PBI AUTO LAW 2014

KOKEN AND RELATED ISSUES

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SOME COMMON TYPES OF UM/UIM CLAUSES

1. Total silence
2. Traditional Arbitration
3. Mutual Consent
4. Venue Selection (ie. Resident at time of accident, at time of application, county v. state or federal)

UNINSURED AND UNDERINSURED MOTORIST ARBITRATION/KOKEN AND CIVIL PROCEDURE

Stepanovich v. State Farm, 78 A.3d 1147 (Pa. Super. Ct. Oct 15, 2013) (Pennsylvania Superior Court Writes That Mentioning Insurance In *Koken* Case Is Not Violative of Pennsylvania Rule of Evidence Rule 411).

Initially, Judge O'Reilly in Allegheny County held that it was a violation of due process for the Plaintiff NOT to be allowed to identify both the third party and the UIM carrier in the jointly tried *Koken* case. The case was appealed and at the appellate level the Pennsylvania Superior Court makes two important findings that:

1. It is not a violation of Rule 411 of the rules of evidence for the insurance company to be identified (see page 8 and footnote 5) and
2. The Plaintiff in this case cannot prevail because he did not show how the failing to identify the insurance company was prejudicial to due process rights. The dissent says that it was proven by the plaintiff being "double teamed".

Essentially, the finding is that mentioning insurance at a *Koken* trial does not violate the Pennsylvania Rules of Evidence. Since it will be almost impossible to prove prejudice of not mentioning the prejudice then the insured should be allowed to mention it.

PAJ's Amicus Brief which was authored by Len Sloane, Jim Haggerty and Mike Davey is cited in footnote 5. Jennifer Webster of Perer Kontos and myself represented the Plaintiff.

Noone v. Progressive Direct Insurance Company, No. 3:12 CV 1675 (M.D. Pa. May 28, 2013) (District Court Holds That Amount Of Underinsured Motorist Coverage Available And Third Party Settlement Are Admissible In *Koken* Trial).

This case involves a underinsured motorist (UIM) claim and bad faith arising out of the handling of a car accident case. Since the insurance policy did not mandate arbitration the Plaintiff filed suit in court.

In anticipation of the pre-trial conference the insurance company filed several motions in limine seeking to preclude the Plaintiff from introducing pieces of information involving the underinsured motorist claim, coverage, premiums and the third party case.

Judge Munley denies Progressive's motion in limine seeking to preclude plaintiff's introduction of the amount of premiums plaintiff paid, the amount of UIM benefits available, and the amount plaintiff received from the tortfeasor.

Padilla v. State Farm Mut. Auto. Ins. Co., 2014 WL 3109999 (E.D. Pa. July 8, 2014) (mem.) (*Koken* - District Court Denies Motion To Dismiss Bad Faith Claim (UIM Breach)).

The case involves a lawsuit arising out of an underinsured motorist (UIM) claim. The Plaintiff brought claims for breach of contract and bad faith based upon State Farm's conduct of delaying its investigation of an underinsured motorist claim (UIM) after repeated requests for a claim evaluation. The company allegedly kept requesting more information from the Plaintiff or simply ignored the Plaintiff's requests.

Also, when State Farm finally made an offer, it was allegedly unreasonably low. The District Court notes that one could infer that the Plaintiff's UIM claim could be evaluated relatively quickly given State Farm was the insurer for the tortfeasor as well as the Plaintiff's UIM insurer. The allegations point to State

Farm's lack of a reasonable basis for its delay and partial denial of benefits along with an inference of self-interest. Therefore, the Plaintiff has alleged a plausible bad faith claim and is allowed to proceed.

Skrocki v. Row, No. 1990 EDA 2012 (Pa.Super. Oct. 17, 2013) (mem.) (Pennsylvania Superior Court Reveres Trial Court *Koken* Order Which Moved Third Party Case from Philadelphia County to Berks County).

The insured brought suit against the tortfeasor and underinsured motorist carrier (UIM) insurer in Philadelphia County because the UIM insurer does business there. The trial court granted the UIM insurer's motion to sever and transferred the UIM claim to Berks County based on forum non conveniens. The tortfeasor then filed untimely preliminary objections to venue in Philadelphia and the Plaintiff filed preliminary objections to the torteasor's preliminary objections on the basis that tortfeasor's objecitons were not filed within 20 days.

The Pennsylvania Superior Court reverses and holds that the trial court erred in granting tortfeasor's preliminary objections because if a claim is filed in a proper venue, it remains proper throughout the litigation. Therefore, the trial court's severance of the third party claim from the UIM claim and the transferring the UIM claim to Berks did not render venue against tortfeasor in Philadelphia improper. The tortfeasor can still file a motion to transfer based on forum non conveniens.

Barnabei v. Schell, No. 1759 EDA 2013 (Pa.Super. Ct. Feb. 20, 2014) (mem.) (Pennsylvania Superior Court Affirms Trial Court Venue Ruling.

The plaintiff filed a claim in Philadelphia County based upon the Defendant becoming intoxicated in the County. The trial court rejected the plaintiff's argument which ultimately resulted in an accident in Delaware County. The trial court granted the Defendant's preliminary objections and transferred the case to Delaware County.

The Superior Court affirms and observes that the allegation where part of the defendant's acts were committed in Philadelphia County is insufficient to establish venue as it amounts to just a part of an occurrence. Further, satisfying part of an occurrence does not satisfy Pa.R.C.P. 1006 and all the facts that satisfied the elements of negligence occurred in Delaware County.

Otto v. Erie Insurance Exchange, NO. 13-6722 (E.D. Pa. March 31, 2014) (Court Analyzes Forum Selection Clause Language).

The case addresses the scope of a Erie Insurance forum selection clause when the insured is suing for underinsured motorist (UIM) coverage. Based upon diversity at the time of filing the suit, Otto filed suit in the Eastern District of Pennsylvania. The Erie policy mandated that a suit "must be filed in a court of competent jurisdiction in the county and state of [the Ottos'] legal domicile at the time of the accident." Erie argued that this language requires the case be filed in state court only. Otto countered that the forum selection clause is broad and includes both federal and state court.

Applying the Third Circuit case of Jumara v. State Farm Insurance Company, 55 F.3d 873 (3d. Cir. 1995) the court finds that the language in the forum selection clause includes the federal court located in the county the insured resides at the time of the accident. Since the Eastern District federal court included Montgomery County where the Ottos' resided, then the federal court is proper. Erie Insurance's motion to dismiss based upon forum non conveniens is denied because the decision to file suit in federal court complies with the forum selection clause.

Bad Faith

§ 8371. Actions on insurance policies.

In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:

1. Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate plus 3%.
2. Award punitive damages against the insurer.
3. Assess court costs and attorney's fees against the insurer.

42 Pa. C.S.A. § 8371.

Clark v. Progressive Advanced Insurance Company, No. 12-6174 (E.D. Pa. April 26, 2013) (Bad Faith Claim Dismissed Because Complaint Allegations Not Specific).

This case involves a bad faith claim filed under Section 8371 of the Pennsylvania Judicial Code and arises after the Plaintiff claimed there was an inadequate offer of monies by the insurance company in an underinsured motorist (UIM) case.

The Plaintiff's claims were that a UIM claim was submitted and then an offer made and rejected. The Complaint alleged that the offer was unreasonable. The Court summarizes the facts in the complaint as stating that a UIM claim was made after the insured complied with the terms of the policy and then rejected. The Court finds that only materials facts may be taken as true to determine whether a "plausible claim for relief" has been state. It then concludes that the "facts are not sufficient to state a plausible claim for relief under Pennsylvania's bad faith statute." The claim for bad faith is dismissed without prejudice.

Tubman v. USAA Casualty Insurance Company, 943 F.Supp.2d 525 (E.D. Pa. April 30, 2013) (District Court Dismisses Fiduciary Duty Claim in Bad Faith Underinsured Motorist Suit).

The case involves a multi-count complaint arising out of an underinsured motorist (UIM) case. Among the counts in the complaint are claims for breach of contract, statutory bad faith, breach of fiduciary duty, common law bad faith and a violation of the Unfair Trade Practices and Consumer Protection Act.

The District Court finds that because of its hybrid nature of being both a first party and third party claim, a UIM case does not provide a right to a fiduciary duty. Therefore, the claim for breach of fiduciary duty is dismissed. The Court also holds that a UIM claim, as stated, is not a case where both a statutory and common law bad faith claim can be simultaneously filed because the common law right is subsumed by the breach of contract claim. Thus, the common law bad faith claim is dismissed. Lastly, the Court finds that no claim for violating the Unfair Trade Practices Act can exist in this case.

Deibler v. Nationwide Mut. Ins. Co., 2013 WL 4511313 (W.D. Pa. Aug. 23, 2013) (mem.) (District Court Dismisses Bad Faith Claim Filed After underinsured Motorist Proceeding Concludes).

The District Court grants the insurance company's Motion for Summary Judgment to dismiss the insured Deibler's bad faith claim with prejudice. The District Court finds that insurance company did not commit bad faith when it failed to (1) obtain insured's statement, (2) inform the insured of the right to file UIM claim, and/or make a claim determination without having the insured's statement under oath. Also, a violation of insurer's claims practice manual does not necessarily give rise to a bad faith claim.

Evidentiary Issue/Damages

Clemens v. New York Central Mut. Fire Ins. Co., 2014 WL 3508221 (M.D. Pa. July 14, 2014) (mem.) (Federal District Court Rules On Motions To Depose Insurance Company Employees And Executives In An Underinsured Motorist/Bad Faith Claim – Koken).

This case initially involved both an underinsured motorist claim (UIM) and a bad faith claim. The UIM case settled and the bad faith claim remained so the Plaintiff's counsel sought to depose various people who are employed by the insurance company for the insured. The insurance company filed a motion for a protective order.

The District Court grants, in part, and denies, in part, Defendant's motion for a protective order regarding the proposed depositions of Defendant's CEO, CFO, and Claims Manager. The District Court finds that Defendant's position in seeking the protective order is overly simplistic. The argument is that only two lower level people made all of the decisions in the handling of the UIM claim. However, the court finds that although only two lower level people made all the decisions regarding how and when to settle the UIM claim, it begs the question whether company policies implemented by their superiors affected their decision making in a way contradictory to their insured's interests. Therefore, the District Court allows the deposition of the CFO and Claims Manager and, depending on those depositions the court will entertain a request to depose the CEO.

Renner v. Progressive Northern Ins. Co., 2:12-CV-2570-CDJ (E.D. Pa. March 18, 2014) (Court Allows Medical Expenses Already Paid To Be Recovered Even If Not Subject To Reimbursement).

The case centers on the admissibility at a underinsured motorist (UIM) trial of medical expenses for which the insured already received payment from her own auto insurance company. In this case, a car accident occurred in Delaware with a Delaware driver. The insured Renner recovered the third party coverage from the Delaware driver and settled for the third party limits. She then sought underinsured motorist UIM coverage from Progressive under her Pennsylvania policy. The Progressive policy contained a provision which stated than any dispute as to the coverage or provisions shall "be governed by the law of the state listed on your application as your residence." At the time of the application for coverage and accident, Renner was a resident of Pennsylvania. However, it also stated that the UIM claim is derivative of the third party claim since it is based upon the third party being underinsured.

Renner argued that the UIM provision applies because her claim arises as a result of the injuries caused by a third party. This is then a derivative claim and basically is part of the third party claim. This distinction is important because in Delaware the collateral source rule applies and a person may recover for medical bills already paid, even if not subject to reimbursement. However, if Pennsylvania law applied then the medical expenses could not be recovered. Progressive argued that the choice of law provision controls and the Pennsylvania law applies.

The District Court relies heavily on Willett v. Allstate Ins. Co., 359 Fed. Appx. 349 (3d Cir. 2009) which holds that the UIM claim is derivative of the third party claim. In this case, the third party claim followed Delaware law so the derivative claim should as well. The court holds that the insurance policy's UIM clause controls over the general choice of law provision and the UIM clause requires that the court apply the Delaware law.

Sharp v. Travelers Personal Security Ins. Co., NO. 12 CV 6483 (Lack. Co. March 7, 2014) (Trial Court Rules On Discovery Issues In Insurance Bad Faith Case).

The trial court in Lackawanna County deals with the discovery of different parts of an insurance company's files and other documentation as a result of the lawsuit which was filed for Breach of Contract and violations of the Unfair Trade Practices and Consumer Protection Law (UTPCPL). In this case, the Plaintiff was seeking the discovery of the insurer's loss reserves for the insured's claims, underinsured motorist (UIM) claim file for the insured, the insurer's claims practice manual, the personnel files for certain adjusters of the insurer, a compilation of other peer reviews requested by the insurer, other lawsuits and Insurance Department Complaints pertaining to medical expense benefits claims against the insurer under insurance policies with insurance coverage of $100,000 or more, records of payments made to the health care professionals who conducted any peer reviews in this matter, and materials generated by the insurer after the insured's medical expense benefits claim was initially closed by the insurer.

The only reason for many of the discovery requests being denied by the trial court is because the insured did not file a claim independently for Bad Faith Liability. The Court finds that since the insured has not asserted an independent claim for Bad Faith Liability against the insurer, its reserves information is protected from discovery as Opinion Work Product and the personnel files of its claims representatives are not discoverable. Also, the insurer's closed UIM file for the insured relevant to any issues in this case is not discoverable. However, the 2009 – 2010 claims practice manuals and training materials concerning the handling of medical expense benefit claims are relevant to the insured's allegations that the insurer violated the UTPCPL by engaging in deceptive

practices and committing actionable malfeasance by abusing the peer review process and proper medical examination procedures and that treble damages are warranted under the UTPCPL since the insurer acted intentionally or recklessly in that regard. For those reasons Travelers is required to provide the requested documentation relating to other litigation and administrative complaints, peer reviews initiated by the insurer in cases with such coverage limits of $100,000 or more, and payments made to the health care professionals who conducted peer reviews of the insured's treatment provided that the Plaintiff executed a Confidentiality Agreement with respect to the proprietary information or trade secrets reflected in the claims manuals, training materials and vendor agreements. The insurer may also redact identities of the insurer to filed Administrative complaints with the Insurance Commissioner.

Last, the insurer is required to submit all post initial file closure materials to a Special Master for an "in-camera" review to determine whether those documents are protected from discovery as Opinion Work Product.

Wagner v. State Farm Mut. Auto. Ins. Co., No. 5:13-cv-06645 (E.D. Pa. Feb. 20, 2014) (District Court Rules On Discovery Deposition of Adjuster in Underinsured Motorist Case).

The District Court denies the plaintiff's motion to compel deposition of a claim representative and team manager in an underinsured motorist breach of contract claim, where no bad faith claim was brought. The Court finds that information about claims handling is not relevant to a breach of contract claim and writes that the "Plaintiff does not allege in his Complaint that Defendant acted in bad faith by failing to properly investigate, evaluate, or negotiate his UIM claim; absent such allegations, discovery related to claims handling is outside the scope of discovery for a breach of contract claim". The motion to compel is denied.

Marlette v. State Farm Mut. Ins. Co., 57 A.3d 1224 (Pa. Dec. 28. 2012) (Pennsylvania Supreme Court Reverses Pennsylvania Superior Court AND Holds That Delay Damages In Underinsured Motorist Claim Are Not Calculated based Upon Award But Are Based Upon The Policy Limit).

This is a case originally arising out of a Koken trial for underinsured motorist benefits. The insured received an award well in excess of the policy limits. The trial court held, and the Superior Court as well, that the delay damages are calculated based upon the actual jury verdict and not the policy limits, even if the verdict is higher than the policy. In this case there was a policy limit of $250,000 and an underinsured motorist verdict of $550,000. The Superior Court held, with Judge Bowes dissenting, that delay damages are based upon the award and not the policy limit.

On November 7, 2011, the Pennsylvania Supreme Court granted a Petition for Allowance of Appeal to hear the following issue:

> *Did the Superior Court err (as identified in the dissenting opinion) in holding, in conflict with Allen v. M[e]llinger, that plaintiffs may recover delay damages based on the full amount of the jury verdict rather than on the legally recoverable molded verdict, which was reduced to reflect the insurance policy limits that plaintiffs were permitted to receive?*

The Supreme Court reverses and holds that the Plaintiff may only recover delay damages on the amount of legally recoverable daamges, after the verdict is molded to reflect the policy limits.

The Supreme Court finds that the Superior Court improperly concluded that the plain language of Rule 238 required that delay damages be calculated based on the jury's award of damages. Further, it improperly opined that limiting delay damages to the amount of a molded verdict eliminated the unpredictability of outcome that motivates an insurer to make a reasonable settlement offer.

The Supreme Court holds that a plaintiff's recovery of delay damages under Rule 238 is limited to the amount of the legally recoverable molded verdict as reflected by the insurance policy limits. Accordingly, the Court vacates the Superior Court's decision and remands it for reinstatement of the trial court's original award of delay damages based upon the policy limit.