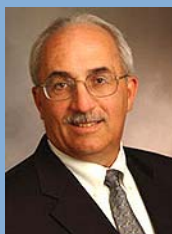




# COUGHLIN DUFFY LLP

CASE ALERT, NO. 12

JANUARY 19, 2007



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## New Jersey Appellate Division Expands Definition of “Operator in UM Coverage”

On January 11, 2007, Judges Lefelt, Parrillo and Sapp-Peterson of the New Jersey Superior Court, Appellate Division rendered an insurance decision of note in *George Pohlod v. NJM Insurance Co., et al.* The issue was on appeal from a decision by Judge Miniman the Superior Court of New Jersey, Law Division, Passaic County. Following oral argument, the Appellate Division held that the definition of “operator,” for UM purposes may, under appropriate circumstances, include a carjacker who does not physically take control of the vehicle until after the injury-producing event. Additionally, the Court held that “arising out of the ... use of a motor vehicle” for UM purposes may include a circumstance where the motor vehicle is not the injury-producing instrument, as long as there is a substantial nexus between the use of the auto and the resulting injuries. This opinion is significant because it expands the definition of “operator,” and “arising out of” for UM purposes, as those terms had been previously defined by the Appellate Division in *Grabowski v. Liberty Mut. Ins. Co.*, 345 N.J. Super. 241 (App. Div. 2001).

By way of background, On February 19, 2002, after finishing his work day, plain-

tiff walked to his car which was parked in his employer’s parking lot. At the time, plaintiff was driving a rental vehicle from Enterprise Rent-A-Car while his own vehicle was being serviced. As he sat in the vehicle warming it up and with the door still open, a man approached the vehicle with seemingly benign intentions. The individual continued to approach the vehicle revealing a sawed off shotgun and ordering plaintiff to move over. As the individual attempted to push plaintiff into the passenger’s seat, he reached for the shotgun in an attempt to protect himself. Thereafter, the individual pulled plaintiff out of the vehicle, threw him to the ground and assaulted him. While plaintiff was on the ground, the individual stole the car and fled the scene. As a result of the incident, plaintiff sustained a fractured hip and underwent three surgeries.

Plaintiff maintained personal auto insurance through New Jersey Manufacturers Insurance Company (“NJM”). Plaintiff’s NJM policy provided uninsured motorist benefits of \$500,000.00. Further, the rented vehicle was self-insured through Elroc, Inc. (Enterprise Rent-A-Car). Subsequent to the incident, plaintiff requested coverage pursuant to the UM portion of

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his NJM policy as well as the Elroc policy. NJM later denied plaintiff's claim for coverage, as did Elroc. As a result of the denial of coverage by NJM and Elroc, plaintiff filed a verified complaint seeking UM coverage under each of the potentially applicable insurance policies.

After hearing oral argument, Judge Miniman found the assailant was an "operator" of plaintiff's vehicle, for UM purposes, although he had not entered the vehicle. Judge Miniman also determined that, although plaintiff's injuries had been inflicted outside of the vehicle, the injuries arose from the use of the vehicle. Finally, Judge Miniman found that "both the carjacking and plaintiff's related injuries were reasonably foreseeable events for which the insurers should expect to provide coverage and against which the insured would reasonably expect to be protected." The Appellate Division affirmed all aspects of this holding.

Pursuant to the Appellate Division's holdings in Grabowski, it has been recognized that a claimant seeking UM benefits must prove: 1) that the claimed injuries were the result of an "accident," and 2) that the injury "arose out of the 'ownership, maintenance or use' of the uninsured vehicle." Grabowski, 345 N.J. Super. at 244. Defendants NJM and Elroc conceded that the events of February 19, 2002 were an accident, but argued that since the assailant never entered the vehicle and the injury-producing events all occurred outside of the vehicle, the assailant was not an "operator" of the vehicle for UM purposes. Additionally, the Defendants argued that the plaintiff's injuries did not arise out of the "use" of an uninsured vehicle.

On consideration of its previous holding in Grabowski, the Appellate Court determined that it had not established any limitation as to the definition of "operator" in Grabowski and further concluded that "the determination of who is an 'operator' for UM purposes is fact-sensitive and involves consideration of all of the surrounding circumstances in resolving the question." Using this principle as a guide, the Appellate Division held that in this instance, the assailant's verbal action, combined with his physical movements, were indicative of his intent to exercise actual physical control over the vehicle. Accordingly, Judge Miniman had properly deemed the assailant an "operator" of the vehicle for UM purposes.

As a separate matter, the Appellate Division found that there was a substantial nexus between the use of the vehicle and Plaintiff's injuries. Specifically, the Court concluded that "the use of the car played a critical role in the resulting injuries" and that there was a direct involvement of the automobile in the injury-producing event. Finally, the Court stated its agreement with the Law Division and held that the factual circumstances of the event was a risk against which the parties might reasonably expect to be protected pursuant to the insurance policy.

This ruling is instructive as an example of an expansion of coverage provided under the UM/UIM portion of an auto insurance policy. Specifically, this case outlines a broader interpretation of the terms "operator" and "arising out of" in the UM/UIM context which therefore requires a broader consideration, at the inception of an auto insurance policy, of the expectations of coverage by an insured. While this case certainly indicates

an extension of coverage pursuant to terms of an auto insurance policy, it is important to note that the Appellate Division specifically concluded that it was not creating a bright-line test relative to the definition of "operator" or "arising out of." Indeed, the Court said that a case-by-case factual analysis must be undertaken in every instance in order to establish the requisite substantial nexus between the use of the uninsured vehicle and the injury-producing event. Regardless of the eventual overall impact of this decision, this ruling stands as evidence that the definitions of these terms, commonly used in many aspects of the insurance industry, are organic and are not without limit. NJM has filed a petition for certification on this issue.

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