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CIVIL PRACTICE

# Here Comes Hurricane Koken

## Response to decision brings surge of litigation, ferocious winds of change

By Daniel E. Cummins

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dancummins@comcast.net

It has now been a little over three years since the state Supreme Court handed down its monumental decision in the case of *Insurance Federation of Pennsylvania v. Commonwealth, Department of Insurance (Koken)*, 889 A.2d 550 (Pa. 2005), holding that automobile insurance carriers were not required to include arbitration clauses in their policies for the resolution of under insured and uninsured motorist claims.

Since that time, automobile insurance carriers have been free to amend their policies and rid them of arbitration clauses in response to many alarmingly unreasonable UIM/UM arbitration results, particularly in Luzerne and Lackawanna Counties. Consequently, recovery on most of these former arbitration claims will now be by way of the filing of literally thousands of lawsuits in the court system across the state.

This major legal storm, which I'll call Hurricane Koken, is gathering steam and quickly bearing down upon the Pennsylvania state trial courts with its potentially inundating surge of under insured and uninsured motorist claims and swirling, gale force winds of change.

As state trial courts brace for the landing of this legal tempest, federal courts in Pennsylvania appear to be reinforcing their levees and closing their floodgates to these types of cases by way of anticipatory decisions on related issues.

### The Storm Forms and Grows

This legal maelstrom was born out of the newly revised automobile insurance policies issued since the *Koken* decision by almost all of the carriers that do business in Pennsylvania.

Carriers which appear to have totally eliminated the arbitration clause altogether include Nationwide, Erie, Liberty Mutual, Donegal, Keystone, and USAA. Other carriers that have opted to change the arbitration clause to require the consent of both parties to submit the claim to arbitration include AMICA, Allstate, GEICO, Harleysville, Progressive, and ISO. State Farm has changed its auto policy to require that all under insured and uninsured motorist claims be resolved only by way of the filing of a lawsuit as opposed to an arbitration.

Given that the carrier's policyholders are now beginning to be involved in accidents under these newly issued non-arbitration policies, Hurricane Koken is currently gathering strength and approaching peak intensity as the third party portion of these claims approach deadlines to file suit. In terms of accidents that happened around two years ago, third party lawsuits are being filed to toll the statute of limitations and some of those claimants are choosing to also include their UIM or UM claims against their own carriers in these filings.

### Joinder of Claims

Note that joinder of these entirely separate actions and recoveries, one based in negligence against the tortfeasor and the other arguably based in contract law, appears to be permissible under Pennsylvania Rule of Civil Procedure 2229(b) which states that "[a] plaintiff may join as defendants persons against whom he asserts any relief jointly, severally, separately or in the alternative, in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences if any common question of law *or* fact affecting the liabilities of all such persons will arise in the action." [emphasis added]. The common factor is obviously the single motor vehicle accident giving rise to the various claims presented.

The early indication from the state trial courts is that where these companion claims are filed under separate captions, the injured party's lawsuit against the tortfeasor will be consolidated under Pa.R.C.P. 213 with the injured party's underinsured motorist claim against his or her own automobile insurance carrier.

For example, in a case involving analogous issues, *Decker v. Nationwide Insurance Co.*, 05-CV-1863 and 06-CV-2119 (C.P. Lackawanna March 4, 2008), Judge Carmen Minora granted a plaintiff's motion to consolidate his bad faith litigation against the carrier with the carrier's declaratory judgment action on whether plaintiff was entitled to UIM coverage. Minora reviewed the two actions before him and found that, under Pa.R.C.P. 213(a), which allows for the consolidation of actions arising out of "the same transaction or occurrence," the joinder of the plaintiff's bad faith action and the carrier's declaratory judgment action on the issue of coverage was permissible.

Even more recently, Allegheny Court of Common Pleas Judge R. Stanton Wettick Jr. implicitly held that underinsured motorist coverage and separate bad faith claims may be consolidated under one caption but that courts faced with such joined claims should have the UIM case decided first by a jury followed by a bench trial on the bad faith claim. In *Gunn v. Automobile Insurance Co. of Hartford*, PICS Case No. 08-1266 (C.P. Allegheny July 25, 2008), Wettick denied Hartford's motion to stay discovery related to the bad faith claim until the plaintiff's UIM claim could be decided. In essence, the court ruled that a piecemeal approach of the various claims arising out of a single motor vehicle accident would not be tolerated by the already overburdened state trial court system.

In addition to seeing third-party lawsuits being joined under one caption with a companion underinsured or uninsured motorist claim, litigants may also expect to see the additional joinder of any bad faith claims and first party benefits claims being pursued by the injured party. Such lawsuits may also be overloaded with the related subrogation claims that may be asserted by the underinsurance carrier against the tortfeasor as well as a property damage subrogation claim against the tortfeasor all arising out of the same accident. Additionally, the UIM/UM carrier may also deem it appropriate to join declaratory judgment actions on coverage issues in the matter.

While the consolidation of all of these at least seven potential claims under one caption may foster the interest of judicial economy, it may also result in judicial mayhem from trying to keep straight all of the swirling claims, issues, and attorneys involved.

**Substantial Delays and Costs**

As such, forecasters have been stymied in their efforts to accurately predict the course this legal storm will take when it makes landfall in the court system. For example, some of the issues include the possible application of different statutes of limitations for different claims, the need to file cross-claims in the pleadings applicable throughout the various claims that are consolidated, and the issue of how the Rules of Civil Procedure, including the rules of discovery, will be applied to the UIM or UM portions of the lawsuit. Other issues may include the number of defense medical exams and vocational assessments that will be allowed with the multiple defendants involved.

At trial, the issue will arise as to whether the prohibited term "insurance" can be mentioned to the jury. If the plaintiffs will be entitled to argue at trial that they paid for UIM or UM premiums and are therefore entitled to such benefits, the question arises as to whether fairness dictates that the defendant carriers should also be able to suggest or even argue, if warranted, that a plaintiff is not entitled to such benefits and that the awarding of the same could have the adverse effect of higher insurance premiums for everyone.

Many issues will also arise at trial in terms of the difficulties over the creation of jury instructions and a verdict slip that separates and explains the many issues and claims presented in a manner that is both coherent and understandable to a jury of lay persons, let alone the court and the attorneys involved.

It is anticipated that Hurricane Koken will cause widespread power outages in the form of great delays in cases reaching trial in the already overburdened state trial court system. The cost and damages caused by this storm are also expected to be substantial in that the overwhelming influx of these new cases may require the creation of even more spots on the bench for additional judges in many counties across the commonwealth to handle this ever-increasing case load at the state level. Additional judgeships may even be required at the appellate level to handle all of the appeals, not to mention the many novel legal issues that will require review.

**Feds Taking Cover?**

Meanwhile, over in the federal court system mixed signals are being issued as to how that forum intends to react when this deluge hits the courts of Pennsylvania.

For example, back in 2007 in the U.S. District Court for the Middle District of Pennsylvania, Judge James Munley issued a decision in the case of *Ketz v. Progressive Northern Insurance*, 2007 U.S. Dist. LEXIS 43245 (M.D. Pa. 2007), which involved a post-Koken policy that required both parties to agree to arbitrate before an underinsured motorist claim could go to arbitration as opposed to a jury trial.

In *Ketz*, it was alleged by the insured that the insured and the carrier could not agree on arbitration and Progressive was allegedly making repeated and ongoing requirements before agreeing to arbitration. Thus, the insured filed a breach of contract and bad faith claim in the Lackawanna County Court of Common Pleas. The case was removed to the U.S. District Court by the carrier and the insured filed a motion to remand.

Munley denied the motion to remand and kept the case in federal court. The decision to deny the motion to remand found that the amount-in-controversy of two counts in the complaint, one alleging a breach of contract and the other alleging a bad faith claim, could be aggregated for diversity purposes. Since both counts sought more than $50,000, the matter was found to have met the amount-in-controversy jurisdictional element and was allowed to remain in federal court.

The more recent trend, and perhaps wisely so, is that the federal district courts are more routinely, even sua sponte, declining to accept UIM and UM coverage cases being removed from the state court system, at least in the declaratory judgment context.

In the January 2008 case *Progressive Northwestern Insurance Co. v. Sczyrek*, 2008 WL 170588, (M.D. Pa. 2008), Munley exercised his discretionary jurisdiction power to dismiss declaratory judgment action on an insurance coverage question in the UIM context.

The central issue presented in that case was an exclusionary clause in the Progressive policy and whether it absolved the company from liability in relation to a motor vehicle accident. Munley opined that, even though diversity jurisdiction applied, the case was in the form of a declaratory judgment action and that such actions in federal court were considered procedural rather than substantive. Accordingly, Munley held that the District Court was allowed to decline to exercise jurisdiction.

In declining to accept jurisdiction, Munley wrote that the "matter before this court is one of contract interpretation under Pennsylvania law. In addition, we would be required to determine whether tort claims of individual liability against an insured who was not operating a motor vehicle can provide liability and a duty to defend outside of exclusions in the insurance policy." Since Munley found that all such questions were of state law and since no unique question of federal law existed, the case was dismissed.

Similarly, in *Nationwide Mut. Ins. Co. v. Kojsza*, 3:08-CV-00949 (M.D. Pa. Aug. 11, 2008) Judge Edwin Kosik, another member of the federal Middle District court, acted sua sponte and likewise declined to accept jurisdiction over a declaratory judgment action between a carrier and its insured regarding the amount of UIM coverage available in light of a dispute between the parties over the residency of the claimant or the

claimant's mother. Kosik saw this matter as "nothing more than a case of an insurance company coming to federal court, under diversity jurisdiction, to obtain declarations on purely state law matters."

The U.S. District Court for the Western District of Pennsylvania has also issued numerous recent decisions over the summer and fall of 2008 declining to accept jurisdiction in declaratory judgment matters pertaining to UIM and UM coverage issues with carriers. Judge Terrence F. McVerry declined such jurisdiction in the case of *Dixon v. Progressive Northern Insurance Co.*, 2008 WL 4072816 (W.D.Pa. Aug. 27, 2008) and Judge Gary L. Lancaster did so on two occasions, once in *Roth v. Progressive Insurance Co.*, 2008 WL 2856472 (W.D.Pa. July 23, 2008) and again last month in *United Financial Casualty Co. v. Fornataro*, 2008 WL 4283347 (W.D.Pa. Sept. 18, 2008).

Among the factors considered in declining jurisdiction in these Western District cases was the fact that the UIM or UM insurance coverage questions did not involve a federal question or promote any federal interest. It was also emphasized that, in addition to the fact that the requested relief would require the federal court to apply well-settled state law, a state's interest in determining its own state law issues weighed against exercising federal court jurisdiction in such matters. The Western District judges were also influenced to decline accepting jurisdiction by the fact that there were already companion parallel state court actions pending in addition to the subject declaratory judgment actions that were removed to the federal court. As the Western District judges found that the state courts were more than capable of resolving these disputes in accordance with its own law, jurisdiction was declined.

It remains to be seen whether the federal courts may attempt to expand the rationale for declining jurisdiction on UIM and UM declaratory judgment actions to those underlying UIM and UM claims that may now be required to be resolved by way of lawsuit as opposed to arbitration. Additionally, parties wishing to keep the matter in the state court could institute a declaratory judgment action and include it or consolidate it in the underlying combined third-party and UIM or UM action as a way of giving the federal court a reason for declining jurisdiction over the entire matter.

Nevertheless, the federal courts would also appear to be able to decline jurisdiction over these cases for lack of complete diversity. In other words, although the defendant UIM or UM carrier may be a foreign party from outside of Pennsylvania, when the injured party and the tortfeasor involved in the third-party aspect of the litigation are both from Pennsylvania, complete diversity and, therefore, federal court jurisdiction, is destroyed.

As such, it appears that, at least from the current path of the steadily approaching Hurricane Koken, the storm has the state court trial system primed for a direct hit. Of course, the path of hurricanes can be haphazard and it is difficult to pinpoint their projected paths with absolute certainty. Accordingly, it remains to be seen whether any portion of this storm will veer off and wreak havoc in the federal court system as well.

**Safety Tips**

In the face of this impending storm, counsel should follow make all attempts to be prepared for whatever it brings our way. Obviously, the impact and strength of the storm can be lessened by litigants remaining open to the prospect of resolving the claims presented through the various forms of alternative dispute resolution available as opposed to trial.

Those forced to go to trial may weather the storm by attempting to stay on top of, and by sharing with colleagues the initial trial court decisions that come down on the new issues presented. Before the storm arrives it may also be wise to identify and maintain contact with those fellow attorneys who focus their practice in this area and who may be able to help other attorneys navigate these novel cases through the court system in the most efficient manner possible.

Last but not least, it is recommended that counsel keep plenty of bottled water on hand in order to keep the vocal cords lubricated as it will certainly take a lot of litigation and legal argument before the storm passes and the dust settles. •

*Daniel E. Cummins practices insurance defense law and is a partner in the Scranton law firm of Foley Cognetti Comerford Cimini & Cummins.*