

February 11, 2008

RE: A Case of First Impression Regarding Uninsured Motorist Workers
Compensation Set-offs

The Fifth District Appellate Court recently addressed the interplay between the workers compensation set off provision in an uninsured motorist policy of insurance and the statutory attorney fee provision of the Workers's Compensation Act.

The Fifth District Appellate Court in Taylor v. Pekin Ins. Co., 376 Ill.App.3d 834, 876 N.E. 2d 1048 (5th Dist. 2007) held as a matter of first impression that although the insurer was entitled to a set off for worker's compensation payments made to the claimant, the claimant was entitled to a reduction of the set-off, reflecting the 25% paid to his attorney in the workers compensation case.

The plaintiff, Billy Taylor, filed a declaratory judgment action against Pekin after being involved in automobile accident with an uninsured motorist. The accident occurred during the course of his employment with Herr Funeral Home. Herr had a business auto policy with Pekin. Pekin also provided workers compensation insurance for Herr.

Taylor received workers compensation benefits in the amount of \$162,588.33. He then asserted a claim for uninsured motorist benefits under the Pekin auto policy. Taylor was awarded \$250,000.00 in an arbitration proceeding. Thereafter, Pekin submitted a check to Taylor in the amount of \$87,412.00, asserting a credit for the full amount of the workers compensation lien.

Pekin asserted that it was entitled to a set-off of the full amount of the workers compensation payment of \$162,588.33, based upon the language found in the uninsured motorist provisions of its policy. Taylor agreed that the policy allowed for a set-off of workers compensation benefits, but demanded an additional \$40,467.00, reflecting the 25% statutory attorney fees as provided by section 5(b) of the Workers Compensation Act, 820 ILCS 305\5(b). The parties could not agree and Taylor filed a complaint for declaratory judgment seeking a declaration in line with his position.

Pekin prevailed on a motion to dismiss the complaint and Taylor appealed. The issue on appeal was whether Pekin should be allowed to set-off the full workers compensation award or whether the set off should be reduced by the amount paid to the worker's compensation attorney. The Pekin policy stated that there would be a set off for "all sums paid or payable under any

workers compensation law”. The Illinois Supreme Court previously held that workers compensation payments may be deducted from payments received under an uninsured-motorist policy. Ullman v. Wolverine Ins. Co., 48 Ill.2d 1, 269 N.E. 2d 295 (1970). The court reasoned that an employee who has received workers compensation must reimburse the employer from any recovery the employee received from a third-party responsible for the employee’s injuries. However, the Ullman court did not address the specific question concerning the statutorily guaranteed payment of attorney fees as provided for under section 5(b) of the Act.

The Fifth District Court in Taylor determined that the policy language upon which Pekin relied could not be read in isolation. Instead, it must be read in conjunction with the Act, public policy considerations, and the reasonable expectations of the policyholder. The purpose behind the uninsured motorist provision in the Illinois statutes is to place the insured in substantially the same position he or she would have occupied if injured by a motorist who has insurance coverage in place. The Code was amended after the Ullman case to allow an insured to purchase uninsured motorist coverage in amounts equal to the general liability coverage limits of the insured’s policy, unless that option is specifically rejected by the insured.

The Taylor court concluded that the limitation described in Ullman to place the injured party in the same position as if the tortfeasor had been minimally insured was superseded when the uninsured-motorist statute was amended to allow the injured party to obtain uninsured motorist coverage in an amount equal to his general liability insurance. Pekin argued that Sulser v. Country Mut. Ins., Co., 147 Ill.2d 548, 591 N.E. 2d 427 (1992) applied and entitled it to a full setoff of workers compensation benefits. The Fifth District held that Sulser actually supported the plaintiff’s position and that section 5(b) allowed for a deduction of attorney fees in computing the setoff. The court reasoned that the policy language identified “workers compensation law” as the statutory basis for calculating the set-off, which includes provisions allowing for a 25% reduction for the payment of attorney fees. Accordingly, the Appellate Court determined that the plaintiff was entitled to the additional 25% paid to the plaintiff’s attorney in the workers compensation case.

Very truly yours,

BUSSE, BUSSE & GRASSÉ, P.C.

Edward K. Grassé