CREDITS IN UIM CLAIMS UNDER FAIR SHARE ACT

In underinsured motorist ("UIM") claims in Pennsylvania, the plaintiff is permitted to settle the tort action for less than the policy limits of the tortfeasor *provided* that the underinsured motorist insurer is given a credit for the full limits of available liability coverage. See Boyle v. Erie, 656 A.2d 941 (Pa. Super. 1995). This is true for all tortfeasors in multiple defendant motor vehicle accidents. See Boyle v. Erie, supra.; Irving v. Progressive, No. 11-7594 (E.D. Pa. 2012). In this situation where there are multiple tortfeasors, this system of credits sometimes becomes problematic for plaintiffs, e.g. the minimally liable defendant with high limits. While this system of allocation of a credit for the full limits of all tortfeasors is fair for claims under the Joint and Several rules of the pre-amendment Comparative Negligence Act, this system of credits needs to be reconsidered in claims arising after June 28, 2011, the effective date of the Fair Share Act. A credit to the UIM insurer for the entire liability limit of the minimally liable defendant is no longer warranted nor equitable.

Prior to the enactment of the Fair Share Act, Pennsylvania had Joint and Several liability. In this regard, the Comparative Negligence Statute stated, in pertinent part:

> Where recovery is allowed against more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages and the ratio of the amount of his causal negligence to the amount of causal negligence attributed to all defendants against whom recovery is allowed. ***The plaintiff may recover the full amount of the allowed recovery from any defendant against whom the plaintiff is not barred from recovery.*** Any defendant who is so compelled to pay more than his percentage share may seek contribution.

42 Pa.C.S.A. § 7102 (emphasis added). Under this statute, any defendant found to be one percent negligent could be held responsible for payment of the entire verdict. Therefore, in underinsured motorist cases involving multiple tortfeasors, providing a credit for the full limits of liability coverage of all tortfeasors was fair and equitable. Since the entire verdict could be recovered against any one culpable defendant, providing a credit for the entire limits of liability coverage for each settling defendant was fair and equitable. Under the Fair Share Act, this is no longer the case. Therefore, the credit rule in underinsured motorist claims needs to be reconsidered in the multiple tortfeasor situation.

The Comparative Negligence Act was amended by the Fair Share Act, effective June 28, 2011. The Fair Share Act eliminated Joint and Several liability, with several limited exceptions. The most notable exception is the 60% Rule. In this regard, Pennsylvania law now provides:

> (2) Except as set forth in paragraph (3), a defendant's liability ***shall be several and not joint,*** and the court shall enter a separate and several judgment in favor of the plaintiff and against each defendant for the apportioned amount of that defendant's liability.
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> (3) A defendant's liability in any of the following actions ***shall be joint and several***, and the court shall enter a joint and several judgment in favor of the plaintiff and against the defendant for the total dollar amount awarded as damages:
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> (iii) Where the defendant has been held ***liable for not less than 60%*** of the total liability apportioned to all parties.

42 Pa.C.S.A. § 7102 (emphasis added). For motor vehicle accidents occurring on or after June 28, 2011, a tortfeasor is only responsible for the entire verdict *provided* the tortfeasor is sixty percent or more negligent. Otherwise, contribution is limited to the proportionate share of liability. Assessing a credit for the full policy limits for such a defendant in the multiple tortfeasor situation, therefore, is manifestly unfair and inequitable.

An example illustrates the problem. A plaintiff is driving his vehicle when struck by tortfeasor No. 1 who runs a stop sign. The plaintiff is pushed into the other lane of travel and struck by tortfeasor No. 2. The plaintiff sustains serious injuries. The case has a value of $300,000.00 to $400,000.00. The plaintiff institutes suit against both tortfeasors. Tortfeasor No. 1, who ran the stop sign, has $15,000.00 in coverage. Tortfeasor No. 2 has $500,000.00 in coverage. The claim arose prior to June 28, 2011; the case settles for $350,000.00. Tortfeasor No. 1 who ran the stop sign is agreed to be 90% negligent; tortfeasor No. 2 is agreed to be 10% negligent. Under Joint and Several liability concepts, tortfeasor No. 1 pays its $15,000.00 limit. Tortfeasor No. 2 pays $335,000.00. In any UIM claim under Joint and Several liability, the UIM carrier enjoys credits of $515,000.00. That same rule should not apply under the Fair Share Act.

Under the Fair Share Act, the elimination of Joint and Several concepts affects the settlement value. If the claim arose after June 28, 2011, despite its total value, the case instead settles for only $50,000.00. The elimination of Joint and Several liability affects the settlement value. Tortfeasor No. 1 still pays the $15,000.00 liability limit. Tortfeasor No. 2, however, pays only its "fair share" namely, $35,000.00 (10% of the total value). In any subsequent underinsured motorist claim, the credit given to the UIM carrier should now only be $50,000.00, namely the $15,000.00 limit of tortfeasor No. 1 and the "fair share" payment of $35,000.00 of tortfeasor No. 2. Credit for the entire liability limit of tortfeasor No. 2 should not be given to the UIM insurer.

The system of credits in multiple tortfeasor underinsured motorist cases after the enactment of the Fair Share Act should be vastly different than that which existed for claims arising before June 28, 2011. This system of credits comes into play when motor vehicle claims are settled. As is known, most cases settle. Therefore, the practitioner needs to be aware of and be prepared to address the potential problem. Certainly, not suing the minimally negligent tortfeasor may be a solution, provided however that there is sufficient underinsured motorist coverage. Alternatively, the minimally negligent tortfeasor can be pursued (so as not to leave money on the table) provided that an agreement can be reached with the UIM carrier as to any credits to be applied in the UIM claim. If no agreement can be reached, then the attorneys need to fashion a creative solution, i.e. placing the liability aspects, only, of the tort case in binding arbitration so that the arbitrator can assess the percentage liability of each tortfeasor. This allocation of liability can then be applied to the agreed value of the case to fashion the credits to be assessed in the UIM action. The UIM carrier cannot be permitted to seek credit for the limits of all tortfeasors under the Fair Share Act in this situation. The personal injury practitioner needs to be aware of this potential issue in the multi-defendant automobile accident case and address it up front in order to avoid the possibility of prolonged litigation.

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