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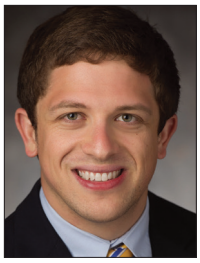

By Christopher Goode and Kenneth Human

Insurance Adjuster Liability

For more than a decade now, Kentucky's Eastern and Western United States District Courts have viewed the potential tort liabilities of insurance adjusters domiciled within the state very differently. It is important for attorneys to understand these conflicting approaches, why they exist, and how they can be made to co-exist, in the event that you and/or your clients succumb to improper conduct by an insurance company. Successfully naming a resident adjuster may prevent your claims from being aired in a more defense-friendly federal forum. Recent opinions from both the Western and Eastern Districts of Kentucky provide further guidance on this evolving issue, further indicating that we may be entering a new frontier of insurance company/adjuster liability in the commonwealth.

Being the master of his complaint, plaintiffs often make claims against adjusters as a corollary to their bad faith claims against insurance companies.[1] A problem arises, however, when such a claim is removed to the Western District. While the Eastern District routinely remands these cases due to the Kentucky residency of the adjuster,[2] the Western District takes a far different approach. As far as the Western District is concerned, an insurance adjuster cannot be liable for common law or statutory bad faith under Kentucky law. Therefore, the Kentucky citizenship of the adjuster will be ignored for purposes of removal under a "fraudulent joinder" theory.[3] The court's consistent application of this doctrine is made all the more remarkable by the fact that a litigant's motive for joining the non-diverse party is considered "immaterial" to the fraudulent joinder inquiry.[4]

The split between the courts is due to differing interpretations of the Supreme Court of Kentucky's decision in *Davidson v. Am. Freightways, Inc.*[5] The question that arises out of the decision is whether insurance adjusters are "persons or entities engaged in the business of insurance" that are subject to claims of bad faith.[6] On one hand, dicta in *Davidson* noted that Kentucky's insurance statutes were not designed to regulate "persons who are neither insured nor engaged in the business of entering into contracts of insurance."[7] On the other hand, *Davidson* also holds that the Unfair Claims Settlement Practices Act applies to "only those persons or entities *(and their agents)* who are engaged… in the business of entering into contracts of insurance."[8] Remand opinions issued by the Eastern District routinely cite this ambiguity in holding that Kentucky law remains ambiguous as to whether bad faith claims may lie against adjusters. The Western District has evidently decided that there is no ambiguity at all.[9]

Until the Sixth Circuit and/or Kentucky's appellate courts provide further clarity regarding the bad faith liability of adjusters under *Davidson*, it appears such claims will not be allowed to proceed in the Western District. But this presupposes that bad faith is the only cause of action capable of holding insurance companies and their adjusters accountable for their improper settlement practices. Several recent opinions indicate that both the Western and Eastern District Courts may have reached a consensus as to what *other* claims of adjuster liability are permitted under Kentucky law. And all they needed was a bad set of facts to rally against.

Enter Shelter Mutual Insurance Company. In the pending matter of *Adkins* v. *Shelter Mutual Insurance Company,*[10] discovery revealed the company's decade-long practice of settling personal injury claims of minors without court approval.[11] In exchange for a typically nominal sum, the company would require a minor's family member (usually unrepresented) to execute a document that purported to be a final and binding release.[12] Last year, Adkins was granted leave to amend her complaint to account for these newly discovered facts, contending that the handling of her claim was the result of a coordinated and fraudulent scheme meant to deprive Shelter policy holders and third party beneficiaries the full exercise of rights and benefits afforded them under the laws of the commonwealth.[13] Among her newly approved claims, in addition to bad faith, were claims of fraud in the inducement, fraud by omission and negligence/gross negligence.

The *Adkins* court's sanctioning of negligence and fraud

claims against an insurance company may eventually change the way Kentucky attorneys hold foreign insurers, along with their agents, answerable to the local jurisdictions in which they sell their policies. Before *Adkins*, defendants cited decisions like *Georgia Cas. Co. v. Mann*,[14] *United Servs. Auto. Ass'n v. Bult*,[15] *Motorists Mut. Ins. Co. v. Glass*,[16] and *Harvin v. U. S. Fid. & Guar. Co.*[17] for the proposition that the Unfair Claims Settlement Practices Act preempted all other causes of action premised upon settlement conduct. Now, Kentucky's federal courts are following the lead of *Adkins* and revisiting these above mentioned decisions to establish some semblance of clarity in Kentucky law regarding insurance company liability.

The first post-*Adkins* case is *R.H. v. Buffin*,[18] in which a bad faith claim against an insurer (Shelter) was brought in tandem with counts of negligence and fraud against a resident adjuster. Judge Thapar of the Eastern District pointed out that *Mann* and its progeny are limited to the context of bad faith claims and that Kentucky law does not preclude suing an adjuster and/or insurance company for other torts not tied to the bad faith standard.[19] Judge Heyburn of the Western District followed suit in *Joy et al. v. King*,[20] a case involving nearly identical facts and a Shelter insurance adjuster. *King* cited *Buffin* and *Adkins* for the proposition that Kentucky law is ambiguous as to whether a plaintiff may sue an insurance adjuster for torts other than bad faith.[21] Both *Buffin* and *King* cited the underlying rationale set forth by *Adkins*, that:

> "Kentucky's standard is high… Bad faith 'is not simply bad judgment, it is not merely negligence.'" These statements are all true regarding a claim of bad faith, but Shelter has cited no authority for its argument that the UCSPA, KRS 304.12-230, "preempts" all negligence claims. Unlike the UCC, the UCSPA is a single statute, rather than a comprehensive code of law.[22]

As attorneys, our jobs often bog us down into the mire of bitter disputes between parties. In order to fairly and equitably resolve such disputes, our courts cannot be in the midst of a dispute themselves. In this way the *Adkins* decision, and the bridge which has been extended between the Eastern and Western Districts, are positive developments towards establishing justice in the commonwealth. Only time will tell where else this bridge may lead. At the time of this article's submission, there are four other cases involving Shelter adjusters (in addition to *Buffin* and *King*) with pending motions to remand before Kentucky's Eastern and Western Districts. Once the dust settles, there may come a time when plaintiffs' attorneys begin to regularly assert

common law actions against insurance companies and/or their adjusters in the absence of, or in addition to, bad faith. Given the current climate, there are seemingly no legal impediments to doing so should the appropriate set of facts arise.

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1 See 14B Charles Alan Wright et al., FEDERAL PRACTICE AND PROCEDURE § 3702, at 46 (3d ed. 1998).

2 *Collins v. Montpelier US Ins. Co.*, 2011 U.S. Dist. LEXIS 143224 (E.D. Ky. 2011); *Gibson v. Am. Mining Ins. Co.*, 2008 U.S. Dist. LEXIS 82205 (E.D. Ky. 2008) *Mattingly v. Chartis Claims, Inc.*, 2011 U.S. Dist. LEXIS 106962 (E.D. Ky. 2011); *Montgomery v. L&M Trucking & Equip. Co.*, 2010 U.S. Dist. LEXIS 144086 (E.D. Ky. 2010); *N. Am. Specialty Ins. Co. v. Pucek*, 2009 U.S. Dist. LEXIS 104482 (E.D. Ky. 2009).

3 *Brown v. A.I.N., Inc.*, 2008 U.S. Dist. LEXIS 23714 (W.D. Ky. 2008); *Fulkerson v. State Farm Mut. Auto. Ins. Co.*, 2010 U.S. Dist. LEXIS 50115 (W.D. Ky. 2010); *Malone v. Cook*, 2005 U.S. Dist. LEXIS 24962 (W.D. Ky. 2005); *Wolfe v. State Farm Fire & Cas. Co.*, 2010 U.S. Dist. LEXIS 126215, *5 (W.D. Ky. 2010); *Lisk v. Larocque*, 2008 U.S. Dist. LEXIS 40303, *4 (W.D. Ky. 2008).

4 *Roof v. Bel Brands USA, Inc.*, 2014 U.S. Dist. LEXIS 146818 (W.D. Ky. 2014) (quoting *Jerome-Duncan, Inc. v. Auto-By-Tel, L.L.C.*, 176 F.3d 904, 907 (6th Cir. 1999).

5 25 S.W.3d 94 (Ky. 2000).

6 *Id.* at 95-96.

7 *Id.* at 98.

8 *Id.* at 102.

9 *Delamar v. Mogan*, 966 F. Supp. 2d 755, 758-759 (W.D. Ky. 2013).

10 CIVIL ACTION NO. 5:12-173-KKC.

11 *Adkins v. Shelter Mut. Ins. Co.*, 2013 U.S. Dist. LEXIS 50207, 4-5 (E.D. Ky. 2013).

12 *Adkins v. Shelter Mut. Ins. Co.*, 2014 U.S. Dist. LEXIS 118755, 2-3 (E.D. Ky. 2014).

13 *Id.* at 3.

14 46 S.W.2d 777, 780 (1932).

15 183 S.W.3d 181, 186 (Ky. Ct. App. 2003).

16 996 S.W.2d 437, 451 (Ky. 1997).

17 428 S.W.2d 213, 215 (Ky. 1968).

18 2014 U.S. Dist. LEXIS 175604 (E.D. Ky. 2014).

19 *R.H. v. Buffin*, 2014 U.S. Dist. LEXIS 175604, 12 (E.D. Ky. 2014).

20 CIVIL ACTION NO. 3:14-cv-00704-JGH.

21 *Id.* ("This Court agrees that, construing any ambiguities in Kentucky law in favor of remand, Plaintiffs have at least a colorable claim that both King and Shelter defrauded them by settling the claims without court approval. At best, Kentucky law is ambiguous as to whether a plaintiff may sue an insurance company and its adjustor for torts other than bad faith. And Plaintiffs have a colorable fraud claim that King settled the disputes with Plaintiffs without court approval, possibly in violation of KRS § 387.280.")

22 *Adkins v. Shelter Mut. Ins. Co.*, 2014 U.S. Dist. LEXIS 118755, 17 (E.D. Ky. 2014).