



# COUGHLIN DUFFY LLP

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## Appellate Division Rules That Statutory Prohibition Of UM/UIM Step-Down Clauses Not To Apply Retroactively

The use of a “step-down” clause that limits uninsured and underinsured (“UM/UIM”) coverage available to an employee of an insured business entity to the amount of UM/UIM coverage afforded under the employee’s personal auto policy was deemed valid and enforceable on June 6, 2005, by the New Jersey Supreme Court in Pinto v. New Jersey Manufacturers Insurance Co., 183 N.J. 405 (2005). On September 10, 2007, the Legislature enacted S-1666, codified at N.J.S.A. 17:28-1.1(f), which reversed the effect of the Pinto Court’s holding by expressly prohibiting the use of step-down clauses in business auto policies.

Following the enactment of S-1666, several cases were instituted in which UM/UIM claimants argued that S-1666 should be applied retroactively to invalidate step-down clauses for accidents that occurred before the enactment of S-1666. The decisions by the trial courts that have ruled on the issue have been inconsistent, with some decisions holding that S-1666 applies retroactively and others holding that it applies prospectively only.

On July 22, 2008, the New Jersey Superior Court, Appellate Division, issued the first appellate decision on the issue in Olkusz v. Brown, \_\_\_ N.J. Super. \_\_\_ (App. Div. 2008).

In its written opinion, which has been approved for publication, the Olkusz court unanimously (3-0) held that S-1666 must be applied on a prospective basis only and that any UM/UIM claim arising out of an accident that predates the adoption of N.J.S.A. 17:28-1.1(f) must be governed by the legal principles articulated by the Supreme Court in Pinto.

In Olkusz, the plaintiff, Susan Olkusz, was employed by Hackensack University Medical Center (“Medical Center”) as a registered nurse. The Medical Center provided a shuttle service to its employees, which transported the employees from the area where they parked their cars to their job sites. On April 13, 2004, the plaintiff was injured while riding the shuttle. She subsequently filed a claim for UM benefits with Atlantic Mutual Insurance Company, which issued plaintiff a personal auto insurance policy that afforded \$100,000 in UM/UIM coverage. Plaintiff was also entitled to UM coverage under the business auto policy issued by Federal Insurance Company (“Federal”) to the Medical Center, which afforded \$1,000,000 in UM/UIM benefits. The Federal policy, however, contained a step-down clause that limited Federal’s UM/UIM liability to the UM/UIM coverage limit contained in plaintiff’s personal auto

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policy.

Plaintiff instituted suit in Bergen County Superior Court seeking a declaration that she was entitled to the full \$1,000,000 UM limit under the Federal policy notwithstanding the step-down clause. Plaintiff argued that S-1666 should apply retroactively to invalidate the step-down clause in the Federal policy. The trial court agreed and ruled that S-1666 should be applied retroactively to any case pending or “in the pipeline” at the time of the amendment’s passage.

The Appellate Division reversed the trial court’s ruling, holding that S-1666 cannot be applied retroactively under New Jersey law. Citing to well-established New Jersey law, the Olkusz court recognized that the presumption is that all statutes or statutory amendments are to apply on a prospective basis only. Notwithstanding, the Olkusz court noted that New Jersey law recognizes three (3) exceptions to the general rule of prospectivity. A statute will be deemed to apply retroactively when: 1) the Legislature has expressed either explicitly or implicitly its intent that the statute apply retroactively; 2) the statute is “curative”; or 3) the expectations of the parties warrant retroactive application of the statute. The Olkusz court rejected the argument that S-1666 falls into any of the three (3) exceptions so as to warrant retroactive application.

With respect to the first exception, the Olkusz court stated that in the absence of a clear indication that the Legislature intended retroactive application, a statute dealing with substantive rights should be given prospective application. Since the Legislature made no such clear indication that S-1666 was intended to apply retroactively, the Olkusz court ruled that the first exception was inapplicable on its face. The Olkusz court further ruled that S-1666 was not curative so as to satisfy the second exception. In order to be curative, the amendment to a statute must be designed to carry out or explain the intent of the original statute. Finally, the Olkusz court determined that the parties’ reasonable expectations did not warrant retroactive application of S-1666 so as to satisfy the third exception as plaintiff’s accident occurred on April 13, 2004, and in January 2004 the Appellate Division upheld the enforceability of step-down clauses in business auto policies in Pinto, and one year later the New Jersey Supreme Court affirmed that ruling. “Thus, the prevailing state of the law at the time of the accident favors a prospective application of the S-1666 amendment.”

Based on the foregoing, the Olkusz court held that S-1666 must be applied prospectively, commencing September 10, 2007. Any UM/UIM claim predicated on an accident that predates the September 10, 2007, adoption of S-1666 must be governed by the principle articulated in Pinto. That is, step-down provisions in business auto policies are valid and enforceable for any accident that pre-dates the enactment of S-1666.

If there are any questions about the decision in Olkusz, please direct them to Kevin Wolff, Kevin MacGillivray or James Lisovicz.