THE PASCHOS LAW UPDATE NEWSLETTER



## May, 2015

# I. INSURANCE LAW

### Medical Malpractice Insurance Not Subject to New Jersey Consumer Fraud Act

In *Khan v. Conventus Inter-Insurance Exchange*, 2013 N.J. Super. LEXIS 216 (N.J. Super. 2013)(Approved for publication April 29, 2015), the court was faced with the issue of whether the CFA is applicable to transactions involving the purchase and sale of medical malpractice insurance.

Plaintiff purchased a medical malpractice policy from Coventus on Aug. 25, 2010. As part of her initial membership, plaintiff was required to make a one time contribution to the exchange's surplus equal to the first year premium. Plaintiff agreed to make this surplus payment in ten annual installments. The obligation to make the full surplus contribution remained even if she withdrew from the exchange prior to completing the ten annual installments. About nineteen months after purchasing the policy, plaintiff notified the exchange and its administrator that she was cancelling her policy as of that month. Plaintiff wanted to purchase tail coverage from Coventus but was advised she could only do so if she paid her remaining surplus contributions in full.

Plaintiff sued Conventus. The complaint alleged violations of the New Jersey Consumer Fraud Act (CFA) with respect to the purchase of the medical malpractice insurance policy. Specifically, the complaint alleged that Conventus' attempt to accelerate payment of the surplus contribution was in violation of the parties' written agreement and was in violation of the CFA. Additionally, plaintiff argued that Conventus improperly debited the her business account without her permission for premium and surplus payments, which also violated the CFA.

Plaintiff argued that medical malpractice insurance policies are an insurance product offered to the general public and are subject to the CFA. In support of this proposition, plaintiff cited to other insurance products such as credit insurance, disability insurance, automobile insurance, homeowners' insurance, business interruption insurance and variable life insurance that have been held to be subject to the CFA.

The court dismissed the claim with prejudice. The court held that the medical malpractice insurance policy was not merchandise that was offered, directly or indirectly to the public for sale, as required for a CFA claim. The court explained that while insurance products offered to the public at large were subject to the CFA, insurance products that were not offered to the general public were not covered by the CFA. The court provided that medical malpractice insurance was not offered to the general public because in order to purchase medical malpractice insurance one must complete a lengthy education and training process and then obtain licensure from the state as a physician.

As such, the court concluded that medical malpractice insurance is not subject to the strictures of the CFA. Therefore, plaintiff's claims for violations of the CFA were dismissed with prejudice.

# II. GENERAL LITIGATION

## Pennsylvania Superior Court Quashes Appeal Holding that an Order on ADR Provision Is Not Immediately Appealable

In *Armstrong World Industries Inc. v. Travelers Indemnity Co. et al.*, 2015 PA Super 109; 2015 Pa. Super. LEXIS 244 (May 6, 2015), the case was initiated by Travelers' denial of insurance coverage for environmental damage allegedly caused by the release of polychlorinated biphenyls (PCBs) to the site of Armstrong's manufacturing facility in Macon, Georgia (Macon Site). In denying coverage, Travelers reasoned that Armstrong had released the environmental claim at issue under a settlement agreement executed by the parties on May 20, 1998.

In June 2012, Armstrong filed suit against Travelers, alleging breach of contract and bad faith. Travelers filed preliminary objections to the complaint in August 2012, arguing that the underlying dispute is governed by the alternative dispute resolution provision of the settlement agreement. Travelers averred that under the plain language of the settlement agreement, the parties were required to submit the dispute at issue to the alternative dispute resolution process laid out in the settlement agreement. The settlement agreement incorporated alternative dispute resolution procedures from a 1985 agreement over asbestos claims.

Armstrong filed an answer and new matter alleging the environmental claim at issue was not subject to the settlement agreement. The trial court overruled Travelers' preliminary objections. Travelers appealed to the Superior Court, arguing that it had jurisdiction over the appeal through Rule 311 and the Uniform Arbitration Act.

Travelers claimed that, under Rule 311(a)(8), the order is appealable by Sections 7320(a)(1) and 7342(a) of the Uniform Arbitration Act. Section 7320(a)(1) of the Act provides that "[a]n appeal may be taken from . . . [a] court order denying an application to compel arbitration made under section 7304 (relating to proceedings to compel or stay arbitration)." Section 7342(a), relating to common law arbitration, provides that Section 7320(a) of the Act, except subsection (a)(4), is applicable also to common law arbitration. In support of their claim, Travelers relied on arbitration cases where the Superior Court held that appellate review of a trial court's order denying a motion to compel arbitration is permissible under Rule 311(a)(8). Travelers cited *Midomo Co., Inc. v. Presbyterian Hous. Dev. Co.*, 1999 PA Super 233, 739 A.2d 180, 184 (Pa. Super. 1999) which held that '[w]hile an order denying preliminary objections is generally not appealable, there exists a narrow exception to this oft-stated rule for cases in which the appeal is taken from an order denying a petition to compel arbitration."

The Superior Court disagreed. The court provided "[t]o render an order overruling preliminary objections seeking to compel arbitration appealable under the act, a party must prove that the dispute is bound by an arbitration agreement, which calls for either statutory or common-law arbitration." The court said the instant case was distinguishable from *Midomo* because the settlement agreement contained an ADR provision. The court agreed with Armstrong that ADR is not synonymous with arbitration. The court held that the statute allowing appeal of orders on the application of arbitration provisions does not govern all ADR. As such, the Superior Court held that an order over the application of an alternative dispute resolution provision is not immediately appealable as of right.

The Court held that while a litigant may immediately appeal an order denying a request to compel arbitration, a litigant may not immediately appeal, as of right, an order refusing to compel other types of ADR such as mediation and negotiation. Since the settlement agreement in this case broadly provided for a range of ADR options, the appeal was quashed.

# III. EMPLOYMENT LAW

## Third Circuit Rules Bus Driver Exempt from Fair Labor Standards Act

In *Resch v. Krapf's Coaches, Inc.*, 2015 U.S. App. LEXIS 7810 (3d Cir. May 12, 2015), Joseph Resch, a driver for Krapf's Coaches, Inc. ("KCI"), filed an action on behalf of himself and thirty-three other KCI drivers ("Plaintiffs") seeking unpaid overtime under the Fair Labor Standards Act of 1938 ("FLSA") and the Pennsylvania Minimum Wage Act of 1968 ("PMWA").

At issue was the Motor Carrier Act of 1935 (the "MCA") exemption that removes from the FLSA's overtime protections "any employee with respect to whom the Secretary of Transportation has [the] power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of Title 49" of the MCA. 29 U.S.C. § 213(b)(1). Section 31502(a)(1) applies to transportation "described in" § 13501, which in turn gives the DOT jurisdiction "over transportation by motor carrier . . . to the extent that passengers, property, or both, are transported by motor carrier . . . between a place in . . . a State and a place in another State." 49 U.S.C. § 13501.

Plaintiffs claimed that the motor carrier exemption did not apply to them because they drove only on intrastate routes. The company moved for summary judgment on the ground that the drivers were correctly classified as exempt. The drivers opposed the motion, noting that during the relevant time period they crossed state lines only 178 (1.3%) of their 13,956 trips, that 16 of the 34 drivers never crossed state lines, 8 did so only once, 5 did so fewer than 5 times, and that interstate trips generated only between 1% and 9.7% of the Transit Division's revenue during that time period.

The district court granted summary judgment, holding that to prove the exemption, it did not need to show that each driver traveled interstate, but only that the drivers reasonably could have been expected to cross state lines as part of their employment.

The Third Circuit agreed finding that professional bus drivers cannot collect overtime wages from their employer under the Fair Labor Standards Act because they make interstate trips. The court held the collective action brought by the drivers would be governed by the MCA, not the FLSA, and their claims under the federal labor standards act would fall into the MCA exemption. The court provided:

> Two considerations dictate whether the MCA exemption applies: the class of the employer and the class of work the employees perform. Specifically, the MCA exemption applies if the employer is a carrier subject to the DOT's jurisdiction and the employee is a member of a class of employees that 'engage[s] in activities of a character directly affecting the safety of operation of motor vehicles in the transportation on the public highways of passengers or property in interstate or foreign commerce within the meaning of the MCA.

Here, there was no dispute that the company was a motor carrier subject to DOT jurisdiction. The court held that the drivers were members of a class of employees engaging in "activities of a character directly affecting the safety of operation of motor vehicles in the transportation . . . of passengers or property" in interstate commerce. Even though they rarely or never crossed state lines, they were members of a class of employees who reasonably could be expected to do so. Therefore, the court affirmed the holding of the District Court.

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