

**IN THE SUPREME COURT OF OHIO**

**DON B. KINCAID, JR.**  
  
**Plaintiff-Appellee,**

**vs.**

**ERIE INSURANCE  
COMPANY**  
  
**Defendant-Appellant.**

) **ON APPEAL FROM THE EIGHTH**  
) **APPELLATE DISTRICT,**  
) **CUYAHOGA COUNTY, OHIO**  
) **CASE NO. 92101**  
)  
) **SUPREME COURT**  
) **CASE NO. 09-1936**  
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**PLAINTIFF-APPELLEE'S MOTION FOR RECONSIDERATION**

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## MOTION

Plaintiff-Appellee, Don B. Kincaid, Jr., hereby requests that this Court reconsider the opinion which was announced on December 16, 2010. *Sup. Ct. Prac. R. 11.2*. No attempt will be made herein to reargue the positions which were previously advanced to this Court in the merit briefing. Plaintiff is concerned, however, with certain terms which appear in the decision which may be susceptible to misinterpretation and abuse.

The primary position which had been advanced by Defendant-Appellee, Erie Insurance Company, was that despite the absence of specific policy language, pre-suit notice of a claim for benefits and proof of loss was still required to be submitted before a policyholder possessed sufficient standing to file a civil action for breach of contract or declaratory relief. This Court ultimately agreed with that contention in the decision which was rendered on December 16, 2010. *Kincaid v. Erie Ins. Co.*, \_\_\_ Ohio St. 3d \_\_\_, 2010-Ohio-6036, \_\_\_ N.E. 2d \_\_\_. However, one sentence from the conclusion appears to exceed the scope of the appeal by stating that:

Until a claim has been denied, there is no actual controversy and the insured has no injury for breach of contract.

*Id.* ¶ 20. This passage may be interpreted as establishing – apparently for the first time in Ohio jurisprudence – that no suit can be brought against an insurance company for violating a policy until the carrier has actually “denied” a claim for coverage.

Such a revolutionary holding would produce far-reaching deleterious consequences. Any insurer could easily immunize itself from suit simply by refusing to openly deny a claim. It is hardly unusual in the experience of the undersigned

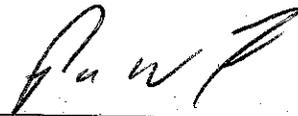
attorneys for coverage applications to remain in limbo for months, if not years, notwithstanding Ohio Department of Insurance regulations requiring prompt claims processing. See, e.g., *Furr v. State Farm Mut. Auto. Ins. Co.* (6<sup>th</sup> Dist. 1998), 128 Ohio App.3d 607, 716 N.E.2d 250. Once it appears that the insurer is simply ignoring the claim, the typical recourse for the insured is to commence a civil action for breach of contract and/or declaratory relief. Noncompliance with administrative regulations, by themselves, are not actionable. *Furr*, 128 Ohio App. 3d at 616.

The grave problems that will be created if a formal denial becomes an absolute precondition to suit against an insurer will be particularly acute in the context of underinsured motorist (UIM) coverage. When the tortfeasor's liability carrier refuses to pay the policy limits and litigation commences, the insured usually joins the UIM carrier to the ensuing lawsuit in order to satisfy the time-to-sue clauses that are permitted in such policies. *R.C. §3937.18(H)*. Typically, the UIM carrier will not have denied the claim at that point in time since the excess coverage is not available until the tortfeasor's liability limits have been exhausted. Indeed, the adjuster may even be in agreement that UIM benefits will be due once the claim against the tortfeasor has been resolved. The previously quoted language from the *Kincaid* opinion would seemingly preclude any joinder of the UIM carrier to the action until that insurer has formally "denied" a UIM claim. If the proceedings against the tortfeasor take three or more years from the date of the accident to resolve, the insured would conceivably be precluded from complying with the policy's time-to-sue clause and denied any UIM benefits at all. An adjustment of this Court's conclusion therefore would appear to be in order.

**CONCLUSION**

For the going reasons, this Court should reconsider the concluding paragraph of the opinion of December 16, 2010 and clarify that a denial of a claim for coverage or benefits is not a precondition for bringing a claim against an insurer for breach of contract or declaratory relief.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **Motion** was served by regular U.S.

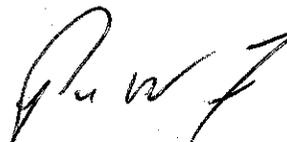
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