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# Appellate Division Affirms Prospective Application of "Step Down" Legislation

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The Appellate Division decision in Makroukalis v. Estate of Garcia, No. A-2800-07T2 (App. Div. Nov. 16, 2009), is the most recent in a series of cases considering the proper application of legislation enacted in 2007 ("S-1666") prohibiting "step down" provisions in commercial automobile policies.

In Makroukalis, the plaintiff was injured in a motor vehicle accident while operating a tow truck for ABC Towing, Inc. ("ABC") on March 27, 2004, prior to the enactment of S-1666. ABC had in effect a commercial auto policy with Empire Fire and Marine Insurance Company ("Empire") that included a "step-down" provision limiting coverage to those who were "named insureds" under other policies.

In addressing whether S-1666 should be applied retroactively, which would have the effect of invalidating the "step down" provision, or prospectively, the Appellate Division considered two competing maxims. While "step-down" provisions limiting both UM and UIM coverage had been deemed valid and enforceable at the time the Empire policy was issued, S-1666 now explicitly prohibits the use of such "step-down" provision.

Despite a split in authority as to the *reason* why S-1666 should apply prospectively, the Makroukalis court unanimously found that the "step-down" provision in Empire's policy was valid and enforceable, and that S-1666 must be applied prospectively. Accordingly, whether the Legislature specifically intended that S-1666 apply retroactively (see Olkusz v. Brown, 401 N.J. Super. 496 (App. Div. 2008)) or whether S-1666 applies prospectively because it would be manifestly unjust to void the "step-down" provision in commercial auto policies since the accident occurred prior to the effective date of S-1666 when the "step-down" provision was deemed valid, (see Hand v. Philadelphia Ins. Co., 408 N.J. Super. 124, 146 (App. Div. 2009)), the Makroukalis court confirmed that S-1666 could not be given retroactive effect.

Based on the foregoing, S-1666 must be applied prospectively, commencing September 10, 2007. Any UM/UIM claim predicated on an accident that predates the September 10, 2007, adoption of S-1666 must be governed by the principle articulated in Pinto v. N.J. Manufacturers Ins. Co., 183 N.J. 405 (2005) wherein the Court held "step-down" provisions in business auto policies to be valid and

enforceable.

If you have any questions regarding this issue, please contact Kevin Wolff, Jim Lisovicz or Kevin MacGillivray.