"Bad Kamara/Good Karma" — Life After *Hartford v. Kamara*

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How the Pennsylvania Supreme Court's Decision in *Kamara* Changes the Legal Landscape for Workers' Compensation Subrogation and Successfully Moving Forward

On November 21, 2018, the Pennsylvania Supreme Court, in a 5-4 decision, reversed the Superior Court stating a right of action in Pennsylvania remains with the injured employee. Specifically, the court held that "unless the injured employee assigns her cause of action or voluntarily joins the litigation as a party plaintiff, the insurer may not enforce its statutory right to subrogation by filing an action directly against the tortfeasor."

The *Kamara* decision immediately changes the way insurers must proceed with workers' compensation subrogation lien recovery lawsuits and follows on the heels of the previous *Liberty Mutual v. Domtar* decision, which covered similar issues concerning an insurer's direct right of suit in Pennsylvania.

Following the *Domtar* decision, it appeared clear from language within the vigorous dissents of Justices Saylor and Todd, who also dissented in *Kamara*, that it remained permissible for insurers to pursue lien reimbursements directly, without the participation of the injured worker, by suing as "Use" plaintiffs with correctly-styled captions. Employing the Use plaintiff blueprint, Hartford, as subrogee of Chunli Chen, filed suit against Kafumba Kamara (Kamara) and Thrifty Rental Car just prior to the expiration of the statute of limitations. A Hartford Subrogation Specialist verified the complaint.

Kamara filed preliminary objections to Hartford's complaint on two grounds. First, Kamara cited the majority opinion in *Domtar* and argued that insurers have no direct right of suit. Second, Kamara argued that the verification was not signed by a person with first-hand knowledge of the facts alleged in the complaint. The trial court sustained the preliminary objections and dismissed Hartford's action. Hartford appealed and the Superior Court reversed the trial court, finding that Hartford complied with *Domtar's* requirement that an insurer's right of subrogation, under §319 of the Workers' Compensation Act, be achieved through a single action by suing as a Use plaintiff. The Superior Court also held that Hartford's verification was valid because Hartford had a real interest in the lawsuit. Notably, in *Kamara*, the injured worker had neither assigned her cause of action to Hartford, nor voluntarily joined in the litigation.

The Pennsylvania Supreme Court accepted Kamara's appeal to decide whether an insurer suing as a Use plaintiff is any different from an insurer suing as a subrogee, thereby protecting against a split cause of action and accommodating an injured worker's right to pursue a pain and suffering claim. The Supreme Court took much of its opinion from the language of the *amicus* brief filed by the Pennsylvania Association of Justice, the Plaintiffs' Bar in Pennsylvania. The court held that merely changing a caption to sue as a Use plaintiff does not give insurers a direct right of suit without an assignment or the injured worker's participation in the suit. The court arrived at its decision despite the clear right to subrogation advanced by the statute. Although the court noted that allowing insurers to pursue subrogation claims would further the purposes of the Workers' Compensation Act, the court noted that it was for the legislature, not the court, to create a remedy to cure any deficiencies identified by its ruling.

While controversy exists over the *Kamara* analysis, there are now two Supreme Court decisions denying insurers a direct right of action to recover their worker's compensation liens in Pennsylvania.

So, where do we go from here? Below, we set forth our recommendations for lien recoveries in a post-*Kamara* world.

1. First, it remains our position that workers' compensation subrogation claims remain alive and well in Pennsylvania. In order to continue to make strong lien recoveries, subrogation professionals and their attorneys will need to continue aggressive investigation activities once an injury occurs to analyze whether subrogation potential exists. These activities continue to include information gathering, evidence preservation, witness interviews, insured participation, expert retention if necessary and legal theory development.
2. If no third party counsel is involved, it is our recommendation that we interview the injured worker as part of our worker's compensation subrogation investigation to determine whether the injured worker intends to pursue litigation. Depending upon his/her response, we will recommend proceeding in accordance with other recommendations offered below. This arrangement will also avoid any *Kamara* issues.
3. If third party counsel is involved early, it remains our recommendation to attempt to work with third party counsel, especially in view of *Kamara,* as doing so could take *Kamara* out of the equation.
4. Finally, if third party counsel is not involved and the worker is not interested in pursuing litigation, we recommend sending a "*Kamara* Letter" to the injured worker. As referenced above, the Pennsylvania Supreme Court opined that, absent an assignment of the cause of action to the insurer from the injured worker or voluntary joinder into the litigation, there is no direct right to sue. Accordingly, we are preparing a *Kamara* Letter to be sent to injured workers who fit the non-participation profile. This letter will contain substantial information including the notice elements which appeared to concern the Supreme Court. For example, we recommend the following items be included in the *Kamara* Letter:
    - the parties involved;
    - the date and location of the loss;
    - the statute of limitations date;
    - the right to seek independent counsel; and
    - the intent of the insurer to file a lawsuit upon assignment of the cause of action and the expected date the lawsuit will be filed.

Additionally, and perhaps most importantly under the *Kamara* decision, the letter should contain language requesting the injured worker assign his/her cause of action to the insurer, explicitly stating the rights given up as a result of this assignment. In this regard, the New Jersey statute may be looked to as a model to advise the worker that the subrogating carrier will be suing in his or her name and, in addition to suing for the lien, will be pursuing their pain and suffering claims. It is our opinion that if challenged, such a letter should satisfy additional legal challenges as to the sufficiency of any assignment as the specific requirements were not discussed in the *Kamara* decision.

A signature line should also be provided along with a self–addressed, stamped, envelope for return of the signed assignment. The letter will be sent via Certified and Regular mail, again mirroring the New Jersey rules. Finally, the letter will include prominent language stating, in part, that failure to sign and return the letter will be deemed acceptance of the assignment of the cause of action subject to all of the terms contained therein. This language will be prominently placed in the letter with the expectation that a certain number of injured workers will either purposely or unwittingly ignore this correspondence.

While the *Kamara* decision is an unwelcome one, Pennsylvania remains a good jurisdiction for workers' compensation subrogation. We believe that with proper notice, even in cases where injured workers do not pursue claims, insurers may still be able to recover their liens through assignment as discussed above.

This correspondence should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only and you are urged to consult a lawyer concerning your own situation and legal questions.