



## Pennsylvania Legal Update

Fall 2008

### Auto Insurance

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policy and thereby carry substantial coverage to protect yourself and your family. You have the option of waiving the purchase and the stacking of UM-UIM coverage. While waiver of the coverage or of the stacking makes for lower automobile insurance premiums, it deprives you of any source of coverage if you or a household member is hurt by an uninsured or underinsured driver.

Even if you do not have an insurance policy yourself, you may be entitled to UM and UIM coverage in the event you are in a car accident. This is because the law's definition of an "insured" includes "a spouse or relative" of a named insured, if the spouse or other relative is "residing in the same household of the named insured." Pennsylvania courts have clarified the facts and circumstances that make a person a resident relative in automobile insurance policies. A person's residence is "a factual place of abode." A residence does not have to be permanent and can simply mean that someone is physically living in the household.

#### Who Is a "Resident"?

In the case involving the death of the child, the child's father argued that his son was a "resident" of both parents' homes. The insurance company claimed that the child was not sufficiently connected to the father's household to qualify as a resident there.

The court observed that where a person resides is a "factually intensive" inquiry that requires a court to look at a "host of factors in reaching a common-sense judgment." The court then noted that the child did

not have his own room at his father's residence, did not eat regular meals there, did not spend overnights there regularly, and did not have a key to his father's house. The court also observed that the child never received any mail at his father's home and did not go to school from his father's home. The father claimed that the amount of time the child spent with him and the physical arrangements at his home were limited by the father's economic circumstances. But characterizing the child's presence in his father's home as "sporadic," the court found that the home simply did not qualify as a residence for the child.

Pennsylvania law does recognize that children can have two residences for automobile insur-

ance purposes. The terms of your policy almost certainly closely track Pennsylvania's automobile insurance statute, which defines an "insured" as any person named in the policy as well as any spouse, relative, or minor who resides in the insured's household. One of the simplest ways to secure full coverage for all of your eligible children is to name them as insureds. If you have a child who is not named as an insured on your policy, that child will be entitled to coverage only if he or she regularly sleeps, eats, and interacts with others at your home. Simply giving your child a key can go a long way toward securing his or her entitlement to coverage of certain benefits under your automobile policy.

### No Military Immunity

A Pennsylvania National Guardsman recently tried without success to avoid criminal liability for driving under the influence by claiming that he was immune from arrest.

Pennsylvania law provides that officers and enlisted military service members cannot be arrested "except for treason or felony" while they are "going to, remaining at or returning from" any place of military duty. This immunity has been extended to all military personnel, including members of the Pennsylvania National Guard.

The guardsman was arrested for DUI and failure to wear his seatbelt after he was observed swerving his car back and forth across the center yellow line of the road in the early morning hours. He was not in uniform and was on his way home from a local bar. He was, however, on "active duty," in that he was currently a member of the Pennsylvania National Guard.

The court rejected the guardsman's claim to immunity from arrest, noting that the immunity granted by Pennsylvania law to military personnel is not a blanket protection for everyone on active duty. Instead, it only immunizes military personnel who are actually going to or from some military obligation.

### Auto Insurance Coverage

When the child of separated parents was killed in an automobile accident, the parents both filed claims against their automobile insurance companies, with very different results. The child died after he was struck by a car while he was

vania are required to offer all customers the option of adding UM-UIM coverage to their policies. If your current policy includes UM-UIM coverage, the *uninsured* coverage pays for your losses if you are injured by a driver who has no insurance or by an unidentifiable or hit-and-run driver. The *underin-*

*sured* coverage pays for your losses if you are injured by someone who does not have enough of his or her own liability insurance to pay for all the injuries you may suffer. You can "stack" the UM-UIM coverage available for vehicles on your

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*You can "stack" the UM-UIM coverage available for each vehicle on your policy, and thereby carry substantial coverage to protect yourself and your family.*

attempting to cross the street in front of his mother's home. The child resided primarily with his mother and visited his father. Because the driver who accidentally struck the child had minimal insurance coverage, both parents filed claims on their own insurance coverage for "uninsured and underinsured" incidents, usually referred to as "UM-UIM" coverage.

#### UM-UIM Coverage

Insurance companies that sell automobile insurance in Pennsyl-

### Signs of the Times

When a Pennsylvania car dealer clashed with his township zoning board over his use of portable searchlights, he found that the law was not on his side.

The car dealer wanted to use portable searchlights to "call attention generally to the business locations" and occasionally to highlight promotional events. The local zoning board banned the use of the lights, finding that they were "rotating or oscillating" signs that were specifically forbidden by the local ordinances. Because the very nature of the searchlights was to direct a very powerful beam of light off-site, the zoning board found that the

searchlight was not the same as a floodlight or spotlight.

On appeal, the board's decision prevailed. The Pennsylvania appellate court noted that the very lights themselves and the trailer on which they were mounted were "devices" that were used to "convey attention," thereby qualifying them as signs.

The regulation of signs is a matter of local zoning law. Many zoning ordinances also address the permitted uses of floodlighting and spotlighting. Before erecting signs or lighting, check your zoning ordinances.

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## Benefits for Injured Workers

An injured worker with a physician's prescription for massage therapy was denied coverage for the prescribed treatment, while another injured worker without any prescription was awarded a wheelchair-accessible van. What made for the different results?

### No Massage Therapy

The worker who received massage therapy had been injured on the job when he strained his lower back. Treated without success by numerous treatment providers including chiropractors and neurosurgeons, he turned to his primary-care physician for help. The primary-care physician referred the worker to a therapeutic massage program, writing a series of prescriptions for treatment with a particular massage therapist.

The injured worker testified that his pain was relieved and that his functioning was improved as a direct result of the massage therapy. However, his entitlement to workers' compensation benefits coverage for the therapy was denied on the ground that the particular therapist was not licensed and was not working under the direct supervision of a licensed health-care provider.

On appeal, the Pennsylvania appellate court found that a referral or prescription from a licensed physician is *not* enough to qualify services for workers' compensation insurance coverage. Instead, all compensable services must be provided by a licensed health-care provider. If you are an injured worker, be sure that all of your health-care providers are licensed or are working under the direct supervision of a licensed health-care

provider if you expect to have workers' compensation insurance coverage pay for the costs of the services.

### Injured Worker Entitled to Van

In the case involving the wheelchair-accessible van, the injured worker had sustained serious injury, rendering him quadriplegic, when he was struck by a bale of hay

that fell from overhead when he was working at a commercial farm. Discharged to his home after a four-month hospital stay, the worker had numerous medical follow-up appointments. His wife rented a series of handicapped-accessible vans and then purchased one for \$28,500.

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## Therapy for Private School Students

Disabled Pennsylvania school children can qualify for occupational therapy even if they choose to attend private school.

The Pennsylvania Supreme Court recently addressed this entitlement in a lawsuit brought by the parents of a kindergarten student who suffers from muscular and visual impairments. The local public school district evaluated the child and decided that he was "handicapped" and was therefore entitled to certain federally mandated services, which included "occupational therapy." The therapy would have included one 30-minute session each week, with additional "teacher consultations and related accommodations."

The child's parents then enrolled the child in a private school, in part due to the fact that the private school offered full-day kindergarten and the public school district did not. But in order to qualify for the occupational therapy, the

parents opted for a "dual enrollment," enrolling the child in both the private school and the public school, with the intention that the child would actually attend the private school only. The public school then denied the occupational therapy services, claiming that they were only available to children "attending" the school.

On appeal, the Pennsylvania Supreme Court ruled in favor of the disabled child, ruling that enrollment is enough to qualify a student for certain federally mandated services for disabled students—and that the disabled student need not actually attend the school to qualify. In fact, as the court emphasized, the federal mandates actually require that public schools undertake actively to seek out and identify qualified handicapped students who are *not* enrolled and inform them and their parents of all of the services that are available to them.

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## Outlaw vs. Rule of Law

Recently, court documents were uncovered from a successful civil case involving some notorious nineteenth-century defendants who were better known for avoiding the legal consequences of their acts: Jesse and Frank James.

Not surprisingly, the case against the James brothers stemmed from one of their signature activities, a bank robbery. During an attempted bank robbery by the brothers in Gallatin, Missouri, in 1869, Jesse James killed a cashier. As the brothers made their getaway, Jesse was thrown from his horse, which he left behind in favor of doubling up on Frank's horse. Soon thereafter, the brothers happened upon the unfortunate Dr. Smoote, who was also on horseback. Jesse relieved Smoote of his horse, at gunpoint, and continued the escape.

Smoote was not the first or the last victim of the James brothers, but he was unusual in then bringing, and winning, a lawsuit against them for the full value of the horse, saddle, and bridle that they had stolen.

One might expect the outlaws to have ignored the lawsuit altogether, but the brothers answered the lawsuit by arguing that they were not personally served with notice of it. Although a sheriff testified that he had delivered the papers to the James family farm (pity the process server charged with serving a summons on Jesse James!), the case was dismissed on that technicality. That might have

been the end of the litigation, were it not for Jesse's decision to publish a letter in a newspaper declaring himself innocent of the holdup and murder.

Correctly pegging Jesse James as a newspaper reader, Smoote's attorney cleverly won the court's approval to file a notice of service in the classified section of a local newspaper, thus giving Dr. Smoote another bite at the apple. Again, through their attorney, the James brothers initially fought the lawsuit, but soon they withdrew from the suit and allowed a judgment to

be entered against them for \$223. The judgment was satisfied when Smoote took possession of the horse which Jesse had left behind at the robbery.

Yes, Dr. Smoote had to endure the dreaded prospect of one day staring down the barrel of Jesse James's weapon, but in dollars and cents he fared well. The horse he now had, which Jesse had bought with cash gained from some of his successful robberies, was believed to have been from Kentucky racing stock and was valued at \$500 (a considerable sum for the time).

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### Injured Workers

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The workers' compensation insurance carrier initially denied coverage for the van, offering to pay only for the "conversion costs"—the costs of approximately \$10,000 associated with equipping the van with a wheelchair ramp. The worker argued that he was entitled to coverage for the full purchase price of the van itself and the conversion package.

The Pennsylvania Supreme Court held that the entire van was an "orthopedic appliance," for which the workers' compensation insurance company was completely liable. The court observed that, de-

pending on an individual's circumstances, a van could be "a necessity, a luxury or something in between." In the case of the quadriplegic worker, the court found that his need for the van was not a "lifestyle choice," but a direct solution to his complete lack of mobility caused by his work-related injury. Finding that both the van and its conversion package were essential to enable the injured worker to get to medical appointments and to "restore some small measure of the independence and quality of life" that he enjoyed prior to his injury, the court held that the insurance company was liable for paying for the total cost of the van and the conversion package.

*Resolution of legal issues depends upon many factors, including variations of facts and interpretations of Pennsylvania law. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.*