

Insurer's Conduct When No Bad Faith Is Pleaded

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In what has commonly become known as the *Koken* decision, the Pennsylvania Supreme Court held that the Pennsylvania Insurance Department “does not possess the authority to require mandatory binding arbitration for UM and UIM disputes.” Prior to *Koken*, captioned as *Insurance Federation of PA v. Department of Insurance*, 585 Pa. 630, 889 A2d. 550 (2005), uninsured and underinsured claims were usually arbitrated before three-person panels with very limited appellate rights. Now, most of these claims are being litigated and many procedural and evidentiary issues are working their way through the courts.

Complaints filed to recover UM/UIM coverage range from simple single-count complaints alleging that the plaintiff was injured by the negligence of an uninsured or underinsured motorist and is entitled to recover UM/UIM coverage, to complaints also including claims for breach of contract or statutory bad faith pursuant to 42 Pa. C.S.A. §8371. The inclusion of a statutory bad-faith claim provides a basis for the plaintiff to argue for a broad scope of discovery regarding the insurer's conduct and evaluation of the claim. However, the insurer may file a motion to sever and stay the bad-faith claim and argue for a more restricted scope of discovery.

The purpose of this article is to discuss some arguments relating to whether discovery of

information relating to the insurer's conduct and claim handling is relevant in a UM/UIM claim pleaded as a breach of contract action without a statutory bad-faith claim. Relevant evidence “means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence,” according to Pa.R.E. 401.

UM/UIM claims pleaded as a breach of contract often include allegations that the carrier failed to properly investigate, evaluate and handle the claim, and may be followed by broad discovery requests focused upon the insurer's conduct. Typical discovery requests focusing upon the insurer's conduct may include: the insurer's evaluation of demands and basis for any settlement offers; procedures followed to determine if and when a claim would be paid; reserves; claim manuals; claims logs; and depositions of adjusters.

Even if such information is deemed relevant, other objections may apply to such discovery requests, including work product and privilege. However, this article is limited to the threshold inquiry of relevance. Also, for purposes of this discussion, it is assumed that there is no dispute as to coverage or the terms of the applicable insurance contract.

As a starting point, below is a sample insuring agreement with respect to UM/UIM coverage:

We will pay compensatory damages which an 'insured' is legally entitled to recover from the owner or operator of an 'uninsured or underinsured motor vehicle' because of 'bodily injury': (1) sustained by an 'insured'; and (2) caused by an accident.

Based upon such language, it would appear that the central issue in a UM/UIM claim is the amount of compensatory damages the plaintiff proves that he or she is legally entitled to recover from the alleged uninsured or underinsured motorist who caused the accident. If so, the insurance carrier has a strong argument that its conduct in handling and evaluating the claim, apart from any factual information obtained relating to liability and damages, is not relevant and therefore not discoverable. In response, the plaintiff may argue that the insurer's failure to pay the amount of UM/UIM coverage demanded amounts to a breach of the insurance contract and that evidence of the insurer's conduct is relevant and necessary to establish that breach and is therefore discoverable.

These arguments give rise to questions as to whether a plaintiff must prove a breach of contract by the insurer in order to recover UM/UIM benefits and, if so, what is the nature of the breach that must be proven? The answers to these questions may have a significant impact on defining the relevant scope of discovery in a litigated UM/UIM claim where no bad faith is pleaded. Appellate case law addressing these issues is sparse.

In *Stepanovich v. McGraw*, 2013 Pa.Super. 275, 78 A.3d 1147 (2013), the Pennsylvania

Superior Court recently commented upon the nature of a litigated UIM claim presented as a breach of contract action. In *Stepanovich*, the plaintiff filed a single lawsuit against both the driver he claimed caused his injuries and against State Farm to recover UIM coverage. The claim against State Farm was labeled as a breach of contract and, in a footnote, the court commented as follows:

Although Stepanovich's claim for underinsured motorist benefits is labeled as breach of contract ... the contract is not technically breached until there has been a determination of liability and an award of damages in excess of the tortfeasor's liability limits. A UIM action represents a disagreement over third-party liability and/or the extent of damages. The insurance contract requires this disagreement be resolved through a lawsuit.

If a UIM action represents, as the comments above suggest, a "disagreement over third-party liability and/or extent of damage," the argument exists that discovery requests focused upon the insurer's conduct in handling the claim, such as evaluations of demands and offers, reserves, claims manuals and the general process that the insurer followed to evaluate the claim, would be irrelevant and therefore beyond the permissible scope of discovery. Assuming that to be true, factual information obtained by the insurer relating to the issues of liability and damages would still be relevant and discoverable. Such information often includes medical records, police reports, witness statements, damage photos and repair estimates. In essence, if evidence of the insurer's conduct is irrelevant to a claim for UM/UIM coverage, the scope of discovery in such claims would be similar to a typical third-party automobile negligence claim. Such a

position would appear consistent with the plaintiff's burden of proof in a UM/UIM claim to establish the amount of compensatory damages he or she is legally entitled to recover from the alleged uninsured or underinsured motorist.

A counterargument is that plaintiffs are permitted to introduce evidence of the insurer's conduct to prove a breach of the insurance contract. However, as the court in *Stepanovich* noted, the contract is "not technically breached until there has been a determination of liability and an award of damages in excess of the tortfeasor's liability limits."

Like many issues in the era of post-*Koken* UM/UIM claims, the law regarding the proper scope of discovery in a UM/UIM action is evolving. While that can make practicing in this area challenging, it also makes it interesting.



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