

Negligent Infliction of Emotional Distress Claims: Will Your Insurance Cover You?

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“The mind and the body are separate and distinct.”

Rene Descartes

“Emotional distress does not constitute ‘bodily injury’ as defined in the State Farm Policy”.

State Farm

Trial lawyers routinely advise their clients to obtain the maximum first party and third party automobile coverage. We practice what we preach when we buy our own personal automobile insurance policies to protect our own assets in the event we cause an accident. Yet despite our educated vigilance, we actually may not be insured for claims of negligent infliction of emotional distress. And vast numbers of less educated consumers, who rightfully assume they have coverage for physical and emotional injuries, may also be personally exposed to an emotional distress claim asserted against them because of policy language written in *Doublespeak*. Imagine the unthinkable happens. Your teenage son normally a careful driver, is distracted and doesn't see a young child crossing the street. The child is terribly injured in the accident which happened in full view of the child's horrified mother. You have adequate insurance to cover the claim of the injured child but are you covered for the mother's legitimate claim of negligent infliction of emotional distress?

In Lipsky v. State Farm, Phila. CCP 080904218, Opinion of Fox, J. 1/19/2010, now pending before Pennsylvania's Superior Court, the court will be asked to decide whether an ambiguous definition (“bodily injury is a bodily injury”) precludes coverage for a claim for negligent infliction of emotional distress. Despite the fact that Pennsylvania law has since Sinn v. Burd, 486 Pa. 146, 404 A.2d 672 (1979) recognized claims for negligent infliction of

emotional distress, liability coverage might not exist to indemnify against such claims.

Lipsky v. White (C.C.P. PHILA COUNTY)

Bystander Claims for Emotional Distress

In Lipsky v. White, Benjamin Lipsky, then 16 years of age, was struck and killed by an intoxicated driver as he was walking home from synagogue. His fatal accident was witnessed by his father and two older brothers. The surviving relatives who witnessed this tragedy suffered emotional distress but no physical injury per se. In addition to the wrongful death and survival claims filed on behalf of the Estate of young Benjamin, his father and siblings asserted claims for negligent infliction of emotional distress. The defendant's carrier, State Farm, claimed that its **insured's policy** did not provide coverage for the emotional distress claims presented by the surviving family members. State Farm relied upon the wording of its policy that defined bodily injury and contended it excluded coverage for the emotional distress claims of the bystander victims.

State Farm's Definition of Bodily Injury

Mr. White's insurance policy with State Farm provided that it would "pay damages which an insured is legally liable to pay because of 'bodily injury'". The term "bodily injury" was defined as "bodily injury to a person and sickness, disease or death which results therefrom." In short, State Farm defined this critical term by the term itself. To State Farm a "bodily injury" is a "bodily injury".

State Farm's definition of "bodily injury" is an example of *circulus in definiendo* or a circular definition. A circular definition conveys no information whatsoever, contrary to the very purpose of a definition. The fundamental flaw in the circular definition is that it lacks a second significant important element: clear and precise statement of the essential attributes or

characteristics of the thing or term being defined. For example, to define a “motor vehicle” as a “motor vehicle” does not rule out a car, train or plane in the definition.

Presumably, what State Farm intended or wanted to say was that a bodily injury is a physical injury only and that it did not include psychic injuries unaccompanied by a physical injury. Certainly there are many different ways to explain or describe the attributes or characteristic of a “bodily injury” so that it would be readily understandable to its insureds.

Declaratory Judgment Action - Lipsky v. State Farm

A declaratory judgment action was filed on behalf of the family members against State Farm seeking coverage for their NIED claims.

The Honorable Idee Fox granted summary judgment in favor of plaintiffs finding that due to the ambiguity in State Farm’s policy language the emotional distress claims are covered claims and not “...subject to the policy limit recovered by the Estate of Benjamin Lipsky..” An appeal filed by State Farm is now pending before the Pennsylvania Superior Court. The Superior Court’s decision in the Lipsky v. State Farm case could impact **every** State Farm Automobile Insurance policy which contains this circular definition of bodily injury. To date, no Pennsylvania appellate court have reviewed the State Farm policy language in question and whether insureds are covered for this type of claim.

Judge Fox relied heavy upon Crabtree v. State Farm Ins. Co., 632 So. 2nd 736 (La. 1994), where the Louisiana Supreme Court rejected State Farm’s argument that a claim of mental anguish did not constitute “bodily injury”.

The Louisiana court came to the conclusion that the State Farm policy language (identical to the State Farm policy in Lipsky v. State Farm) was ambiguous and the court determined that it must be interpreted in favor of finding coverage. State another way, the court concluded that

“mental anguish constitutes bodily injury as defined in the State Farm policy.” It is suggested that the Louisiana Court correctly focused on the policy and not interpreting philosophical issues of when mind and body separate or statutory construction.

There is a significant policy difference between a plaintiff’s claim for first party benefits and the claim of an insured that the insured is entitled to indemnification on a claim. Indeed, were State Farm’s argument to be accepted, public policy in Pennsylvania favoring effective automobile liability coverage would be undermined. (See e.g., 75 Pa. C.S.A. § 1786, 1702, 1714 and 1724.) State Farm’s interpretation of its policy would have each of its insureds operating vehicles within the Commonwealth of Pennsylvania completely uninsured for valid claims of negligent infliction of emotional distress.

Tort reform comes in many different packages. We react to the direct and frontal attacks seeking to limit access to our civil justice system but we also need to be vigilant against the more insidious types of tort reform when insurance policies are written in a manner to deny victims the rights and protection guaranteed by Pennsylvania law and undermine the reasonable expectations of the insured.