THARPE & HOWELL, LLP

TRANSPORTATION NEWSLETTER

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This Newsletter is brought to you by Firm Partner Robert "Bruce" Salley, Chair of the Firm's Transportation Practice Group. Please feel free to contact Bruce at rsalley@tharpe-howell.com; or phone number (818) 205-9955 to discuss any questions or comments you might have. Also, for our friends and colleagues in the business community, Tharpe & Howell recently launched the *California Business Law Report* – an online forum which addresses the rapidly increasing convergence of business and law. To remain apprised of significant developments in the area of business law, please visit our forum at www.commercialcounselor.com.

DRIVER NOT AN "INSURED" WHILE STANDING OUTSIDE TRUCK WHEN STRUCK BY PASSERBY!

In *Westerfield Insurance Company v. Ken's Service, et al.*, defendant Ken's Service, a tow truck company, dispatched one of its employees, Mark Robbins, to assist a police officer in removing his vehicle from a ditch. When he arrived at the scene, Robbins got out of the tow truck and connected the tow cables to the police vehicle. While he was operating the control levers positioned on the side of the tow truck, another driver, Ashley See, sideswiped the tow truck and collided with Robbins. Robbins suffered substantial injuries, including a broken right arm and a protruding break of the right tibia/fibula. As a result of the accident, Robbins alleged to be "crippled for life."

The insurance carrier for the vehicle Ms. See was driving tendered its $100,000 policy limits to Mr. Robbins to settle the claim. However, Robbins sought additional compensation from Westfield Insurance, the insurer of Ken's Service, based on the underinsured motorist coverage on the subject tow truck. The uninsured/underinsured motorist endorsement to the Westfield Insurance Policy provided for underinsured coverage for the "insured," which the policy defined in relevant part to include "[a]nyone [besides the named insured or a family member] 'occupying' a covered 'auto' . . . ." Further, the endorsement defined "occupying" to mean "in, upon, getting in, on, out or off."

In response to the underinsured motorist claim, Westfield Insurance refused to pay based on its determination that Robbins was not "occupying" the vehicle at the time the accident occurred. Westfield Insurance then filed action for determination of its obligations to Robbins under the insurance contract.

Ken's Service and Robbins moved for summary disposition, claiming that Robbins was leaning on the tow truck for balance and support when See struck him; and that the incident had occurred while he was operating the towing controls which were located on the driver's side of the truck. They asserted that Westfield Insurance owed Robbins additional compensation because: (1) his injuries greatly exceeded the limits available under the negligent driver's policy of insurance; and (2) Robbins was an "insured" under the terms of the underinsured motorist endorsement to the policy because he was "occupying" the insured vehicle by leaning "upon" the tow truck at the time of the crash. Westfield Insurance argued that Robbins was not occupying the tow truck when See struck him; and had already been outside the truck for several minutes at the time.

The trial court (Michigan) interpreted the contract to mean that Robbins could only prevail if he could demonstrate he was "occupying" the truck by being "upon" it when he was struck; and then focused on the word "occupying." The trial court determined that coverage depended on a person's connectedness with the activity of being a driver or passenger of the vehicle; and if the activity or physical contact was incidental to being a driver or passenger, then the person would be occupying the vehicle and therefore would be insured. The trial court stated that physical contact alone with the vehicle was not relevant; and that the dispositive issue was whether Robbins' actions were the natural and probable result of being a driver or passenger. Thus, based on the fact that Robbins was operating the vehicle as a towing machine when struck, the trial court concluded his use was **unrelated** to being a driver or passenger of the truck and Robbins was therefore not covered under the policy terms.

Ken's Service and Robbins appealed.

In its analysis, the Michigan Court of Appeals noted insurance contracts are to be treated no differently than any other contract; and stated contractual language that is clear and unambiguous should be given its full effect according to its plain meaning unless it violates the law or is in contravention of public policy. It noted that in this case, the parties focused on the word "upon" and the meaning of that word; and the appellant court found that at the time of impact, Robbins was not in the vehicle, nor was he getting in, on, out or off the vehicle; and he had in fact been out of the vehicle for several minutes and was operating the levers of the tow truck at the time the accident occurred. Accordingly, the appellate court concluded the trial court was correct in finding that Robbins was not "occupying" the vehicle when he was struck and therefore was not an insured at that time under the policy terms.

Is Pre-Judgment Interest A Litigation Expense or Element of Damages?

In *State Farm Mutual Automobile Insurance Company v. Joanne Enrigue*, Enrigue made a claim for uninsured motorist benefits under her $100,000 UM policy coverage. State Farm disputed the claim and Enrique filed suit. During litigation, State Farm advanced $25,000 to Enrique and, prior to trial, Enrique sent a formal demand to State Farm under Delaware's rejected settlement offer statute in which she (Enrique) requested payment of an additional $65,000 (for a total of $90,000). The demand was rejected by State Farm and, before trial, the parties stipulated that $75,000 remained under the policy's UM coverage.

Following trial, the jury awarded $260,000 to Enrique. Enrique then filed a motion to assess expert witness fees, court costs, and prejudgment interest. The Superior Court judge awarded $1,369 for court costs, $2,000 for expert fees, and prejudgment interest; finding that the prejudgment interest, when added to the damages award, **could** exceed the UM policy limits. The judge noted however that the basis for calculating the prejudgment interest would be the remaining coverage balance of $75,000 (as stipulated to by the parties pre-trial), and not the jury's higher award of $260,000.

On appeal, State Farm claimed the trial judge erred by awarding Enrique prejudgment interest. It argued that the prejudgment interest, when added to the $75,000 damages award, would impermissibly exceed the uninsured motorist coverage limit. The appellate court found that prejudgment interest only becomes an obligation of a litigating party, (the uninsured motorist carrier in this case), when that party rejects the formal pre-trial demand for an amount less than what the jury subsequently awards. Accordingly, it agreed with the trial judge and found that prejudgment interest is an **expense** associated with the defense of the case and, as a litigation cost, does not constitute an element of damages relative to the policy limits.

Defense Verdict For Insured College Student Driver!

Following a 3-day jury trial, Firm attorney Gene Sharaga recently obtained a defense verdict on behalf of a college student client insured by Alliance United Insurance Company!

In this case, the Firm's college student client was sued by a 62-year old office manager of the Law Offices of David Drexler (a plaintiffs' personal injury firm), after a vehicular collision occurred while the student was on his way to school. At the time, the Firm's client was driving his Ford Escort at approximately 35-40 mph on a secondary four-lane roadway, with 2 lanes in each direction. The posted speed limit was 35 mph.

At trial, the student testified the plaintiff had made a left turn in front of him as the plaintiff exited a medical complex driveway. The student explained he was unable to stop in time, resulting in a broadside collision to the plaintiff's driver's door. Conversely, the plaintiff testified the student had made a sudden lane change (from the No. 2 to the No. 1 lane) because several cars were making a right-hand turn into the medical complex – when plaintiff pulled out from the driveway and into the No. 1 lane.

After plaintiff opened the door to evidence of insurance, attorney Sharaga inferred at trial that plaintiff's ulterior motive for suing the student was to bolster his (the plaintiff's) separate bad faith suit against his own carrier, Farmers Insurance, as Farmers had allegedly found him (the plaintiff) at fault for the accident, causing his premiums to increase. After deliberating for one hour, the jury returned a defense verdict in favor of the Firm's student client – which verdict will likely be utilized as collateral estoppel against plaintiff in his bad faith suit!

Defense Verdict Obtained With Recovery On Cross-Claim!

Firm Partner Shawn Elliott recently won a defense verdict on behalf of a Firm client who was sued for personal injuries, lost income, and property damage after being involved in a vehicular collision. In this case, the Firm's client had made a left-hand turn at an intersection, in front of a Honda Civic which had been traveling in the opposite direction. The resulting collision totaled both vehicles, and caused the operator of the Honda, Mr. Herrera, to sustain a number of injuries, including an open, compound fracture of his right heel. Mr. Herrera underwent 3 surgeries, and his experts testified he would require 2-3 surgeries in the future. Further, due to severe pain and heavy medications, plaintiff and his experts testified the 36 year old plaintiff may never be able to drive a vehicle again, and he was indefinitely prevented from continuing to work as a hotel manager. Plaintiff's past medical expenses were **$180,000+**, and his future medical expenses were estimated to cost an additional **$120,000**. These expenses, combined with lost earnings/lost earning capacity and additional items, resulted in a claim for special damages in excess of **$2.2 million**.

Prior to trial, the plaintiff demanded the defendant's $500,000 automobile liability insurance limits. The defendant's insurer did not accept this demand and, after initially offering $35,000 to plaintiff pursuant to Code of Civil Procedure Section 998, orally communicated a settlement offer of $100,000.

As a result of a preliminary, two day hearing, the court granted defendant's motion to preclude plaintiff's claim for pain and suffering pursuant to Civil Code Section 3333.4. Thereafter, a 7 day trial commenced on the issues of liability and plaintiff's claimed economic damages. Plaintiff focused on defendant's pre-trial admission that she did not observe plaintiff's Honda prior to turning left. The Firm's client countered that although she did not specifically see the Honda prior to the collision, she was certain there were no vehicles within 300 feet of her vehicle when she initiated her turn, and that the collision occurred because plaintiff was driving well over the posted 45 mph speed limit. After 1½ hours of deliberation, the jury returned a verdict in favor of the Firm's client, which included a favorable award on her $18,000 property damage claim!

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In The News

Tharpe & Howell recently launched the ***California Business Law Report*** – an online forum which continuously provides updated information on significant legal developments and practical advice for the business community. Please be sure to check it out at www.commercialcounselor.com!

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Tharpe & Howell has been part of the California, Arizona, and Nevada business communities for more than 35 years, providing clients with experience, judgment, and technical skills. We are committed to delivering and maintaining excellent client service and case personalized attention, and to be an integral member of each client's team.