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Good News for Bad Faith Plaintiffs

Court Allows Contract And Tort-Based Claims

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Pennsylvania law allows for a belt-and-suspenders approach when suing an insurer for bad faith, so that plaintiffs may pursue both a statutory claim under Section 8371 and a contract-based claim, a federal judge has ruled.

In his recent opinion in *Kakule v. Progressive Casualty Insurance Co.*, Senior U.S. District Judge Robert F. Kelly reversed himself and revived the plaintiff's contract claim after finding that he had previously taken too narrow a reading of the Pennsylvania Supreme Court's 2001 decision in *Birth Center v. St. Paul Co. Inc.*

For practitioners, Kelly's opinion clarifies an important question of state law that may have appeared to be in conflict.

In his April opinion, Kelly relied on the state Supreme Court's 1981 opinion in *D'Ambrosio v. Pennsylvania National Mutual Casualty Co.*, which held that Pennsylvania does not recognize common law claims for bad faith.

Charles K. Graber

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But in a motion for reconsideration, plaintiffs attorney Charles K. Graber of King of Prussia, Pa., argued that Pennsylvania does permit common law contract actions for bad faith after the decision in *Birth Center*.

Now Kelly has granted that motion, saying "I failed to afford the *Birth Center* decision its proper precedential value."

Kelly found that the *Birth Center* decision "did depart from the weight of the case law" in Pennsylvania's lower courts, "which consistently held that there were no common law remedies available in Pennsylvania to address insurer's bad faith conduct."

Those lower court decisions, Kelly said, "referenced the common law as a whole, and did not make any distinction between bad faith actions sounding in contract versus those sounding in tort."

As a result, Kelly said, prior to *Birth Center*, "the rule was that insureds had a statutory scheme under which to bring their bad faith claims, and all bad faith claims had to be brought under the statute."

But Kelly said the *Birth Center* court "intentionally moved away from this general proposition by holding that an insured is permitted to bring a contractual bad faith action against its insurer."

There still is no common law tort remedy available in Pennsylvania, Kelly found, because those claims are governed Section 8371.

"But the *Birth Center* court was clear in

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deciding that an insured in Pennsylvania is now permitted to bring a bad faith claim sounding in contract to recover those types of damages available in contract actions generally," Kelly wrote.

Kelly found that the confusion stemmed from language in the *D'Ambrosio* that might appear to conflict with *Birth Center* but, in fact, does not.

In *D'Ambrosio*, Kelly found, the state Supreme Court held that Pennsylvania would not recognize a common law action for bad faith when confronted with the prospect of creating a new tort along the lines of that being created in California.

"While the case accurately stands for the proposition that Pennsylvania does not recognize common law actions for bad faith that sound in tort, the court in *Birth Center* held that *D'Ambrosio* does not also bar actions sounding in contract for the same conduct," Kelly wrote.

As a result, Kelly said, "*D'Ambrosio* does not stand for the proposition that common law contractual remedies for an insurer's bad faith are barred in Pennsylvania."

Instead, Kelly said, a proper reading of *D'Ambrosio* shows that the court was simply declining to create a new common law remedy for bad faith by insurers, choosing instead to leave the task to the General Assembly.

And the Legislature responded by passing Section 8371, Kelly noted.

Pennsylvania's lower courts, Kelly said, have consistently cited *D'Ambrosio* "for the proposition that common law claims for bad faith were not remediable in

Judge Robert F. Kelly

Pennsylvania during the period before *Birth Center* was decided."

Some lower courts, Kelly said, "still cite *D'Ambrosio* for that very proposition," such as the 2004 decision from the Pennsylvania Superior Court in *The Brickman Group Ltd. v. CGU Insurance Co.*, which held that "all bad faith claims derive from statute."

But Kelly found that *D'Ambrosio* "did not speak to contract issues as those were not before it," and that the *Birth Center* court found that "nothing in *D'Ambrosio* bars a party bringing a bad faith action sounding in contract from recovering damages that are otherwise available to parties in contract actions."

Progressive Casualty's lawyers — Chester F. Darlington and William K. Conkin of Marshall Dennehey Warner Coleman & Goggin — argued that Kelly was bound by the 2000 decision from the 3rd U.S. Circuit Court of Appeals in *Keefe v. Prudential Property and Casualty Insurance Co.*, which held that no common law remedy for bad faith in the handling of insurance claims was recognized under established Pennsylvania case law.

Kelly disagreed, saying that while he is "generally bound by decisions of the 3rd Circuit," the announcement of a change in the law by the state Supreme Court "must be taken as controlling."

"Since *Birth Center* was decided after *Keefe*," Kelly said, "the rule used by the 3rd Circuit has been effectively supplanted by the more recent Pennsylvania Supreme Court decision."

(Copies of the 15-page opinion in Kakule v. Progressive Casualty Insurance Co., *PICS No. 07-1045, are available from* The Legal Intelligencer. *Please call the Pennsylvania Instant Case Service at 800-276-PICS to order or for information. Some cases are not available until 1 p.m.)* •