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Harville
LAW OFFICES, PLLC

The Louisville Accident Lawyer Journal

APRIL 2021 • VOLUME 4 OVER 35 YEARS EXPERIENCE

We gladly accept and appreciate your referrals

- **We are counselors, not just attorneys**
- **We meet with our clients personally - not caseworkers**
- **We want you to understand how the legal system works as it applies to your case**
- **We will keep you informed and guide you every step of the way**

Why a Newsletter?

You are receiving this newsletter because you are an existing or past client of our firm, or have contacted us about representation. For this reason, this newsletter is not an "advertisement" under Ky. Supreme Court Rule 3.130-7.02(1)(h). It is our way of staying in touch with people who have had a relationship with our firm. We care about the people we have helped and want you to know your relationship is valuable to us, even after your case is over. We hope you find it entertaining and informative, and would love to hear from you if you enjoy it!

Our best,
Brad Harville
Dana Skaggs

What Happens When the No-Fault Runs Out?

Kentucky's No-Fault system, which has been around since 1975, remains a mystery to a lot of people. Often, when I meet with clients for the first time, they think it means there is no such thing as fault for an accident in Kentucky, when that's not what it means at all.

No-Fault means if you are injured in a car accident in Kentucky, your own car insurance must pay for the first $10,000 of your medical bills and lost wages. That's all it means. Some people are even offended at the idea that their own insurance should have to pay anything if an accident is someone else's fault, but that's the law.

And there's a good reason for it. The legislature made that decision in 1975 to make sure that injured persons got their medical bills and lost wages paid without haggling with the other driver's insurance company over who was at fault for the accident. That's why these benefits are referred to as No-Fault.

The problem is, $10,000 was a lot of coverage in 1975 when the law was passed. Nowadays, some 46 years later, that same $10,000 doesn't go half as far, due to the effects of inflation and rising medical costs. But our legislature is never going to do anything about it, because that would spark an increase in the cost of car insurance, which is already high in this state, and get them voted out of office.

Thus, if someone is injured in a car wreck, goes to the emergency room, and requires treatment for more than a few weeks, that $10,000 in no-fault coverage is going to run out pretty quickly. Sure, you can buy more than $10,000 in no-fault coverage, but almost nobody ever does.

So what happens when the no-fault money runs out? Typically the no-fault insurance company sends out an "exhaustion of benefits" letter, letting you know that the coverage has been spent. At that point, any additional treatment will have to be covered by the injured person's health insurance, subject to any co-pays and deductibles.

Once health insurance kicks in, it may very well assert a lien at the end of the case demanding reimbursement. If the injured person is covered by Medicare, then Medicare is required to be notified of any settlement, and will send what is called a "conditional payment letter" asserting its lien. These letters should be scrutinized, as Medicare often overreaches on its liens to include payments that are not accident-related.

What if the injured person has no health insurance to fall back on once the no-fault insurance runs out? That can be more problematic, but is not insurmountable. Many medical providers are happy to continue providing treatment if the patient and his/her lawyer are willing to sign a "letter of protection," or "LOP," basically saying that the patient agrees to pay for the cost of continuing medical care from the proceeds of any settlement recovery.

All of these are reasons why you should hire a lawyer to help you with your serious accident case. You cannot know ahead of time how much of a settlement you may ultimately recover, but I can just about guarantee that you won't recover as much if you discontinue medical treatment, even though additional medical treatment is needed, because the amount and duration of medical treatment is almost always the main driver of settlement value in every injury case. A good lawyer can negotiate down any health insurance lien or outstanding medical expenses in order to maximize the client's settlement recovery in nearly every case.

We do it every day. • BDH

THE DECLINE OF NURSING HOME AND BAD FAITH CASES IN KY. - PART 2

This article is Round 2 of the two types of cases that Kentucky personal injury lawyers are no longer willing to take on as much as they used to be. Last month, I discussed nursing home cases and how Kentucky courts have flipped on enforcement of arbitration agreements, which has removed any level playing field. This month, the topic is bad faith cases against insurance companies, which may be less familiar to most folks than nursing home cases.

So what is a "bad faith" case against an insurance company, anyway? That's a good question, because the answer has been increasingly hard to pin down as far as the Kentucky Supreme Court (KSC) and Court of Appeals (COA) are concerned.

A. The History of Insurance Bad Faith cases in Ky.

Basically, there are two types of insurance "bad faith" cases in Kentucky: "first party" bad faith and "third party" bad faith.

"Third party" bad faith results from an insurance company's conduct toward someone who is not an insured under the insurance company's policy. Traditionally, a claim for third party "bad faith" arises when an insurance company fails to settle a case within its policy limits against its own insured, the case goes to trial, and a judgment results in excess of the policy limits, leaving its insured exposed to an "excess judgment." If a court determines that the insurance company exposed its insured to an "unreasonable risk" of an excess judgment, then that insurance company can be sued for bad faith to pay the whole judgment plus consequential and punitive damages.

In the 1980s, however, a broader version of insurance "bad faith" cases emerged. In 1984, the Kentucky state legislature passed the Unfair Claims Settlement Practices Act ("UCSPA"). Among other things, this statute provided that an insurance company had certain duties not to misrepresent facts or coverages, to respond promptly, to conduct reasonable investigations, and to act in "good faith" to promptly and fairly settle claims in which liability was "reasonably clear." Some of these standards were clearly intended to apply to "first party" claims - claims made by an insured under an insurance policy - but others seemed to extend to "third party" claims as well.

Next, in 1988, the KSC rendered an opinion that said a third-party claimant could sue an insurance company for a violation of the UCSPA for any damages suffered as a result of the violation. The Court also noted there was no such thing as "first party" bad faith in Kentucky. That changed the next year with another opinion establishing the tort of insurance "bad faith" in first party cases, if the facts of the case established that: (1) the insurer was obligated to pay the claim under the terms of the policy; (2) the insurer lacked any reasonable basis in law or fact for denying the claim; and (3) the insurer knew there was no reasonable basis for denying the claim or acted with reckless disregard for whether such a basis existed.

B. The *Wittmer* case.

Four years later, in a case called *Wittmer v. Jones*, the Court held that this same tort also applied to "third party" cases. But the *Wittmer* case didn't stop there. It also said these same standards applied to any claim based upon the UCSPA, even though previous decisions of the KSC said that a UCSPA claim was created by the legislature, and the statute says nothing about creating a claim for bad faith.

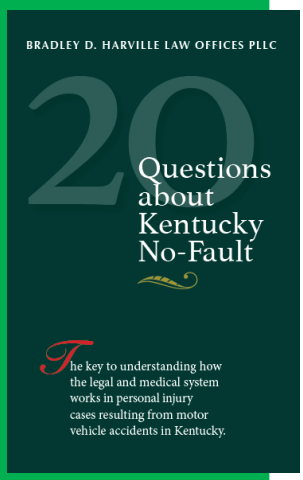
Wittmer, however, was a terrible case to become the yardstick by which all future "bad faith" cases must be measured. The dispute in *Wittmer* was whether property damage to a vehicle should be measured by fair market value or repair costs, which barely scratches the surface of any number of ways in which an insurance company might act in "bad faith," such as in personal injury cases in which an insurance company either lowballs or denies a claim in cases in which liability is "reasonably clear" as prohibited by the UCSPA, which has been neutered by *Wittmer*.

C. The erosion of Bad Faith cases in Ky.

Still, in the wake of this newer version of "bad faith" espoused in *Wittmer*, many plaintiffs' lawyers began adding a bad faith claim against the insurance company in just about every personal injury case that they couldn't settle without filing a lawsuit. At first, the insurance companies were troubled by these claims. Over time, however, judges grew weary of such claims due to overuse, while insurance companies figured out how to successfully defend against them. Subsequent decisions from the KSC and COA reinforced that the tightly-drawn criteria in *Wittmer* weeded out all but the most glaring instances of bad faith, and reaffirmed that any violations of the UCSPA, however clear, lacked any teeth at all. The makeup of the KSC has also grown more conservative and less proactive over the years since *Wittmer*, to the point that they now appear completely disinterested in revisiting the one-size-fits-all framework dictated by *Wittmer*, even though there are any number of situations where it doesn't seem to fit very well at all.

Consequently, "bad faith" claims don't seem to scare insurance company very much anymore. Nowadays, if an attorney files a "bad faith" lawsuit against an insurance company, he or she better be prepared for some intense litigation as insurance companies will defend these cases very aggressively, knowing that the deck is stacked against such cases under the current state of the law, and judges tend to be skeptical of them. And that's a shame, because insurance companies are free to lowball cases as much as they want and force lawyers and their clients to either accept their offers or file a lawsuit, which often isn't worth it in many soft tissue cases. And they know it.

Not all insurance companies engage in these tactics, but many lawyers (including yours truly) can tell you which ones do.



Current Trends in Personal Injury Law

In workers' comp cases, older workers are treated differently than younger workers. That's a fact.

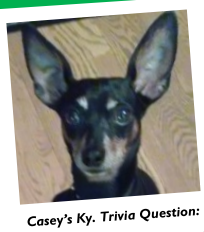
It didn't used to be that way. But in 1996, the legislature changed the statute - KRS 342.730(4) - to terminate disability benefits once the injured worker qualified for Social Security benefits, or after two (2) years, whichever was longer.

The constitutionality of this statute was subsequently challenged, but in 2002, the Kentucky Supreme Court (KSC) determined that the change to the statute was constitutionally valid. And that was the end of it. Or so we thought.

Fifteen years later, in 2017, the KSC did a complete about-face and held that the 1996 change was unconstitutional after all. The Chief Justice even filed a dissent to say that nothing had changed except the personnel on the Court. So now, 15 years after being told the statute was constitutional, the Court changed its mind and decided it wasn't.

Well, the legislature wasn't crazy about this decision, so it got busy and changed KRS 342.730(4) again in 2018. The law now says that disability benefits will terminate once the injured worker turns 70 years old or after four (4) years, whichever is longer. It's better than the 1996 version, but still less than the standard 425 week award (a little over 8 years) for everyone else.

But wait, the story's not over yet. The constitutionality of the 2018 version of KRS 342.730(4) is now being challenged in the courts. The Court of Appeals (COA) rendered an opinion in May 2020 upholding the constitutionality of the latest version, but this case is now pending before the KSC to see what they are going to do this time around. There are 7 justices on the KSC, and there are 3 new ones since the previous version was declared unconstitutional in 2017, so it's anybody's guess what they might do. I expect it will be at least a few more months before we find out.



Casey's Ky. Trivia Question:

The Ky. state record largemouth bass (14 lbs. 9.5 oz.) was taken in 2019 from a lake in what county?

A. Livingston Co.
B. Pulaski Co.
C. Greenup Co.
D. Harlan Co.

Be the first person to answer correctly by sending an e-mail to bdh@harvillelaw.com and we'll mail you a $5 Starbucks gift card!

Stupid-Easy Recipe of the Month

A classic Springtime Easter dish!

Easter Ambrosia Salad

Ingredients:
30 oz. can fruit cocktail (in syrup, drained)
7 ounces flaked coconut
1 cup chopped pecans
10 oz. mini-marshmallows (plain or pastel)
12 oz. Cool Whip whipped topping (thawed)
1 cup Greek vanilla yogurt
small can Mandarin oranges

Instructions:

Drain fruit cocktail. Mix yogurt, fruit and flaked coconut together. Slice mandarin oranges in half, add to fruit combination. Mix in cool whip, mini marshmallows, and pecans (optional).

Cover and refrigerate until serving.

Enjoy!

Favorite Pet of the Month

Jason

Jason is a new addition to Barktown Rescue! This 5 year-old Rottweiler likes activity. He would be great with an active family willing to exercise his body and mind!

Jason would probably do best in a home with another large dog, or as an only-dog. He is not fond of cats. Jason loves to play and run in our play yard, but when he tuckers out, he likes to rest and relax with his people.

Jason would love to be your new BFF!

Dana serves on the Board of Directors at Barktown Rescue. You can visit them at www.barktownrescue.org.

Brad and his family love pets, too!

If you want to tell us about your pet(s), send an e-mail to bdh@harvillelaw.com with a photo and we'll try to put this in a future issue!

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We want to help you secure the best possible outcome out of a difficult situation that you wish had never happened. If you have been injured, our goal is to obtain maximum recovery in the shortest amount of time it takes to get your case resolved.

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