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## Another Arrow in the Defense of Quiver



By Wilhelm Dingler, Esq. of Marshall, Dennehey, Warner, Coleman & Goggin

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On June 26, 2012, the Superior Court of Pennsylvania affirmed the dismissal of claims against a defendant who was discharged in bankruptcy because plaintiff did not object to the discharge. *Gubbiotti and Pavinski v. Santey*, 2012 PA Super 131, 2012 Pa. Super. LEXIS 1059 (PA Super. 2012) The case arose due to an automobile accident. The defendant was insured at the time of the accident. The defendant filed for bankruptcy after suit was filed but before a judgment was entered. Plaintiffs received notice of the bankruptcy filing and their claims were listed as unsecured, non-priority claims in the bankruptcy petition. The bankruptcy court ultimately discharged the defendant's debts to which plaintiffs had never objected.

Following these events, plaintiffs attempted to proceed with their personal injury action claiming that, notwithstanding the bankruptcy, defendant's insurance policy remained applicable to pay the claims. The defendant asserted the bankruptcy discharge in an amendment to "new matter" as required under Pennsylvania's pleading requirements. For their position, plaintiffs relied on a provision of 40 P.S. §117 which states that the bankruptcy of an insured does not release the insurer from liability "for the amount of the judgment" against a defendant, up to the policy limits. It was plaintiffs' belief that they could proceed under this statute, the defendant's bankruptcy discharge notwithstanding. In a case of first impression, the Superior Court held that insurance survives a bankruptcy only to pay a "judgment." Since no judgment existed at the time of the bankruptcy discharge, the statute did not preserve defendant's insurance proceeds and those proceeds were not available to the plaintiffs. The Superior Court held that plaintiffs should have objected to the discharge if they wanted to have defendant's insurance respond to the claim. No appeal was taken from this decision.

It has long been the belief of members of the bar that insurance survives bankruptcy and an amount less than or equal to the available limits would be available as recompense to a deserving plaintiff. The Superior Court has now made it clear that policy proceeds are only available in this circumstance if: (1) a judgment is entered before the bankruptcy discharge; or (2) a plaintiff/claimant has timely objected to the discharge. The general belief that insurance survives bankruptcy is not the law in Pennsylvania and plaintiffs' lawyers often are not aware that they have to object to a discharge if no judgment has been entered. Moreover, defense lawyers often are not aware that they can raise the bankruptcy discharge via their answer and new matter in such a situation.

[Practice Notes: The answer and new matter must be amended to affirmatively plead the discharge. The claim must be identified in the bankruptcy petition or otherwise made a part of the bankruptcy proceeding. Plaintiff must have notice of the bankruptcy and the claim. A suggestion of bankruptcy should be filed in the underlying tort case.]

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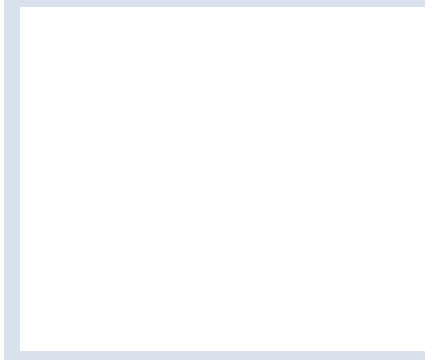
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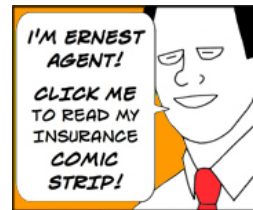
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