reconsider the case on Nationwide's request for re-argument in Sackett v. Nationwide Mutual Insurance, 940 A.2d 329 (2007) (Sackett II). The court also solicited an amicus statement from the insurance commissioner. The insurance commissioner disagreed with Sackett I's conclusion that adding a new vehicle to a multivehicle policy constituted a purchase of UM/UIM coverage. Instead, the commissioner explained that the department had always viewed that as an extension of existing coverage.

According to the commissioner, most vehicles are added to policies via "after-acquired-vehicle" (AAV) clauses. These provide that coverage is automatically extended under the same terms to new vehicles acquired by an insured subject to certain conditions, including timely subsequent notice to the insurer.

The commissioner's position persuaded the court to "clarify" Sackett I by explaining that Sackett I did not preclude enforcement of an initial stacking waiver with regard to coverage extended under certain types of AAV clauses in an existing multivehicle policy.

The court identified two types of AAV clauses: those that afford closed-term coverage (finite) and; those that afford continuous coverage (continuous). In Sackett II,the Supreme Court held that a new waiver is required only where a vehicle is added to a policy pursuant to a finite AAV clause because when the finite coverage ends, the insured will be required to purchase new coverage for the vehicle.

A footnote in the opinion noted that the holding was limited to scenarios involving addition of a vehicle to multivehicle policy and that the holding did not apply to additions to single-vehicle policies.

Since Sackett II, the debate over the need for new stacking waivers has focused on whether the Sackett analysis applies to single vehicle policies as well as multivehicle policies, and the characterization of AAV clauses as finite or continuous.

The U.S. Court of Appeals for the Third Circuit predicted the Pennsylvania Supreme Court would apply Sackett II to single-vehicle policies in State Auto Property & Casualty Insurance v. Pro Design, 566 F.3d 86, 93 (3d Cir. 2009). It reasoned that the Supreme Court had shown deference to the insurance commissioner's opinion that the mere addition of a vehicle to an existing policy is not a purchase and that therefore the addition of vehicles to a policy did not require a new waiver even for a single vehicle policy.

In Toner v. Travelers Home & Marine Insurance, 137 A.3d 583 (Pa. Super. 2016), the Superior Court also held that the Sackett II analysis applies to single vehicle policies. However, in a dissenting opinion, Judge Jacqueline O. Shogan agreed with the insured's contention that Sackett was not applicable to single-vehicle policies.

AAV clauses were addressed in Bumbarger v. Peerless Indemnity Insurance, 93 A.3d 872 (Pa. Super. 2014), and in Toner. In Bumbarger, the Superior Court held that an AAV clause that required an insured to notify the insurer within 45 days of the addition of a vehicle (as opposed to replacement of a vehicle) in order for coverage to apply was a finite AAV clause requiring a new waiver. In Toner the Superior Court held that a clause requiring the insured to notify the insurer within 30 days of acquisition, but did not distinguish between "new" vehicles and replacement vehicles, was a continuous clause.

The Pennsylvania Supreme Court recently agreed to hear an appeal of the Superior Court's decision in Toner on Sept. 8. •

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.*