RECENT COURT DECISIONS

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The following cases represent recent developments in uninsured motorists coverage. The first two cases involve "stacking" of coverage.

In ***Farmers Insurance Exchange v. Stever,*** 854 P.2d 1230 (Colo. 1993), the insured was not permitted to stack coverage. Tracy Stever was an insured under three policies of automobile insurance issued by Farmers Insurance Exchange. Stever was the named insured in one policy and was also an insured under two policies issued to her mother and step-father. Stever was severely injured in an automobile accident while riding as a passenger in an automobile driven by another individual, who was insured for liability under a policy issued by Safeco Insurance Company. The policy provided $50,000 per occurrence in liability coverage. Stever received $32,000 in settlement for any claims against the driver of the automobile. Farmers then agreed to pay Stever $68,000 which represented the difference between the $100,000 maximum limit of uninsured coverage available under any of the three Farmers' policies and the $32,000 that she had received in settlement from Safeco.

However, Stever contended that she was entitled to stack the three policies and therefore was entitled to $300,000 in uninsured motorist benefits. The appellate court ruled that the anti-stacking provisions contained in the Farmers policies were void as against public policy. However, the Supreme Court of Colorado reversed, finding the anti-stacking provisions valid.

Again, in ***Langley v. Allstate Insurance Company,*** 995 F.2d 841 (8th Cir. 1993), anti-stacking provisions were found to be permissible. Tamara Langley was injured in an automobile accident in 1989. She lived with her mother who owned two automobiles, both insured by Allstate under one policy. Neither of those vehicles was involved in the accident.

After being injured, Langley settled with the tort-feasor for $25,000. She then made a claim against Allstate for $100,000 in uninsured motorist benefits. Allstate paid $50,000 claiming that it was obligated to pay on only one insured car under the provisions of the policy.

Langley's mother, on her behalf, filed suit in federal court seeking a declaratory judgment that under the insurance policy and Arkansas law she should be

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allowed to "stack" coverage and thus have available $100,000 in uninsured motorist benefits. The appellate court affirmed the finding of the district court that Arkansas law does not prohibit anti-stacking provisions and that the insurance policy precluded stacking of benefits. The district court had found that, when the policy was read as a whole, it unambiguously prohibited intra-policy stacking of uninsured benefits.

In ***State Farm Mutual Automobile Insurance Company v. Laforet,*** 18 Fla. Law Weekly, D2522 (December 1, 1993), a State Farm insured filed an uninsured motorist claim and obtained a jury award of $24,000 in damages. The trial judge, in response to a motion for additur, increased the award to $265,753.

State Farm appealed contending that the trial court applied the wrong standard of proof on the issue of whether State Farm had acted in "bad faith." State Farm argued that the correct standard, the so called "fairly debatable" standard, should have resulted in a directed verdict in favor of State Farm.

The court defined the "fairly debatable" standard as providing that an insurer is not liable for bad faith if the evidence shows an objectively reasonable basis for the insurer to deny the first-party claim. The court found that the trial court apparently did include in its jury instruction the "fairly debatable" standard, and application of the standard would not have resulted in a directed verdict for the appellant because there was conflicting evidence on the issue.

The court declined to find that the "fairly debatable" standard was the law in Florida because the case was resolved on other grounds. The court merely said that it appears that standard was used and because of the conflicting issues, the motion for a direct verdict was properly denied.

The court also discussed Florida law which provides that an uninsured motorist action brought pursuant to the Florida "Civil Remedy" statute which provides that the amount of claimant's damages should include the total amount of damages "including the amount in excess of policy limits." The statute overturned a Florida case which had provided that in a first-party uninsured motorist case the plaintiff could not collect more than the policy limits. The legislature provided that statute was to be retroactive in application, and the appellate court certified the question of retroactivity to the Florida Supreme Court.

There has been significant litigation recently involving banks engaging in insurance agency activities. In ***Ludington Service Corporation v. Acting Commissioner of Insurance,*** Michigan Supreme Court Case No's. 95123, 95124 filed February 25, 1994, the bank's subsidiary was permitted to sell insurance. Ludington Savings Bank proposed to purchase and operate an existing insurance agency through Ludington Service Corporation, a wholly owned subsidiary.

The types of insurance proposed to be offered were life, accident, health, annuities, personal and commercial property, and casualty insurance. While the insurance and banking operations were to take place in the bank building, the

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bank had prepared a business plan that was designed to separate the lending activities from insurance activities.

The plan was submitted to the insurance commissioner and the bank filed suit seeking a declaratory judgment and requesting approval to operate the insurance agency in accordance with the business plan it had proposed. The initial suit was dismissed on the grounds that the plaintiff had failed to exhaust administrative remedies.

The plaintiff subsequently filed another suit in circuit court, apparently on the grounds that the commissioner had delayed his decision improperly. Subsequently, the insurance commissioner issued a declaratory ruling in conjunction with answering the plaintiff's complaint and filed the declaratory ruling along with his answer in the circuit court. The commissioner found that the plaintiff's business plan violated the Michigan Insurance Code. The commissioner, in essence, found the plan amounted to a prohibited "kickback" scheme, that the bank would use mortgage information improperly to its own advantage, that the plan would result in coercion of customers to purchase insurance through the plaintiff, and that the plan did not provide sufficient "safeguards." The trial judge affirmed the commissioner's findings. The appellate court, however, reversed the commissioner, who then appealed to the Michigan Supreme Court which affirmed the Court of Appeals.

In discussing the burden of proof the court indicated that great deference should be accorded to the commissioner's factual findings and construction of statutory provisions. Thus, the decision of the insurance commissioner should be upheld if supported by evidence that a "reasonable mind would accept as adequate to support the decision."

Despite the fact that deference should be given to the commissioner, the court found the record lacked competent material and substantial evidence to support the finding that a prohibited "kickback" scheme, as contemplated by the statute, was in place.

The insurance commissioner had found that the bank's informational mailings violated Michigan law because they would be received by some customers who are required to obtain insurance as a condition of a mortgage. The court disagreed with the finding that this activity constituted an improper use of mortgage information. The court wrote, "A generalized and untargeted informational mailing to all customers does not exploit the bank's knowledge that a specific borrower must have insurance as a condition of the loan." The court found that, absent direct targeting, the proposed business plan did not violate Michigan law.

In response to the commissioner's theory that "operations in accordance with the proposed business scheme would result in threats and intimidation of bank customers to purchase insurance through the plaintiff," the court found that the record lacked the necessary competent, material and substantial evidence to support such a violation.

The court found that the commissioner improperly relied on a statute which empowers the commissioner to review the granting and renewal of a license.

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The court found that the statute did not apply to the acquisition of an existing insurance agency.

The court also noted that regulatory controls are available to prevent the inherent pressure and intimidation that customers would endure where a subsidiary of a financial institution is allowed to sell insurance to borrowers of that financial institution.

In ***Barnett Banks of Marion County v. Tom Gallagher, Insurance Commissioner of the State of Florida, et. al.,*** United States District Court, Middle District of Florida, Case No. 93-178-Civ-Oc-20 (Dec. 2, 1993), state law prohibiting banks from selling insurance was not permitted to be preempted by federal law allowing such activity if sold from a community with a population of less than 5,000.

Barnett Banks Inc., which is a national bank, purchased the assets of an insurance agency located in Belleview, Florida, which has a population of less than 5,000. Barnett proposed to sell insurance through an insurance division of the Barnett Belleview Bank using licensed insurance agents. Barnett's intent was to market insurance to existing and potential customers regardless of where they were located. Sales were to be conducted only on behalf of insurers licensed to do business in Florida, and the insurance was not to be sold from bank branches in towns whose population was in excess of 5,000 persons (in other words, insurance was to be sold throughout Florida from the Belleview Branch). In October 1993, insurance commissioner Gallagher issued a Cease and Desist Order to the insurance agents associated with Barnett to stop any and all insurance agency activity other than credit life and credit disability which are allowed by Florida law. Barnett Bank then filed an action for an injunction and declaratory relief.

In essence, Barnett argued that § 626.988 Florida Statutes is preempted by federal law, specifically 12 U.S.C. § 92.

> Section 626.988 Florida Statutes provides in part as follows:
> (2) No insurance agent or solicitor licensed by the Department of Insurance under the provisions of this chapter who is associated with, under contract with, retained by, owned or controlled by, to any degree, directly or indirectly, or employed by, a financial institution shall engage in insurance agency activities as an employee, officer, director, agent, or associate of a financial institution agency.

The statute then defines a "financial institution" as, among other things, a bank or bank holding company, or any subsidiary, affiliate, or foundation thereof. Excluded from the definition of financial institution is a bank which is not a subsidiary or affiliate of a bank holding company and which is located in a city having a population of less than 5,000.

12 U.S.C. § 92 allows national banks to act as insurance agents in localities where the population is less than 5,000. Thus, the Plaintiff was asking the

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Court to declare that the state statute is preempted by the federal law and that, consequently, the Plaintiff should be allowed to employ insurance agents.

The Court noted that under Florida law, the scheme would be allowed as long as the bank, located in the town with a population of less then 5,000, was not a subsidiary or affiliate of a larger bank holding company. Since the Belleview Bank is an associate or affiliate of a larger bank holding company, the proposed plan violates Florida law and would be allowed only if Florida law was preempted by federal law.

In addressing the preemption issue, the Court took notice of the fact that 12 U.S.C. § 92 does not currently appear in the United States Code. The court addressed the question of whether section 92 actually continues to exist and found that the Supreme Court had recently resolved the issue by stating that a 1918 amendment had neither repealed nor affected section 92 and thus it remains current law.

The Court wrote that section 92 does not place limitations on the geographic scope of insurance sales authorized thereunder. Citing *Independent Insurance Agents v. Ludwig,* 997 F.2d 958 (D.C. Cir. 1993), the Court found, "Provided that the bank is selling insurance *from* a community of fewer than 5,000 inhabitants, there are no limits as *to where* the insurance may be sold."

The Court succinctly framed the issue as follows: "For Plaintiffs to prevail, the Court must find that section 92 is a "bank law;" that section 626.988 is a "bank law;" and, therefore, that the Florida provision, as inconsistent with federal law, is preempted and superseded by section 92. For Defendants to prevail, the Court must find that section 626.988 is a law enacted for the purpose of regulating the business of insurance; that section 92 does not specifically relate to the business of insurance; and, therefore, that McCarran-Ferguson exempts section 626.988 from any preemption, thus allowing 626.988 to remain effective, even with the continued existence of section 92." After detailed analysis, the Court concluded that section 92 did not relate to the business of insurance nor did it specifically require that apparently conflicting state laws be preempted. Thus, the Court found that McCarran-Ferguson saves § 626.988 from preemption and denied Barnett's motion for preliminary injunction and declaratory relief. The case most certainly will be appealed.

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