

Finding Bad Faith in Kentucky Requires Evidence of Outrageous Conduct By Insurer

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In its recent decision in *Powell v. Cherokee Insurance Company*, Case No.: 5:09-CV-00205, the U.S. District Court for the Western District of Kentucky reaffirmed that in a third-party bad faith lawsuit alleging failure to timely settle a personal injury claim, the third-party claimant must produce evidence of conduct by the insurer that is outrageous, because of the defendant's evil motive or his reckless indifference to [her] rights in order to establish a bad faith claim under the Kentucky Unfair Claims Settlement Practices Act (UCSPA).

Powell was involved in an automobile accident with a driver, Young, who was insured by Cherokee on November 27, 2004. Cherokee immediately assigned an adjuster to handle Powell's claim and paid Powell's property damage claim within three weeks of the accident. Powell hired an attorney in February 2005, who began communicating with the adjuster. On February 28, 2005 and in response to the adjuster's request for Powell's medical records, Powell's attorney advised he would provide the Powell's medical information and a settlement demand when Powell reached maximum medical improvement. Instead of providing the requested information, however, on November 17, 2006, Powell filed suit against Cherokee's insureds, the driver and owner of the other vehicle. Defense counsel sent Powell interrogatories on December 14, 2006, requesting medical and other information related to Powell's damages. Powell did not answer the interrogatories until May 2008, producing extensive medical records and claiming damages of \$1.2 million. Defense counsel determined he needed to depose Powell and began communicating with Powell's attorney to schedule that deposition. Powell's deposition finally took place on March 11, 2009. On May 19, 2009, Powell's attorney communicated Powell's first settlement

demand in the amount of \$475,000. Counsel for Powell and defense counsel then discussed mediation, which took place on September 16, 2009. The case settled at mediation for \$325,000.

Against this backdrop, Powell filed suit against Cherokee on November 13, 2009, alleging Cherokee had the information necessary to settle her claim in May 2008 when she responded to the interrogatories and that delaying settlement until September 2009 constituted bad faith under the UCSPA.

Under Kentucky law, an insurer's violation of the UCSPA creates a cause of action both for the insured as well as for those who have claims against the insureds, and the same standard applies in both types of cases. Reviewing both Kentucky state court decisions and recent 6th Circuit decisions on bad faith under the UCSPA, the District Court reaffirmed that a plaintiff "must meet a high threshold standard that requires evidence of intentional misconduct or reckless disregard of the rights of the claimant by the insurance company that would support an award of punitive damages" in order to establish bad faith on the part of an insurer. Once a plaintiff has met this initial showing, she must establish three elements to maintain a claim of bad faith:

- (1) the insurer must be obligated to pay the claim under the terms of the policy;
- (2) the insurer must lack a reasonable basis in law or fact for denying the claim; and
- (3) it must be shown that the insurer either knew there was no reasonable basis for denying the claim or acted with reckless disregard for whether such a basis existed.

The court determined that Powell failed to provide evidence of “intentional misconduct or reckless disregard of her rights” so as to warrant submitting a bad faith claim to a jury. Evidence of mere negligence, or the failure to pay Powell’s claim in a timely fashion, is not sufficient, especially given that much of the delay was attributable to Powell, herself. Because Powell did not meet her burden on the threshold issue, the court determined the remaining elements necessary to prove a bad faith cause of action were not relevant.

Although it required two summary judgments, a reconsideration, remand from the 6th Circuit, and re-briefing of the issues, the District Court once again found the insurer

had committed no bad faith as to Powell. The District Court’s opinion provides a helpful summary of Kentucky bad faith case law that will assist claims personnel and counsel in analyzing a bad faith claim under Kentucky law.

To discuss any questions you may have regarding the opinion discussed in this Alert, or how it may apply to your particular circumstances, please contact:

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