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INSURANCE LAW UPDATE

On December 21, 2011, the Supreme Court of Pennsylvania held that the “made whole” doctrine does not apply to an insurance company’s practice of reimbursing an insured’s deductible from funds obtained in an insurer’s subrogation action against a third-party tortfeasor on a *pro rata* basis. See Jones v. Nationwide Property and Cas. Co., 2011 WL 6379955 (Pa. Dec. 21, 2011).

After Jones was involved in an accident, Nationwide paid Jones for all of the damage to her vehicle reduced by her \$500 deductible. Nationwide then filed a subrogation claim against the other driver. Nationwide recovered in excess of the \$500 deductible but only 90% of the value of the vehicle. Nationwide paid Jones a *pro rata* share of the subrogation award by reimbursing her for 90% of the deductible—that is, \$450. Jones filed a class action against Nationwide claiming that its practice of *pro rata* reimbursements of deductibles violated the “made whole” doctrine. Nationwide filed preliminary objections which were granted by the trial court. The Superior Court affirmed.

On appeal to the Supreme Court, Jones argued that pursuant to the “made whole” doctrine, Nationwide was required to make sure that its insured was made whole by repaying the entire deductible before it “dips its own hand” into the recovery.

Nationwide argued that the “made whole” doctrine does not apply because Jones was attempting to seek reimbursement for an uninsured loss. Specifically, Nationwide argued that application of the “made whole” doctrine to deductibles would undermine the public policy expressed in the Motor Vehicle Financial Responsibility Law (“MVFRL”), which forbids the issuance of insurance policies without deductibles. If Nationwide were required to reimburse Jones for the deductible in full, it would in essence create a no-deductible policy contrary to the policy language and the MVFRL. The Pennsylvania Insurance Commissioner filed an *amicus* brief in support of Nationwide, asserting that the “made whole” doctrine is inapplicable to cases involving collision coverage because the doctrine was developed to give consumers with excess damages priority over their insurer when there is a shortfall in the amount of first-party coverage. However, collision coverage is fundamentally different because there is no coverage limit. Furthermore, the deductible requirement in the MVFRL was designed to ensure risk sharing and loss avoidance. Applying the “made whole” doctrine would undermine differentials in premiums paid by consumers electing higher or lower deductibles and the rate structures approved by the commissioner. The Commissioner also noted that reimbursement of the entire deductible should be disfavored as a matter of public policy because the insurer bears the cost and risk of litigation and because in subrogation cases where there has been an apportionment of fault to the insured, the insurer recovers only a portion of the damages.

The Supreme Court agreed with the reasoning set forth by the Insurance Commissioner. It could not “ignore that the legislature has set forth a clear policy regarding deductibles generally. The Motor Vehicle Financial Responsibility Law requires all motor vehicle insurance policies for the collision coverage issued in this Commonwealth to contain a deductible...This requirement ensures that insureds share with their insurance companies the risk of damage to the vehicle.” Given this directive, the application of the “made whole” doctrine to the distribution of subrogation recoveries would undermine the Motor Vehicle Financial Responsibility Law and in essence create a no-deductible policy.

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