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Underinsured Motorists Provisions Do Not Cover Accident Victims Whose Household Membership Is Not Readily Apparent

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Tooth Discoloration

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is the clear purpose of Congress.

Lederle argued that the FDA regulations in effect before the 1965 amendments did not permit the company to add warning labels regarding tooth staining without FDA approval. Lederle did not obtain the approval until 1963. Lederle also claimed that warning without approval would have violated federal regulation 21 C.F.R. 146.4, which prohibits the relabeling of drugs without FDA permission. Thus, Lederle asserted that it would have violated federal regulations by complying with the New Jersey law requiring a warning to be communicated as soon as reasonably feasible once a company gained actual or constructive knowledge of a danger.

Feldman argued that Lederle knew or, through the exercise of reasonable diligence, should have known of the potentially serious and permanent side effects of Declomycin at the time she ingested the drug. Feldman also asserted that, in light of this knowledge, Lederle failed to warn antibiotic consumers of these dangers in a timely and reasonable fashion and thereby violated state tort law.

The supreme court found no direct conflict between federal and state law. The court expressed concern that, since nothing in the federal regulations explicitly preempted claims brought under state law, a finding of preemption would leave Feldman without a remedy. Thus, the court asserted that using the FDA regulation governing label changes as Lederle proposed infringed on the state's powers to protect and promote the safety of its citizens.

The New Jersey Supreme Court then considered whether the FDA regulations actually precluded Lederle from warning of Declomycin's dangerous side effects. Lederle argued that by warning without permission, it would have been subject to either punishment for misbranding or removal of its product from the market. The court disagreed, stating that the FDA had determined that warning of dangerous side effects at the

earliest possible time was consistent with its goal of protecting public health. The court offered some alternatives Lederle could have considered, including not distributing the drug, trying harder to get approval, or waiting until more tests were done to ascertain if the drug caused tooth discoloration.

Finally, Lederle contended that if the case were retried, Feldman would not prevail. It relied on the newly created New Jersey Products Liability Statute, N.J.S.A. 2A:58C-4, which states that where a warning or instruction has been approved by the FDA, there is a rebuttable presumption that the label is adequate. However, the court disagreed, asserting that label adequacy standards were different in the 1960s and that a strong likelihood of rebutting the presumption existed in this case.

Dissenting Opinion

Dissenting Judge Garibaldi criticized the majority's narrow view of the FDA's role in society. The FDA's mission is to make a risk-utility analysis of drugs in order to determine if the benefit to society outweighs the potential dangers. The Judge asserted that the FDA has a greater accumulation of information and expertise on drugs than any other source, including Lederle. Thus, the majority opinion upset this risk-balancing analysis by imposing the court's judgment in hindsight upon drug manufacturers.

Judge Garibaldi recognized that promoting uniformity is another goal of the FDA. Thus, the majority's contention that pre-1965, drug manufacturers could change a product warning without FDA approval was erroneous. Otherwise, with each manufacturer changing labels upon its own prerogative, labels would become useless and unbelievable.

Gregory R. Bockin

Underinsured Motorists Provisions Do Not Cover Accident Victims Whose Household Membership Is Not Readily Apparent

In *Vaiarella v. Hanover Insurance Company*, 567 N.E.2d 916 (Mass. 1991), the Supreme Judicial Court of Massachusetts held that a mother involved in an automobile accident was not entitled to a settlement under the underinsured motorist provision of her son's automobile insurance policy because she was not a member of his household at the time of the accident.

Background

Salvatore and Italia Vaiarella ("Mr. and Mrs. Vaiarella", respectively) lived in both East Boston and Winthrop, Massachusetts between 1941 and 1984. Their son Joseph ("Son") lived in Brockton, Massachusetts, and their daughter in East Boston. In August, 1984, the Vaiarellas had their mail transferred to their daughter's address but began living with their Son, bringing with them some personal items and furniture. Thereafter, the Son began remodeling his garage into living quarters for his parents.

In November, 1984, the Vaiarellas moved to Winter Haven, Florida. They planned to live there from January to May each year and to live in Brockton, Massachusetts with their Son from May to December. Upon moving to Florida, the Vaiarellas bought a mobile home. This purchase required Mr. Vaiarella to have a Florida driver's license and a Florida registration for the car he had bought in Brockton.

During the 1984 Christmas holidays, the Vaiarellas visited their Son and returned to Florida immediately thereafter. At that time, their living quarters in their Son's garage had not yet been finished. On May 3, 1985, after their winter stay in Florida, the Vaiarellas started out for Brockton by car. En route, the two were in a car accident that killed Mr. Vaiarella and injured Mrs. Vaiarella.

The Son had an automobile insurance policy with Hanover Insurance Company ("Hanover") at the time of the accident. As mandated by Massachusetts law, the policy provided both uninsured and underinsured coverage for policy owners and relatives living in their households. Mass. Gen. L. ch. 175, sect. 113L (1988). After Hanover denied a settlement to Mrs. Vaiarella under the underinsured provision of her Son's policy, she filed suit in Massachusetts Superior Court. She alleged that Hanover had violated a Massachusetts statute, Mass. Gen. L. ch. 93A, sections 2(a) and 9 (1988), by refusing to make an offer of settlement.

The superior court found no violation of the statute because, for the purposes of underinsured motorist coverage, Mrs. Vaiarella was not a member of her Son's household at the time of the accident. The court held for Hanover, and Mrs. Vaiarella appealed to the Massachusetts Supreme Judicial Court.

Flexible Definition of Household Member Does Not Include Future Intentions

On appeal, Mrs. Vaiarella argued that the superior court erroneously determined she was not a member of her Son's household for insurance purposes. She further alleged that Hanover had violated Massachusetts state law by not making a reasonable, good faith investigation of her status. Mrs. Vaiarella's primary support for both arguments was that the superior court, in making the determination as to her status, failed to consider her intention to live in her Son's household for about six months out of each year.

The supreme judicial court first considered Mrs. Vaiarella's claim of membership in her Son's household. It noted that because a variety of living arrangements exist in today's society, an inflexible and precise meaning should not be applied to the term "household member." However, the court indicated that since the household member requirement for underinsured motorist coverage was controlled by statute, ambiguities in the policy should not be construed against the

insurance company. The definition of household member, the court reasoned, was a question of law that required the examination of specific facts on a case by case basis.

The supreme judicial court reasoned that Mrs. Vaiarella's claim was based almost entirely on future intentions and not on an established living arrangement. Before August, 1984, the Vaiarellas had lived independently from both their children for forty years. Although the Vaiarellas planned to reside with their Son, they had lived with him for only a few months prior to the accident. Taken together, the Vaiarellas' history of living independently from their children, their four-month stay in the Son's home, and their long-term intentions were not enough to establish household membership.

The court added that Hanover would not have known about the Vaiarellas' intentions. Accurate calculations of insurance risks require a knowledge of the volume of persons covered; thus, the court said, companies must be able to identify all covered persons.

After discounting future intentions, the court considered other factors which indicated where the Vaiarellas had established residency. The court did not rule out the possibility of dual residences, but considered such matters as where the Vaiarellas received their mail, where they transacted business, where they maintained possessions, as well as whether the Vaiarellas were financially dependant upon their Son.

Although the Vaiarellas had lived with their Son in Brockton, they, nonetheless, transferred their mail to their daughter. Their daughter handled all their business affairs. Once in Florida, they also received mail there. At least some of their possessions were in Florida, and Mr. Vaiarella obtained an auto registration and driver's license in that state. (Since a Florida driver's license and registration were required to purchase the mobile home, the court noted that these factors did not significantly weaken Mrs. Vaiarella's claim of residence in Massachusetts.)

Even though some of the Vai-

arellas' possessions were with their Son, none of their activities or transactions significantly indicated residence with him or financial dependence upon him. Moreover, after the car accident, Mrs. Vaiarella went to recuperate in her daughter's home and then returned to Florida, never again living with her Son. Thus, the court concluded that Mrs. Vaiarella had failed to establish dual residences in Winter Haven, Florida and Brockton, Massachusetts.

Finally, the supreme judicial court found no reason to comment separately on whether Hanover had made a reasonable, good faith investigation to determine Mrs. Vaiarella's residency.

Clarinda Gipson

Traditional Tort Principles Dictate That Corporate Successors Are Not Liable To Consumers

In *Nissen Corp. v. Miller*, 594 A.2d 564 (Md. 1991), the Maryland Court of Appeals refused to extend tort liability to a successor corporation with no causal connection to the product causing a consumer's injury. The court reinforced the traditional principle that fault must exist before tort liability can be imposed.

Background

Frederick Brandt ("Brandt") purchased a treadmill from Atlantic Fitness Products ("Atlantic") in January, 1981. The treadmill was designed, manufactured, and marketed by American Tredex Corporation ("American Tredex").

In July, 1981, Nissen Corporation ("Nissen") purchased all assets of American Tredex. The asset purchase agreement specified that Nissen would assume certain American Tredex obligations and liabilities. However, the agreement explicitly stated that Nissen would not shoulder any liability ensuing from injuries associated with any product previously sold by Ameri-

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