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Colorado Supreme Court Rules Insurance Adjuster is not Personally Liable for Claim Denial

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Insights for Insurers

Attorneys

Sarah Anderson

Scott M. Seaman

In a highly anticipated decision delivered on March 14, 2022, the Colorado Supreme Court rejected a policyholder's attempt to hold an insurance director personally liable under sections 10-3-1115 to -1116, C.R.S. (2021) for unreasonable delay or denial of a claim in *Skillet v. Allstate Fire & Casualty Insurance Co.*, 2022 CO 12, ¶ 1.

The Colorado Supreme Court agreed to answer a certified question of law from the United States District Court for the District of Colorado regarding the potential liability of insurance adjusters. *Id*. The certified question was stated as follows: "Whether an employee of an insurance company who adjusts an insured's claim in the course of employment may for that reason be liable personally for statutory bad faith under Colorado Revised Statutes Sections 10-3-1115 and -1116." *Id.*

The court answered the question in the negative based upon the plain language of the statute. *Id.* An action for unreasonably delayed or denied insurance benefits under Colorado law may be brought against an insurer, not against an individual adjuster acting solely as an employee of the insurer. *Id.*

The Claim Involved Underinsured Motorist Coverage

The case involves an underinsured motorist coverage claim that the policyholder, Alexis Skillett (Skillett), asserted against Allstate Fire and Casualty Insurance Company (Allstate) after a July 3, 2020 car accident. *Id.* Skillett was injured while riding as a passenger in her mother's car after another vehicle struck the right front corner of the car. Skillett settled with the at-fault driver's insurer for $23,907.15 but filed a claim with Allstate for underinsured motorist benefits. *Id.* ¶ 2.

Allstate assigned one of its employees, Collin Draine, to handle the claim. *Id.* ¶ 3. Draine was not a party to the insurance contract between Skillett and Allstate. *Id.* Draine handled Skillett's claim solely in his capacity as an Allstate claims adjuster. *Id.* Draine concluded that Skillett was not entitled to underinsured motorist benefits, and Allstate denied Skillett those benefits. *Id.* Skillett sued both Allstate and Draine in Denver District Court, asserting breach of contract, statutory bad faith, and common law bad faith against Allstate. *Id.* ¶ 4. As to Draine, she alleged that he had personally violated section 10-3-1116, which creates a cause of action for policyholders whose insurance benefits

have been unreasonably delayed or denied. *Id.* Skillett filed a suit in state court alleging that the denial was unreasonable and requested double the $25,000 per-person limit on her insurance policy, plus attorney's fees and costs. *See id.* ¶ 11.

The Decision Arose Out of a Question of Diversity Jurisdiction

Draine and Skillett are both Colorado residents, which ordinarily would preclude a federal court from exercising diversity jurisdiction of state court claims under 28 U.S.C. § 1332(a)(1). *Id.* ¶ 5. Allstate removed the case to federal court, arguing that Draine had been fraudulently joined to thwart diversity jurisdiction. *Id.* According to Allstate, Skillett could not possibly recover from Draine under section 10-3-1116, as that section only provides a cause of action against a claimant's insurer—not against an insurer's employees. *Id.* Thus, if the complaint included only the proper parties, it would satisfy federal jurisdictional requirements. *Id.* The federal district court determined that Allstate raised an important, unsettled question of Colorado law and certified that question to this court. *Id.* ¶ 6.

Conflicting Decisions on Adjustor Liability Under Colorado Statutes

In certifying the question, the district court noted there was conflicting authority about whether the statute imposed individual liability on an insurance adjustor. *Id.* In *Riccatone v. Colorado Choice Health Plans*, 315 P.3d 203, 207 (Col. App. 2013), a Colorado appellate panel held that the statutes provided a cause of action only against an insurer and not against individual employees of an insurer. In *Seiwald v. Allstate Property & Casualty Insurance Co*., No. 20-cv-00464-PAB, 2020 U.S. Dist. LEXIS 220999, at *7 (D. Colo. Nov. 24, 2020), a federal district court held the statutes could plausibly be interpreted to create a cause of action against an individual insurance adjuster.

The Colorado Supreme Court summarized the subject statutes. *Skillet*, 2022 CO 12, ¶ 10. In 2008, the General Assembly enacted "An Act Concerning Strengthening Penalties for the Unreasonable Conduct of an Insurance Carrier." Ch. 422, sec. 5, §§ 10-3-1115 to -1116, 2008 Colo. Sess. Laws 2171, 2172–74. The law included section 10-3-1115, which prohibits the unreasonable delay or denial of payment for a claim for insurance benefits, and section 10-3-1116(1), which establishes a cause of action for an insured whose claim for insurance benefits has been unreasonably delayed or denied. *Id.*

Skillett argued that section refers to "[a] person engaged in the business of insurance" and section 10-3-1102(3), C.R.S. (2021) defines "person" in part 11 of Title 10 to include "adjusters." *Skillet*, 2022 CO 12, ¶ 12.

The Court's Analysis of the Colorado Statutes Leads it to Conclude There is no Personal Liability for Insurance Adjustors

The Colorado Supreme Court noted that Skillett is correct that section 10-3-1102(3) includes "adjusters" among "persons, " but "that section does not make its definitions absolute." *Skillet*, 2022 CO 12, ¶ 13. Rather, those definitions apply "unless the context otherwise requires." *Id.* Throughout sections 10-3-1115 and 10-3-1116, the context makes clear that first-party claimants whose insurance claims have been unreasonably delayed or denied may bring suit against their insurers, but not against individual claims adjusters. *Id.*

According to the Court, read in its entirety, the statutes make clear that a cause of action lies only against the insurer and not an insurance adjuster. For those interested in the court's interpretation of the statute, a pertinent excerpt of the opinion is listed below:

> Most importantly, section 10-3-1115(2) establishes the standard by which a cause of action for unreasonable delay or denial of insurance payments is measured, explaining that, "for the purposes of an action brought pursuant to this section and section 10-3-1116, an insurer's delay or denial was unreasonable if the insurer delayed or denied authorizing payment of a covered benefit without a reasonable basis for that action." In other words, insureds may bring suit under section 10-3-1116(1), and section 10-3-1115(2) explains what they must show to prove unreasonable delay or denial; namely, that the insurer's delay or denial was "without a reasonable basis." § 10-3-1115(2); see also Am. Fam. Mut. Ins. Co., ¶ 9, 418 P.3d at 1184 (explaining that sections 10-3-1115 and 10-3-1116 "operate concomitantly through cross-reference").

Reading these provisions to allow for adjuster liability leaves unnecessary statutory gaps. Under such a reading, section 10-3-1115(2) would explain what standard applies when assessing whether an insurer's delay or denial was unreasonable, but it would offer no guidance for evaluating an adjuster's conduct. That, presumably, would be left for judicial development, but without legislative guidance. Moreover, section 10-3-1115(2) refers to instances where the insurer "delayed or denied authorizing payment of a covered benefit." (Emphasis added.) Because the insurer—not any individual employee—authorizes payment, this language indicates that an action for unreasonable delay or denial of insurance benefits is triggered by a decision of the insurer, not the adjuster.

Similarly, section 10-3-1116(1) allows first-party claimants to bring suit when their "claim for payment of benefits has been unreasonably delayed or denied." (Emphasis added.) The "payment of benefits" is made by and on behalf of the insurer—not the adjuster. Likewise, "first party-claimants" are those who "assert[] an entitlement to benefits owed . . . under an insurance policy." § 10-3-1115(1)(b)(I) (emphasis added). Insurers and insureds—not adjusters—are the parties to an insurance policy. They are the ones who undertake obligations under such policies, and it is the insurer—not the adjuster—who may be obligated to pay insurance benefits. And section 10-3-1116(1) allows first-party claimants whose claims for benefits are unreasonably delayed or denied to recover "reasonable attorney fees and court costs and two times the covered benefit." (Emphasis added.) It would seem odd to allow an insured to recover two times the covered benefit from an adjuster, who is not a party to the insurance policy that establishes the covered benefit and has not otherwise undertaken any obligation to pay the covered benefit.

Other parts of the statutory context likewise indicate that an action for unreasonably delayed or denied insurance benefits proceeds against the insurer. Under the statute's child support enforcement exemption, for example, sections 10-3-1115 and 10-3-1116 "do not apply to any claim payment that is delayed or denied because of the insurer's participation in the child support enforcement mechanism established in section 26-13-122.7, C.R.S." § 10-3-1115(7) (emphasis added). And under section 10-3-1118(5), C.R.S. (2021), "[a]n insurer is not liable for a claim . . . under sections 10-3-1115 and 10-3-1116 because the insurer solely provides the insured with the required amount of time" to respond to its written requests or to cure alleged failure to cooperate. (Emphases added.) These provisions carve out exceptions for the liability of insurers, yet make no reference to adjusters.

The only language in the Statutes that supports Skillett's argument is the use of the word "person" in section 10-3-1115(1)(a) and the attendant inclusion of "adjusters" as "persons" in section 10-3-1102(3). Given the statutory command that the definitions included in section 10-3-1102 only apply "unless the context 12 otherwise requires," we conclude that individual adjusters are not personally subject to suit under the Statutes.

Id. ¶¶14–18.

The Troubling Trend of Policyholders Seeking to Hold Adjustors Personally Liable

It seems that policyholders are, with increasing frequency, seeking to hold insurance adjusters personally liable for claims determinations under various state insurance and consumer protection statutes. Whether policyholders are seeking to destroy diversity jurisdiction, attempting to intimidate insurance adjusters or the insurance industry, wishing to infuse division between insurers and their employees, looking for litigation leverage, or attempting to expand their potential recovery, such tactics are improper and should be vigorously opposed.

Attempts to sue adjusters or hold them individually liable for bad faith have met with mixed success. Some decisions have allowed bad faith claims to proceed against adjusters. *See, e.g., O'Fallon v. Farmers Insurance Exchange*, 859 P.2d 1008, 1015 (Mont. 1993); *Liberty Mutual Insurance Co. v. Garrison Contractors, Inc.*, 966 S.W.2d 482, 487 (Tex. 1998); *Taylor v. Nationwide*, 589 S.E.2d 55, 62 (W. Va. 2003); *Leaphart v. Nat'l Union Fire Ins. Co. of Pittsburgh*, No. CV-15-106-GF-BMM, 2016 U.S. Dist. LEXIS 2059, at *5-6 (D. Mont. Jan. 7, 2016); *Waste Mgmt. v. AIG Specialty Ins. Co.*, No. H-16-3676, 2017 U.S. Dist. LEXIS 126880, at *9 (S.D. Tex. Aug. 9, 2017); *Crosthwait Planting Co. v. Snipes*, No. 4:17-CV-141-SA-JMV, 2018 U.S. Dist. LEXIS 159021, at *5-6 (N.D. Miss. Sep. 18, 2018); *Gallagher Bassett Servs., Inc. v. Jeffcoat*, 887 So. 2d 777, 784 (Miss. 2004); *Hambelton v. State Farm Fire & Cas. Co.*, No. 18-65-HRW, 2018 U.S. Dist. LEXIS 110042, at *6-8 (E.D. Ky. July 2, 2018).

Most courts have rejected attempts to hold an adjuster personally liable. *See, e.g., Keodalah v. Allstate Insurance Company, 449* P.3d 1040, 1048 (Wash. 2019); *Trinity Baptist Church v. Brotherhood Mutual Insurance Services, LLC*, 341 P.3d 75, 85 (Okla. 2014); *Lodholtz v. York Risk Servs. Grp., Inc.*, 778 F.3d 635, 640 (7th Cir. 2015) (applying Indiana law); *Hawaiian Isle Adventures v. N. Am. Capacity Ins. Co.*, No. 08-00574 SOM, 2009 U.S. Dist. LEXIS 10536, at *7-8 (D. Haw. Feb. 10, 2009); *Stone v. State Auto. Mut. Ins. Co.*, No. 5:16-cv-00381-AKK, 2017 U.S. Dist. LEXIS 21737, at *4 (N.D. Ala. Feb. 15, 2017); *Gilbert v. Nationwide Ins. Cos.*, No. 08-2681-STA-dkv, 2009 U.S. Dist. LEXIS 4409, at *6-7 (W.D. Tenn. Jan. 22, 2009); *Sims v. First Am. Prop. & Cas. Ins. Co.*, No. 1:16-cv-00870-WJ-KBM, 2017 U.S. Dist. LEXIS 9767, at *10-11 (D. N.M. Jan. 20, 2017); *Paiz v. State Farm Fire and Cas. Co.*, 880 P.2d 300, 309 (N.M. 1994); *1st Am. Warehouse Mortg. v. Topa Ins. Co.*, 2014 Cal. App. Unpub. LEXIS 5497, at *9 (Aug. 4, 2014); *Gruenberg v. Aetna Ins. Co.*, 510 P.2d 1032, 1042 (Cal. 1973); *M.V.B. Collision Inc. v. Allstate Ins. Co.*, 49 N.Y.S.3d 837, 848 (Dist. Ct. 2017); *Reto v. Liberty Mut. Ins.*, 2018 U.S. Dist. LEXIS 133336, at *1, 5 (E.D. Pa. Aug. 8, 2018).