

2010 AUTOMOBILE LAW UPDATE - CLE

A. Third Party/UIM Consolidation

In *Insurance Federation of Pennsylvania v. Commonwealth, Department of Insurance (Koken)*, 889 A.2d 550 (Pa. 2005), the Pennsylvania Supreme Court held that automobile insurance carriers were not required to include arbitration clauses in their policies for uninsured and underinsured motorist benefits claims. As a result plaintiff have begun to files suits for personal injuries against third party tortfeasors and UIM claims against their own insurers in a single action.

So far, defense challenges to bringing suits in one action have been typically denied. The underlying rationale is that since these post-Koken claims arose out of the same "transaction or occurrence," i.e., the same motor vehicle accident and involved similar factual and legal issues, they should be consolidated under one lawsuit. The overriding factor behind these decisions was the principle of judicial economy, which favored streamlined ,as opposed to piecemeal litigation to handle these lawsuits.

Philadelphia County

So far, these trial courts have held that these combined claims should proceed in a consolidated fashion under one caption: *Richard Hess v. Cosgrove*, C.P. Philadelphia, July Term, 2008, no. 3708; and *Kelly Hess v. Dickel*, C.P. Philadelphia, October Term, 2008, no. 3220.

However, just last month, a Philadelphia trial court in *Zerggan v. Rietman and Nationwide Insurance*, June Term 2009 No. 1752 (Jan. 20, 2010) per Judge Patricia McInerney sustained the preliminary objections filed by the tortfeasor and transferred the case to Chester County on a venue argument and also severed the third-party case from the underinsured motorist claim. There was no opinion, just an Order, but it's worth citing in a motion to sever such a case.

Other Counties

In *Jannone v. McCooey and State Farm*, 2009 WL 2418862, 2320-2008-Civil (C.P. Pike April 1, 2009), Pike County Judge Gregory H. Chelak denied the preliminary objections filed by the third party defendant-driver to the joinder of third party liability claim with the UIM claim under one caption or lawsuit. This court also noted, that evidence of insurance may be introduced at trial for limited purposes as necessary.

Serulneck v. Kilian and Allstate, 2008-Civil-2859 (C.P. Lehigh April 7, 2009). In that case, Judge Carol K McGinley denied the motion of the tortfeasor defendant seeking a severance of the claims against him from the UIM claims that were alleged by the plaintiff in a single case. McGinley noted that "the entire cause of action, whether sounding in tort or contract, arises from the same set of facts. Defendant Allstate will be prejudiced if excluded in any litigation which fixes its liability." As such, the Lehigh County court allowed the claims to proceed in a consolidated fashion.

Six v. Phillips, (C.P. Beaver, June 30, 2009), Judge Kwidis denied efforts to sever the case into separate lawsuits when he denied preliminary objections filed by Erie, the insurance company that covered the defendant-driver on the third party lawsuit side of the case. While evidence of insurance is ordinarily not permitted under Rule 411 to show that a defendant had coverage, the rule does allow

evidence of insurance when it is offered for a separate, relevant purpose such as, in his opinion, for assisting the jury in determining whether or not a tortfeasor was underinsured in a post-Koken case.

In so ruling, the court rejected the argument that allowing the cases to proceed together under one caption would prejudice the defendant driver in terms of the introduction of evidence of insurance.

Federal Cases

In *Calestini v. Progressive Cas. Ins. Co.*, 3:09-CV-1679 (M.D.Pa., Dec. 16, 2009) Judge A. Richard Caputo of the Middle District of Pennsylvania ruled against the Defendant insurance carrier's Motion to Bifurcate and Stay Discovery in which a UIM breach of contract action was joined with the bad faith action.

Where Third Party Insurer is the same as the UIM insurer

Bradish-Klein v. Kennedy and State Farm, (C.P. Beaver Dec. 3, 2009 Kwidis, J.) State Farm was both the UIM carrier and also provided the liability coverage to the third party tortfeasor. Plaintiff initially filed suit only against the tortfeasor and then moved to amend the Complaint to add the UIM claim against the UIM carrier, State Farm. The defendant tortfeasor opposed the motion to amend on the grounds that "insurance" would then come into play during the trial. The judge allowed the amendment joining the third party claim and UIM claim under one caption. The court noted that merely because evidence of insurance may come in at trial does not preclude joinder.

Severance Granted

Baptiste v. Strobel and State Farm Mut. Auto. Ins. Co., 2009 WL 3793590, A.D. 09-11444 (C.P. Butler Co. Nov. 5, 2009) went against the trend of other trial court opinions allowing third party claims against the tortfeasor to proceed in a consolidated fashion with the UIM claim under one lawsuit.

In *Baptiste*, the defendant driver was allegedly driving while intoxicated at the time of the accident and it was the UIM carrier, State Farm, that filed preliminary objections against the joinder, presumably to avoid having to face a jury inflamed by the DUI status of the tortfeasor. The court per Judge Marilyn J. Horan, granted State Farm's preliminary objections filed pursuant to Pa.R.C.P. 1028(a)(5), "misjoinder of a cause of action" and severed the claims from each other. State Farm's additional request that the UIM claim be stayed pending the resolution of the third party action was also granted.

The plaintiff's argument for the permissive joinder of claims under Pa.R.C.P. 2229(c), pertaining to the joinder of claims arising out of the same transaction or occurrence, was rejected by the Court. The court again indicated that the joinder of these claims would improperly inject irrelevant and prejudicial insurance issues in the negligence portion of the case against the tortfeasors. The court felt that, even though the severance would require a second trial on the same issues of liability and damages, undue prejudice to the defendant would be avoided by severing the cases into two matters. The court did not cite or review any prior trial court opinions that have allowed these consolidated cases. The court accepted the argument that keeping an insurance company in as a defendant in a negligence action involving the third party tortfeasor would violate Pennsylvania Rule of Evidence 411, which generally precludes the admission of evidence of insurance in civil litigation matters.

More specifically, although Pa. Rule of Evidence 411 allows the admission of evidence of insurance for certain limited purposes such as to show agency, ownership, control or bias or prejudice of a witness, the *Baptiste* court stated that there was no "other purpose" under which Rule 411 would support the admission of UIM insurance issues in the third party negligence portion of this post-Koken lawsuit. The trial court noted that the issue of UIM insurance in the claim against State Farm bears no relation to the determination of the negligence cause of action between Plaintiff and Defendant. The court also noted that, even if the insurance evidence was relevant to the negligence portion of the lawsuit, such evidence would still be inadmissible under Pennsylvania Rule of Evidence 403 which allows a court to exclude evidence "if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

The court also rejected the plaintiff's arguments in favor of judicial economy and the goal of avoiding inconsistent verdicts. The consideration of whether the joinder would interfere with a just determination of the matter for all parties was of a higher priority than those other interests. Lastly, the court noted its power to sever and order separate trials where warranted under Pa.R.C.P. 213(b). The court reiterated its opinion that "where joinder presents the potential for undue prejudice, [judicial] economy and inconvenience must yield to fairness for all parties."

In *Grove v. Uffelman and Progressive Ins. Co.*, 2009 WL 3815756, No. 2009-SU-2878-01 (C.P. York Nov. 9, 2009), the third party tortfeasor objected to the plaintiff's complaint on the grounds that the joinder of these two types of claims was improper in that they did not arise out of the same transaction and given that the introduction of insurance issues would prejudice the defendant-driver on his side of the case.

The plaintiff countered that the claims arose out of the same transaction or occurrence and also asserted that judicial economy would be furthered and inconsistent verdicts prevented by a litigation of these claims in a single lawsuit. The plaintiff also argued that the insurance problem could be avoided at trial by simply not mentioning insurance and referring to the issue by some other name.

The court sided with the tortfeasor defendant's arguments and ordered a severance of the cases. It viewed the two claims as involving separate transactions — a tort claim based on negligence against the defendant-driver and a contract claim against the UIM carrier to enforce the plaintiff's rights under the policy. The judge emphasized that by advising the jury that the plaintiff was pursuing a UIM claim, the jury may improperly conclude that the defendant-driver had insufficient liability insurance, which would be "a violation of the prohibition against the jury knowing about the Defendants' insurance coverage." He noted that, "even worse, the claim for UIM benefits advises the jury that there is a second insurance company involved as a source for payment, potentially causing the jury to award an increased amount of damages." He also cautioned that information about the availability of additional UIM insurance coverage to pay the plaintiff's verdict may also leave the jury with the incorrect assumption that the tortfeasor defendant would not remain personally responsible for any verdict in excess of the tortfeasor's liability limits. The judge noted that the very fact that the insurance company is named in the caption triggers the concerns that prevent insurance

from being mentioned in civil litigation matters as a matter of law.

Lastly, consolidating the claims would force UIM carriers to participate in pleadings, discovery, and trials in cases where the UIM coverage is never reached either because a defense verdict is entered in favor of the defendant-driver or an award is given that is below the defendant-driver's liability limits.

In *Megert v. Stambaugh, Erie Ins. Co. and The Hartford*, No. 2009-S-1416 (Adams Co., Jan. 15, 2010, 2010; WL 231525), Judge John Kuhn granted defendants preliminary objections to sever the third party claims against the tortfeasor from the UIM claims asserted against the two separate levels of UIM carriers.

The court adopted the minority rule in favor of severing such claims primarily on the grounds that the claims of negligence against the tortfeasor were misjoined with the contract claims against the UIM carriers in violation of Pa.R.C.P. 2229 and should therefore be severed under Pa.R.C.P. 213. Judge Kuhn determined that the negligence claim and the breach of contract claim did not arise out of the same transaction or occurrence. Although the claims arose out of the same car accident, the facts and the law relevant to the negligence claim and the contract claim against the carrier would be "very different" and can not be said to have arisen out of the same transaction or occurrence.

The court further noted that "although there is clearly case law from other jurisdictions to support Plaintiffs' arguments [in favor of consolidation of post-Koken cases], this issue has not been conclusively decided by the appellate court in Pennsylvania." The court believed that "the better reasoned decision is to grant Defendant's preliminary objection" and to sever the cases. It also found that severance would avoid the undue prejudice to the tortfeasor defendant that may result from the introduction of insurance issues in a negligence trial. He felt that any probative value of the evidence of insurance in these matters would be outweighed by the unfair prejudice to the tortfeasor defendant in violation of the Rules of Evidence.

So far, the count is 19 cases in favor of joinder and 4 in favor of severance.

Appellate Cases?

None, nada, zilch, zip - so far

These issues are typically raised in preliminary objections, so the trial court would have to grant permission for an interlocutory appeal - pretty rare. Koken was decided nearly 5 years ago but no case has so far made it to an appellate decision. And, since most cases settle along the way, it could be a while before we get some appellate decisions on the matter.

Other Consolidation Issues

O'Hara v. The First Liberty Ins. Corp. d/b/a Liberty Mut. Ins. Group, 2009 Pa.Super. 214 (Nov. 9, 2009, Judges Freedberg, Cleland and Kelly).

A Delaware County resident was injured in a Delaware County accident but brought suit against the UIM carrier in Philadelphia County. The Superior Court upheld the trial court's transfer of that case to Delaware County. The consolidation issue was not involved or addressed in this case as the plaintiff had already settled out with the defendant-driver and, therefore, the tortfeasor was not included in this suit that was solely filed against the UIM carrier.

Query whether the decision would have been different if the original tortfeasor defendant was still in the case and venue was proper against him in Philadelphia.

B. First Party Subrogation by Carriers outside of Pennsylvania

As we know, Pennsylvania law does not allow a first party carrier to recover for payments it makes for treatment to its insured involved in an auto accident. As such, plaintiffs cannot introduce evidence of the amounts of first party payments in civil actions against third party tortfeasors. However, issues arise when out of state plaintiffs sue Pennsylvania defendants in Pennsylvania.

***Serrano v. Cowles*, 2008 WL 4442532 (E.D.Pa. Sept.30, 2008)**

Transguard paid Mr. Serrano's disability and medical expenses pursuant to a valid occupational accident insurance policy. The reimbursement to Transguard is governed by the policy conditions set forth in that policy:

Lien: We shall have a lien on the amounts collected by You from such third persons to the extent of all benefits paid or payable to You. The amount collected by You to which Our lien shall attach shall be Your total recovery. We shall also be entitled to Our pro-rata share of any interest collected on the Net Recovery....

Subrogation: We shall be subrogated to any right of recovery You may have against others to the extent of Our benefits paid and payable together with Our expenses of recovery and We may, upon thirty days' prior written notice to You, commence Our own action under this right of subrogation. In such event, the recovery will be distributed in the same manner as a recovery by You.

The anti-recovery provision of section 1722 must be read in conjunction with the anti-subrogation provision of section 1720. Because section 1720 denies insurers any right of subrogation from the tort recovery of an insured, and section 1722 only allows an insured to recover for damages that have not already been compensated by the insurer, the two statutes work together to create a legislative scheme that allows accident victims to receive compensation for their injuries, but ensures that they will not receive double compensation.

In *Serrano*, the court held that due to jurisdictional constraints, however, Pennsylvania Courts cannot enforce the anti-subrogation provision of section 1720 on out-of-state insurers. This case follows prior case law set forth in *O'Malley v. Vilsmeir Auctions Co.*, 986 F.Supp. 306 (E.D.Pa.1997) which held that with an out-of-state plaintiff and an out-of-state insurance company asserting a subrogation

claim, and a Pennsylvania defendant, because it was unable to enforce the anti-subrogation provision of section 1720, the Pennsylvania policy of precluding recovery for such liens was unserved. Holding otherwise would entitle the insurer to subrogate what the insured was not permitted to recover). The anti-recovery provision, then, cannot have been intended to apply to Plaintiffs in this action; it would not serve the interests of Pennsylvania law and it would lead to an unfair result.

Remember, federal cases may be persuasive but are not binding on Pennsylvania courts. Pennsylvania courts have not specifically spoken on the issue. See e.g. *Davish v. Gidley*, 417 Pa. Super, 145, 611 A.2d 1307 (Pa. Super 1992) (workers compensation case where NJ employer was entitled to subrogation from an employee's recovery because NJ allowed subrogation and Pennsylvania then did not.

C. Set-off of UIM Benefits

In the September 24, 2009 case of *Pusl v. Means*, the Superior Court affirmed the trial court's order molding a verdict against a third party tortfeasor, reducing the verdict by the amount that plaintiff had already received in settlement of her UIM claim. In the case, Ms. Pusl settled her UIM claim for \$75,000 before her claim against the tortfeasor was tried. The tortfeasor trial led to a \$100,000 verdict which was reduced by the trial court to \$25,000, setting off the UIM recovery.

The Superior Court held that UIM benefits fell within §1722's definition of required benefits that would be precluded from recovery in an action against a tortfeasor. Further, the court ruled that the UIM benefits were not a collateral source because of the UIM carrier's right of subrogation against the tortfeasor.

Now best to put in an affirmative defense to all New Matter:

To the extent plaintiff has received or does in the future receive payment of uninsured or underinsured motorist benefits as a result of the accident described in plaintiff's complaint, defendants are entitled to a set off against any verdict awarded against them to the extent of all such uninsured or underinsured motorist benefits paid.

D. Negligent Entrustment

In order to plead a valid claim for negligent entrustment, a plaintiff must prove that the defendant:

- (1) permitted a third person,
- (2) to use a thing under the control of the defendant, and
- (3) that the defendant knew or should have known that the third person intended to or was likely to use the thing in such a way that would harm another.

Ferry v. Fisher, 709 A.2d 399 (Pa. Super. 1998).

The theory of negligent entrustment, is generally confined to specific and narrow fact situations. Negligent entrustment was first recognized by the Supreme Court in *Gibson v. Bruner*, 406 Pa. 315,

