was left uninsured at the time of the accident. This was an issue of first impression in Kentucky with respect to automobile liability insurance. The case validates the "owned or available for regular use" exclusion. Additionally, this case provides further support for arguments that there are some exclusions in automobile liability policies that are enforceable in Kentucky.

by Elizabeth Deener

On May, 27, in an unpublished decision, the Kentucky Court of Appeals held that for the purpose of establishing whether an insurance policy was in effect, the "occurrence" trigger "was the time the claimant was injured, not the time when the negligence leading up to the injury occurred." Doug Hoots and Jeff Taylor of Landrum & Shouse, LLP represented Ohio Casualty in Asbury College v. Ohio Casualty Ins. Co.

Ohio Casualty had provided both a comprehensive general liability (CGL) policy and an umbrella liability policy to Asbury College. The CGL policy had expired by February 1978. There were allegations of negligent hiring and supervision that had occurred during Ohio Casualty's coverage period. Asbury argued that these negligent acts "triggered" the Ohio Casualty coverage. On behalf of Ohio Casualty, we argued that the date of actual physical injury was the date for "triggering" policy coverage. The alleged sexual assault did not occur until 1979. Therefore, we said there was no covered "occurrence" within Ohio Casualty's commercial general liability policy period.

The Kentucky Court of Appeals agreed that the prevailing view of "insurance law is that the time of the occurrence of an accident is when the complaining party was actually damaged and not the time when the negligent or wrongful act was committed." Although the opinion in Asbury College was unpublished, and therefore may not be cited as authority in the Commonwealth, it does provide some guidance that Kentucky is in line with the majority on the interpretation of "occurrence" in general liability insurance contracts.

by Dinah Bevington

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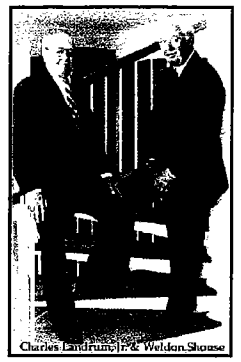
THE LANDRUM & SHOUSE REPORT



THE LANDRUM & SHOUSE REPORT

Winter 2006

Welcome to the Landrum & Shouse Report, a newsletter designed to keep you imformed on current events and legal issues. Landrum & Shouse, LLP, traces its history from pre-World War II legal service. For nearly 40 years following military service, the late Weldon Shouse and Charles Landrum, Jr., together with their firms practiced law throughout Kentucky before merging in 1984 to become what is now known as Landrum & Shouse, LLP. The resulting firm is built upon the well-deserved reputations of its founders as experienced, knowledgeable, and hard working trial lawyers.

PERSPECTIVES FROM FIVE DECADES OF CLAIM HANDLING

Attorney advertising and a completely different public perception of claim handling makes it appear to an outsider that claim handling has changed drastically over the years. The truth of the matter is, nothing about the mechanics of claim handling has changed since I first became a Claim Agent for the old Louisville Transit Company many years ago. It would be a mistake to allow outside influences to change the way a claim file is prepared.

The claim behavior and the environment in which claims are handled has changed, but the basic needs of good claim handling have not. The basic needs of every claim include early contacts, a complete investigation, an analysis of that investigation, and a solid evaluation of the claim before any attempt is made to negotiate settlement. These needs were important when I started handling claims, and they are important today.

Contacts still must be prompt, and the investigation needs to be completed early while the facts are still fresh in the minds of the participants and witnesses. If an attempt is made to enter into negotiations, or even solicit a demand, before the first three of the basic fundamentals are completed, it is a safe bet the evaluation will be influenced to some degree by the demand.

Conversely, if those basic claim needs are met before any attempt is made to discuss negotiations, the adjuster knows the range of value for the claim, and will not be influenced by outrageous or ridiculous demands.

In the handling of an insurance claim, "coverage" is the first item of investigation that must be completed. It has been said that coverage is the first word in a claim person's vocabulary. If there is no coverage, nothing else about the claim matters.

A thorough investigation to determine if coverage was in force at the time of the loss is very critical to file handling. All persons claiming coverage for the loss, or any person known at the time to claim coverage under the policy involved, must be contacted.

There are five basic fundamentals to good claim handling. We have mentioned four. They are: 1) investigation, 2) an analysis of that investigation, 3) an evaluation of the information gathered, and 4) negotiation. Fundamental number 5 is closing the file. This may sound simple, but to close a file before a thorough review of the contents can lead to serious problems.

All potential claims in the file must be investigated to determine if there is exposure. This is especially true since Kentucky's Unfair Claims Settlement Practices Act allows the Insurance Commissioner to impose penalties up to 18% of the value of certain claims when a delay, without reasonable foundation, results in settlement more than 30 days after the claim is reported.

The commissioner is also authorized to add additional penalties, up to and including a suspension of licenses, for violations of the Unfair Claims Settlement Practices Act. Many of the violations we have seen of this act occur in files which were closed prematurely with outstanding claims still pending.

The consumer today demands, and deserves, prompt service, a clear explanation of the process, and guidance with what to do to expedite payment of their loss. By making their needs a first priority, and following the basic fundamentals of claim handling, life will be a lot easier for the claim person.

by Carl Sumner
President
Insurance Institute of Kentucky

A Taste of Democracy in Iraq An Inside Look at the First Free Iraqi Election

On July 7, 2004, I was activated by the United States Marine Corps to serve as a Detachment Commander in 4th Civil Affairs Group (4th CAG), which had received deployment orders for Iraq as part of OPERATION IRAQI FREEDOM II. The missions for 4th CAG included rebuilding the economic, political and social infrastructure, assisting in establishing a legitimate government for the people of Iraq and quelling the insurgency. One significant task involved in these missions was to assist in conducting Iraq's first free democratic elections.

In Ramadi, the capitol of Al Anbar Province, it was apparent that our missions would be extremely difficult. The city was embroiled in insurgent sponsored violence, and the citizens were living in terror. Provincial government officials had been kidnapped and/or killed, and those that remained had abdicated their responsibilities to the insurgents. The recently reconstituted local police was infiltrated by "Muj", the colloquialism created by Coalition Forces for the enemy, such that the police force had to be disbanded. We were the new kid on the block, having just replaced our predecessors, so the insurgents sought to gain the advantage with attacks on convoys and bases using mortar, rocket and small arms fire and the dreaded improvised explosive devices (IED) or roadside bombs. However, we continued to conduct daily missions into the neighborhoods to establish a presence and control. At first, the extent of civil affairs work involved assessment of and compensation for battlefield damages, assessment of infrastructure and pushing information and psychological operations themes while participating in firefights, raids, searches and checkpoints with the battalions we supported. Ground was gained through these efforts, and the populace began to look to the Coalition Forces for protection and support in rebuilding. The insurgents were losing, and we were later able to open schools, hospitals and the Government Center and bring water and electricity to neighborhoods that were in complete disrepair from years of neglect by Saddam Hussein's regime.

After Ramadan, a month long Muslim holiday from mid-October to mid-November during which the insurgent attacks increased, we began to focus on the elections. We were to work with the Independent Electoral Commission of Iraq (IECI), an Iraqi government sponsored group of citizens tasked with conducting the elections, to provide guidance, protection and logistical support. However, the IECI representatives for Ramadi refused to come to the city due to the insurgency. The elections were to have an Iraqi face and limited Coalition Forces presence. However, a week prior to the elections we had no idea as to the identities or numbers of Iraqis who would volunteer to risk their lives to run the polling stations. The IECI had yet to reveal its "plan" on the design of the polling stations and the materials had not arrived to Camp Ramadi. As the elections drew near and we still had no word from the IECI on volunteers, we were ordered to conduct an enlistment campaign to find election workers in the streets. We developed our plans for receiving, training, convoying and securing election workers, if any were found. Election tasks that seem routine in the United States, such as registering voters and preventing fraud, proved challenging to us without guidance from the IECI and limited translator support. We waited desperately for instructions on how to collect, secure and transport ballots and how results were to be obtained and reported.

A few days before the election, the IECI representative for Ramadi surfaced from hiding with a plan. With assistance from the IECI, we quickly made revisions and adjustments to the operational plan we had developed. Election workers from all over the country were to be flown by helicopters to Camp Ramadi, where Marines and Soldiers would greet them and arrange and provide security, transport, training, food and lodging.

On the eve of the elections the helicopter flights continued all night. Over 240 Iraqis came to this little base in Ramadi, not knowing if they would ever return. Workers were hustled off helicopters and into barracks, where Marines organized them into teams and assigned polling stations. Most of the workers had volunteered as their own way of fighting back against the insurgency and for their new country. Many had been imprisoned and tortured during the Hussein regime. One worker explained how all of his teeth had been violently pulled by Saddam's henchmen. Another man had severely disfigured limbs from years of abuse. These were doctors, lawyers and businessmen who had suffered imprisonment, loss of loved ones from gas attacks and complete ruin from an oppressive regime. They were all united in the cause, despite the risks. They assured us that their countrymen were also behind this historical moment. Failure was not an option for us or them.

The workers were placed at the stations in the early morning hours. Sites were selected primarily based on security concerns. Hundreds of concrete barriers, some as high as 8 feet, were moved that same morning to prevent having the enemy plant bombs in them. Polling center materials came in large tubs that are similar to tupperware items purchased at Walmart. The centers were manufactured, the workers quickly trained, the polls were opened and fingers were crossed.

Ramadi is a city of approximately 400,000 people. Unfortunately, only about 2000 of the city's residents voted. This was due to intimidation rather than a Sunni-sponsored boycott. Reports were received of insurgents killing voters and removing ink-stained fingers. Bodies were dumped in neighborhoods as a warning to others. We conducted patrols to gather up voters and protect them as they moved to the polls. We witnessed the first female to vote in the province.

Despite the low turnout, we claimed an ugly victory. The Marines and soldiers returned to the camp, with only one casualty, and millions of voters outside of Anbar Province exercised their rights for the first time. The election took place, which was a significant baby step on the path to freedom. Our election workers, despite having worked two straight days, were elated and danced through the night after the elections. They thanked us repeatedly for helping them.

Despite the human and monetary costs that have been and will continue to be incurred, small victories such as this reap significant benefits for the Iraqi people who want to be free and for the interests of all free nations fighting this war against terrorism.

Dan Murner

EVALUATING PERSONAL INJURY CLAIMS

In evaluating a personal injury case, one of the most important factors is the determination of the amount of damages a plaintiff can collect. Two recent decisions by the Kentucky Supreme Court have a direct bearing on this question.

In Baptist Healthcare Systems, Inc. d/b/a Central Baptist Hospital v. Golda Miller, Kentucky's high court found that a Plaintiff's damages include all medical expenses, even those not paid or payable because of an agreement between a service provider and Medicare. Central Baptist sought to limit Plaintiff's recovery of medical expenses to those that were actually paid or payable. Central Baptist argued that it should not be held liable for medicals that were not paid or payable due to contractual allowances between the healthcare providers and Medicare.

Ms. Miller claimed $40,922.08 in medical expenses at trial. Her treating physician's bill totaled $31,840. Medicare only paid $3,356.38 of the total medical charges. Central Baptist argued that it should pay only $3,356.38, as the remaining $28,483.80 had been written off as a Medicare adjustment and would be a windfall to Plaintiff.

The Court reasoned that the tortfeasor should not receive the benefit of a policy in place to protect the injured party and allowed the Plaintiff to recover the actual amount of the original medical bill even though the Plaintiff had no obligation to pay any balance after the Medicare adjustment. This decision gives plaintiffs an opportunity to recover damages far beyond the actual loss, at least in situations involving paid Medicare or Medicaid benefits.

In Krahwinkel v. Commonwealth Aluminum Corporation, the Court dealt with the interaction of workers' compensation and third-party tortfeasors. Lewis Krahwinkel was employed by Intech Industrial. Through his job with Intech he was working on a project at property owned by Commonwealth Aluminum. While attempting to move a storage tank, he slipped and fell through a hole in the floor injuring his knee and ankle.

Mr. Krahwinkel pursued a workers' compensation claim under the coverage provided to Intech Industrial. He also sued Commonwealth Aluminum, claiming that they were negligent. Intech intervened to collect their workers' compensation subrogation but entered a voluntary dismissal before trial. Mr. Krahwinkel went to trial against Commonwealth Aluminum. The jury awarded $44,971.02 in damages but apportioned fault 75% to Commonwealth Aluminum and 25% to Mr. Krahwinkel.

One issue on appeal was whether the Plaintiff could essentially receive a "double recovery" in the tort action for benefits that he had already received as part of his workers' compensation claim. Pursuant to KRS 342.700, an injured worker can proceed against both his employer for compensation and the other responsible person to recover damages, but he cannot collect from both for the same element of damages. Based on this statute, the Court reasoned that the Plaintiff should not be entitled to a double recovery for benefits previously paid by a workers' compensation carrier. The Court reasoned that the employer's insurer owns a subrogation right to the amount of compensation it paid to the injured employee while the employee has the right to any other damages to which the third-party tortfeasor is legally liable. Thus, the statute allows the employee to assert claims against both the employer and the third-party tortfeasor, but to the extent he collects from one, he may not collect the same damages from the other.

With these cases, our Supreme Court has arguably taken contradictory positions on the issue of whether a plaintiff is entitled to a windfall when a third-party entity is responsible for paying some damages sought at trial. The Krahwinkel case follows the longstanding defense position that the plaintiff's claimed damages should be reduced by certain collateral source payments. However, the Baptist Healthcare decision presents an opportunity for plaintiffs to collect a windfall, at least in cases involving Medicare or Medicaid benefits. As the respective attorneys have asked the Court to reconsider both of these decisions, neither is yet considered binding authority.

by Brad Hooks

APPELLATE REVIEW

In the recent decision of Joyce Snow, Administratrix of the Estate of Jasmine Snow, and Arthur Snow v. West American Insurance Company, Ky.App., 161 S.W.3d 338 (2004), the Kentucky Court of Appeals validated a policy exclusion for liability coverage on an unscheduled auto that was owned, furnished, or available for regular use to a family member of the named insured. Doug Hoots of Landrum & Shouse LLP successfully presented the case to the appellate court. As Kentucky's Supreme Court has denied discretionary review, the decision is now binding authority.

On September 14, 2001, Jasmine Snow was a passenger in a vehicle owned and operated by her father, Arthur. Arthur had recently purchased the vehicle and there was no liability coverage in effect at the time of this accident. Arthur collided with another driver, Glenn Wainscott. Jasmine died as a result of the injuries she sustained in this accident. Jasmine's estate filed suit against both Arthur and Glenn Wainscott. At the time of the accident, Arthur, Joyce and Jasmine lived with Arthur's father, George Snow. George had liability insurance for his two automobiles through West American. Joyce demanded George's $100,000 liability policy limits from West American. West American denied coverage based on a standard liability exclusion arising from the use of an unscheduled vehicle that was owned or available for the regular use of a "family member". West American filed a complaint seeking a declaration of rights to support its denial of liability coverage. Appellants claimed that the exclusion was ambiguous. The estate of Jasmine Snow also argued the exclusion is contrary to the mandatory provisions of the Kentucky Motor Vehicle Reparations Act.

The Court found that, pursuant to the policy terms, liability coverage was provided for all members of George Snow's household, including Arthur, when operating George's two covered vehicles or any other "non-owned" vehicle. However, there was no dispute that the vehicle Arthur was driving at the time of the accident was owned exclusively by him, not George. In upholding the validity of the exclusion, the Court of Appeals determined that the exclusion was not ambiguous and not against public policy even though Arthur