# Bad Faith, Depositions of Insurer's Employees Coverage Update

July 1, 2021

## Accrual of Bad Faith Claims – Kentucky

***U.S. Liab. Ins. Co. v Watson***
--- S.W.3d ---, 2021 WL 2618171 (Ken. June 17, 2021)

The Supreme Court of Kentucky held that the statute of limitations on a third-party insurance bad faith claim, following settlement of the underlying claim, is triggered once the insurer and the third party have reached an agreement to settle the claim – not when final payment is made to the third party. In 2008, William Watson (Watson) was seriously injured after the vehicle in which he was a passenger left the road and flipped several times. The driver was intoxicated and found to be over the legal limit.

In 2009, Watson filed a lawsuit, asserting a negligence claim against the driver and claims under Kentucky's dramshop law against various establishments that served the driver, including Pure Country, LLC (Pure Country). Later, Watson moved for leave to file a second amended complaint to assert bad faith claims against, among others, Pure Country's insurer, United States Liability Insurance Company (USLI). The circuit court denied the motion, concluding that Watson could not state a viable statutory bad faith claim against USLI.

After rejecting an offer from USLI in 2011, Watson made a written settlement offer to Pure Country on June 11, 2012, which remained open until June 19, 2012. In the offer, Watson agreed to accept USLI's policy limits and further agreed that he would be responsible for resolving anticipated medical liens. Pure Country's counsel promptly accepted the offer and forwarded the final release on July 30, 2012. In December 2012, after the details underlying the medical liens were resolved, USLI paid the agreed amount.

Claims against the driver of the vehicle remained in suit through 2017. On Aug. 9, 2017, Watson moved for leave to file a third amended complaint to assert a bad faith claim against USLI. The trial court granted the motion, and USLI moved to dismiss the complaint because, among other things, the five-year statute of limitations barred the bad faith claim. Eventually, the circuit court granted USLI's motion for summary judgment, finding that the parties agreed in June 2012 to settle the underlying claim against Pure Country – more than five years before the Aug. 9, 2017 filing date – and Watson could not identify any bad faith actions by USLI that would fall within the statute of limitations.

The Kentucky Court of Appeals disagreed and concluded that Watson's bad faith claim did not accrue until December 2012, when Watson "accepted" USLI's June 2012 offer and executed the settlement agreement. Therefore, the August 2017 bad faith claim was timely according to the appellate court. The Supreme Court of Kentucky reversed, holding that under traditional contract principles, the parties entered a binding settlement agreement that triggered the five-year period no later than July 30, 2012. The agreement, not the payment, was held to trigger the bad faith statute of limitations.

Prepared by: Joshua LaBar

## Bad Faith Failure to Settle – Kentucky

***Mosley v. Arch Specialty Ins. Co.***
--- S.W.3d ---, 2021 WL 2618196 (Ken. June 17, 2021)

The Supreme Court of Kentucky upheld the lower court's grant of judgment on the pleadings and summary judgment to two insurers alleged to have engaged in bad faith conduct during settlement of an underlying personal injury and wrongful death case.

Rhett Mosley was killed while working at a surface mine when his truck overturned and crushed him underneath. Crystal Lee Mosley (Mosley), on behalf of his estate, commenced a negligence and wrongful death action against several entities involved in the operations at the surface mine. Several of these entities were insured by Arch Specialty Insurance Co. (Arch) and National Union Fire Insurance Co. (National Union).

As the liability case progressed, the parties went to two mediation sessions. Arch offered its full $1 million limit under its policy at both sessions, but did not send an adjuster to participate in the second session. At the second session, Arch refused Mosley's demand to apply its policy limits settlement to one of its insureds while leaving the claims against its other insured open. Arch "insist[ed] that it had an obligation to both of its insureds and could not exhaust its policy limits to protect only one of its insureds, leaving the other exposed." National Union offered $2 million toward a global settlement under a $6 million policy limit, which was refused by Mosley, who continued to demand National Union's full policy limits.

Mosley then commenced a bad faith action against both insurers, alleging that the insurers' insistence on global settlement offers, and Arch's unwillingness to settle for its policy limits for a release of only one insured's liability, constituted bad faith, civil conspiracy and a violation of Kentucky's Unfair Claims Settlement Practice Act (KUCSPA). The trial court granted Arch's motion for judgment on the pleadings on the basis that "Arch's alleged conduct was legally insufficient to prosecute a claim for bad-faith because of violations of KUCSPA, civil conspiracy, and punitive damages." The trial court also granted summary judgment to National Union.

The Supreme Court of Kentucky ultimately agreed with the trial court's ruling, holding that Mosley had failed to show that Arch and National Union acted in bad faith while negotiating settlements under their policies. With respect to Mosley's allegation regarding the insurers' insistence on making only global settlement offers, the Supreme Court found that such a practice was not barred by the KUCSPA. The Supreme Court also rejected Mosley's claim that Arch's refusal to apply its policy limits to only one insured was improper, holding that because both defendants were "insured by Arch, both of which Arch owed a duty to indemnify, it only conditioned a settlement of a sum that would exhaust policy limits on the condition that both insureds receive a full release of liability in exchange for such payment. " That condition, according to the Supreme Court, was not barred by the KUCSPA and was not in bad faith.

Prepared by: Stephanie Brochert

---

## Depositions of Insurer's Employees – Texas

***In Re USAA Gen. Indem. Co.***
--- S.W.3d ---, 2021 WL 2483767 (Tex. June 18, 2021)

The Supreme Court of Texas ruled that an insured may depose an insurer's employee regarding liability and damages alleged with respect to an auto accident claim. Insured Frank Wearden (Wearden) had an auto policy with USAA General Indemnity Company (USAA) and was injured in a car accident caused by a negligent driver. Wearden settled with the negligent driver and brought an action against USAA for breach of contract and declaratory judgment, seeking to recover Underinsured Motorist (UIM) benefits. Wearden claimed that he suffered damages beyond the value of the driver's policy, entitling him to the USAA policy's UIM benefits.

During discovery, Wearden demanded that USAA produce an employee to testify on issues, including how USAA calculated the damages, whether the negligent driver was an uninsured/underinsured during the accident, how the insurer decided that Wearden did not meet coverage prerequisites, and questions about other contractual provisions. USAA argued that it was premature to depose its employees on the matter and that the proposed deposition topics were too broad. USAA also argued that the discovery could be completed using more convenient sources, such as the driver and witness of the accident, police investigators, medical providers and experts. The trial court denied USAA's motion to quash the requested deposition.

The Supreme Court of Texas ultimately ruled that USAA failed to show that the deposition would be burdensome or delay the litigation process. More specifically, the Supreme Court held that the representative's lack of personal knowledge of the accident and damages did not foreclose deposition and that information regarding the insurer's legal theories, defenses and the alleged tortfeasor's status as an underinsured motorist was discoverable. Nevertheless, the Supreme Court also determined that the trial court abused its discretion by allowing Wearden to depose USAA's employee on all of the proposed topics. The Supreme Court held that discovery on Wearden's compliance with contractual provisions and conditions precedent to recovery exceeded the relevant subject matter of the suit. Additionally, the Supreme Court determined that any inquiry into offsets was premature. Lastly, the Supreme Court held that questions concerning the reasoning behind denying the claim, investigative process, work product and privileged communications with attorneys were improper for questioning.

Accordingly, the Supreme Court conditionally granted USAA's petition for writ of mandamus, in part, and ordered the trial court to vacate its order as it related to the topics that were impermissible under the Supreme Court's opinion.

Prepared by: Michael Hanchett

---

**Plunkett Cooney's insurance coverage update, The e-Post, is published bi-monthly via email. To receive your copy when it is issued, simply email - subscribe@plunkettcooney.com. Please indicate in the email that you would like to be added to the e-POST marketing list.**