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Pa. Superior Court Should Change Its Publishing Policy

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Precedent: "[A]n adjudged case or decision of a court of justice, considered as furnishing a rule or authority for the determination of an identical or similar case afterwards arising, or of a similar question of law." Black's Law Dictionary (10th ed. 2014).

Lawyers practicing in Pennsylvania have reason to be concerned about the proliferation of unpublished, nonprecedential decisions issued by the Pennsylvania Superior Court, the state's intermediate appellate court of general jurisdiction. In 2013, the Superior Court issued 4,860 opinions, but only 326 (approximately 7 percent) were published. Thus, although the Pennsylvania Superior Court has earned its reputation as the busiest state appellate court in the country, the vast majority of its recent decisions are not available to courts and litigants in later cases, even when those cases involve similar circumstances or the same legal question.

According to the Superior Court's internal operating procedures, "[a]n unpublished memorandum decision shall not be relied upon or cited by a Court or a party in any other action or proceeding, except ... when it is relevant under the doctrine of law of the case, res judicata, or collateral estoppel." 210 Pa. Code § 65.37 (emphasis added). Recent Superior Court opinions underscore this restriction. E.g., Bank of Am. N.A. v. Gibson, 102 A.3d 462, 466 n.5 (Pa. Super. 2014) (criticizing litigant for citing unpublished decision).

The Superior Court's unpublished decision in Glick v. Progressive Northern Insurance Company, issued on Jan. 24, 2014, amply illustrates why the Superior Court's internal procedures and policies regarding unpublished opinions should be re-examined. In a 2-1 ruling, the Superior Court in Glick reversed a trial court's certification of a statewide class of medical providers. 2014 Pa. Super. LEXIS 648 (noting only that trial court ruling was "reversed/vacated/remanded"). On Oct. 15, 2014, the Pennsylvania Supreme Court denied allocatur to plaintiff Richard S. Glick, declining to review the Superior Court's decision. 2014 Pa. LEXIS 2728.

The Glick case began in 2002, one of several putative class actions against different insurers raising the same issue of statutory construction: whether, under Section 1716 of Pennsylvania's Motor Vehicle Financial Responsibility Law, an automobile insurer receives "reasonable proof of the amount of the benefits" as a matter of law once it receives a bill from a medical provider on a standardized claim billing

form (known as a HCFA-1500 or UB-92), seeking payment for the provider's treatment of a patient injured in an automobile accident. Glick argued that Progressive's receipt of the standardized billing form automatically triggers the 30-day period in Section 1716 to pay the provider the amount on the bill without incurring interest; on bills paid after the 30-day period, Glick contended the insurer must pay an additional 12 percent per annum statutory interest on the "overdue" bills.

In a published decision issued in 2003, the Philadelphia Court of Common Pleas accepted Glick's statutory construction and, on that basis, certified a class action on behalf of a medical provider class. 64 Pa. D.&C. 4th 533. In 2009, the Court of Common Pleas granted summary judgment to the medical provider class on the basis of the same underlying ruling of statutory construction. 2009 Phila. Ct. Com. Pl. LEXIS 303. While Glick was pending, the same core legal issue was raised in substantially similar putative class actions filed against American Independent Insurance Company and Government Employees Insurance Co. In American Independent, the trial court granted class certification on the basis of the trial court ruling in Glick. Freedom Med. Supply Inc. v. American Indep. Ins. Co., February Term 2009, No. 4484 (Com. Pl. Phila. Cty. Jan. 13, 2014). The GEICO court granted class certification based on the same statutory construction ruling in Glick, without expressly citing Glick. Schappell v. GEICO Corp., No. 1333 S 2001 (Com. Pl. Dauphin Cty. Jan. 6, 2011).

Glick then reached the Superior Court on Progressive's appeal. In a 2-1 ruling, the Superior Court rejected the trial court's interpretation of MVFRL Section 1716. Writing for the majority, Judge John T. Bender reasoned that the plain meaning of the term "reasonable proof of the amount of the benefits" in Section 1716 involves "evidence addressing several factors, including coverage, causation and medical necessity," and that the HCFA-1500 form "is merely indicative of treatment" and provides "prima facie evidence that such treatment was medically justified" but "does not establish coverage for such treatment." "Whether an insured is entitled to coverage in the form of medical benefits raises additional questions unanswered by mere submission of the form ..." Because each bill potentially raises factual inquiries requiring individualized determinations, the Superior Court held that the case was "not readily suitable for class action".

In its briefs and at oral argument, Progressive informed the Superior Court that the same questions of statutory construction and class certification were at issue at the trial court level in American Independent and GEICO, and that the same issue of statutory construction was also at issue in individual claims pending in Philadelphia Municipal Court against USAA. Progressive drew the court's attention to the expert testimony of former Pennsylvania Insurance Commissioner Constance B. Foster, who opined in Glick that the same legal issue impacted every automobile insurer in the Commonwealth. Amici curiae, The Insurance Federation of Pennsylvania and The Property Casualty Insurers Association of America, similarly emphasized that Glick had implications for all member insurers who issued automobile coverage in Pennsylvania.

Despite all of this, the Superior Court in Glick designated its decision as nonprecedential; thereafter, it denied Progressive's motion seeking to have the ruling published.

The Superior Court's decision not to publish Glick left the trial courts in the remaining class actions with an obvious dilemma: how can a trial court logically ignore the fact that the Superior Court has reached and resolved the identical legal issue in favor of the insurer in a nearly identical case, particularly when a trial court had expressly relied upon a now-discredited trial court opinion?

The trial court in American Independent recently wrestled with this dilemma and resolved it by reversing its earlier class certification decision and decertifying the class of providers, on the basis of the Superior

Court's ruling in Glick. As the trial court explained, the facts of the American Independent case "are virtually identical to those in the Glick case"; "the Glick opinion is not binding precedent except among the parties to that action"; the court "does not think that it is appropriate to disregard the Glick opinion and its reasoning in deciding this case"; and the court would "adopt the Superior Court's reasoning in Glick as its own in this case". 2014 Phila. Ct. Com. Pl. LEXIS 191. A few months later, the same trial court judge reached essentially the same conclusion in another class action brought by Freedom Medical against a different insurer, asserting a substantially similar claim under a comparable provision of the Workers Compensation Act. Freedom Med. Supply Inc. v. PMA Capital Ins. Co., 2014 Phila. Ct. Com. Pl. LEXIS 319.

Doubtless, there are many other examples of cases where the Superior Court could have furnished valuable precedent for future cases by publishing its decisions. Although the Superior Court's caseload is staggering, and the majority of its decisions properly may be written for the parties alone, the Superior Court should reconsider the standards under which it decides whether to publish its decisions, and publish more of them, particularly where the litigants persuasively demonstrate that the decision is likely to impact other cases. Alternatively, the Superior Court should revisit its rationale for precluding courts from citing to decisions the Superior Court declines to publish, similar to the more flexible practice in the Third Circuit in which nonprecedential opinions are not binding but may be considered "strongly persuasive authority" for trial courts. See United States v. Moore, 2014 U.S. Dist. LEXIS 61509, * 6-7 (W.D. Pa. May 2, 2014). In American Independent and PMA Capital, the trial court apparently took this approach as a matter of plain logic and common sense.

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