[J-95-2004]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

CAPPY, C.J., CASTILLE, NIGRO, NEWMAN, SAYLOR, EAKIN, BAER, JJ.

INSURANCE FEDERATION OF PENNSYLVANIA, INC.,	:	No. 207 MAP 2003
Appellant	:	Appeal from the Order of the Commonwealth Court entered on 6/17/02 at No. 1854 CD 2001 which affirmed the
v.	:	Order of the Department of Insurance entered 7/16/01 at No. D097-07-001
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF INSURANCE, DIANE KOKEN, INSURANCE COMMISSIONER,	:	
Appellee	:	ARGUED: May 12, 2004

DISSENTING OPINION

MR. JUSTICE SAYLOR **Decided: December 30, 2005**

In Burstein v. Prudential Property and Cas. Ins. Co., 570 Pa. 177, 809 A.2d 204 (2002), I expressed the view that, in experimenting over the years with various regulatory schemes designed to further the remedial purpose of ensuring available compensation to victims of motor vehicle accidents in a cost efficient manner, the Legislature left a fairly wide range of detail open to development and refinement by the Insurance Department, as the administrative agency with specialized expertise in the complex arena of insurance regulation. See id. at 219-20, 809 A.2d at 230 (Saylor, J., dissenting). At the same time, via delegation to the Department of the power to approve uninsured motorist provisions in motor vehicle insurance policies, see Act of August 14,

1963, P.L. 909 §1 (as amended, 40 P.S. §2000), and in subsequent legislation, the General Assembly enabled the Department to fill gaps concerning, inter alia, the particular requirements of insurance offerings, in effect, granting the authority to make substantive rules having the force and effect of law and entitled to the usual presumption of reasonableness and validity. See id. (citing Borough of Pottstown v. Pennsylvania Mun. Retirement Bd., 551 Pa. 605, 609-10, 712 A.2d 741, 743 (1998)). Further, the Department has been given the tools to monitor the degree to which its regulations operate to further the objectives of the governing statutes, in light of continuing industry experience and other salient factors. See id.

I believe that the Department has implemented its broad authority under the governing statutes with the making and maintenance of its 1963 substantive regulation requiring mandatory arbitration of uninsured motorist disputes between insurers and their insureds, via reference to a national standard form for uninsured motorist insurance containing, inter alia, a mandatory arbitration clause, see 31 Pa. Code §63.2, as well as its extension of an identical requirement to underinsured motorist claims.[1] Significantly, the Department's regulation, with highly visible consequences, has stood intact throughout several decades of continuing changes to the governing statutory scheme, thus, in my view, strongly indicating legislative acquiescence and approval.[2]

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[1] It is a different question, beyond the limited scope of this appeal, whether the Legislature possessed the ability to accomplish such a broad delegation consistent with the non-delegation doctrine embodied in Article II, Section 1 of the Pennsylvania Constitution, PA. CONST. art. II, §1 ("The legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives.").

[2] See Gilligan v. Pennsylvania Horse Racing Comm'n, 492 Pa. 92, 99, 422 A.2d 487, 491 (1980) (citing NLRB v. Bell Aerospace Co. Div. of Textron, Inc., 416 U.S. 267, 274-75, 94 S. Ct. 1757, 1762 (1974) ("[A] court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration. This is (continued . . .)

I do not denigrate the concerns of Appellant or its amicus regarding flaws in the present arbitration practice that are outside the range of matters amenable to correction in the limited judicial review available in the arbitration setting, and that merit serious consideration by the Insurance Department in its ongoing review of the appropriate regulatory approach, as well as by the Legislature in its overarching role. Further, I do not discount that the appropriate response may at some point entail consideration of the possibility of modifications to the scheme to increase judicial involvement and oversight. I simply would not invalidate the Department's present approach on the ground that it is ultra vires.

The second issue concerns Appellant's assertion of a right to a jury trial in the uninsured and underinsured motorist setting. On this point, I agree with the Insurance Commissioner that the fairly formalistic analysis established in early decisions of this Court and followed in Wertz v. Chapman Twp., 559 Pa. 630, 741 A.2d 1272 (1999), and Mishoe v. Erie Ins. Co., 573 Pa. 267, 824 A.2d 1153 (2003), requiring a determination of whether the particular cause of action was within the contemplation of the framers of the 1790 Constitution, see Wertz, 559 Pa. at 639-40, 741 A.2d at 1277, must also control here and forecloses relief, given the relative recency of the UM and UIM concepts.

Accordingly, I respectfully dissent.

Mr. Justice Castille joins this dissenting opinion.

(...continued)
especially so where Congress has re-enacted the statute without pertinent change."); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381, 89 S. Ct. 1794, 1802 (1969) (recognizing the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction.")).