UPDATE ON *COOTS v. ALLSTATE & KRS 411.188(2)*

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Recent decision have had a major impact on the application of *Coots v. Allstate*. Also, notice to subrogation holders is still required per KRS 411.188(2).

Basic Principles of *Coots*

In 1993, Justice Leibson writing for the majority of the Kentucky Supreme Court issued *Coots v. Allstate*, 852 S.W.2d 895 (Ky. 1993). Before this decision, underinsured motorist ("UIM") cases were governed by *Kentucky Cent. Ins. Co. v. Kempf*, 813 S.W.2d 829 (Ky. App. 1991) which stood for the proposition that the plaintiff must obtain a judgment against the tortfeasor before claiming UIM benefits. *Coots*, in overruling *Kempf*, held that the plaintiff no longer had to obtain a "judgment" against the tortfeasor before claiming UIM benefits.

Coots also created a notice requirement to the UIM carrier. When a plaintiff receives a tortfeasor's tender offer of limits, the UIM carrier must first be notified of this offer and be given an opportunity to substitute its own money for that of the tortfeasor. Doing so keeps the tortfeasor in the case and preserves the UIM carrier's subrogation rights. This is commonly referred to as the *Coots* procedure. Alternatively, the UIM carrier may waive its subrogation rights. The plaintiff may then settle with the tortfeasor and proceed on with the UIM claim.

1998 Codification of *Coots* Procedure

In 1998, the Kentucky Legislature codified this procedure in KRS 304.39-320(3)(4) & (5). This statutory amendment created written notice to the UIM carrier by certified or registered mail giving the UIM carrier thirty (30) days to either advance the tortfeasor's limits (keeping the tortfeasor in the case & preserving its subrogation rights) or consent to the settlement (allowing the plaintiff to accept the tortfeasor's limits & releasing the tortfeasor from any further liability or subrogation).

True v. Rains: Implication Of The Tortfeasor's "Tender Offer"

Did you know by sending the *Coots* letter you have probably released the tortfeasor without your client's consent? The moment a tortfeasor's liability limits offer is received there should be a meeting with your client advising them of the implications of accepting the UIM carrier's advancement and, more troubling, the effect of written notification of the tender offer to the UIM carrier. Regardless of whether the UIM carrier advances, the physical act of mailing the written notification to the UIM carrier automatically creates an implied acceptance of the tortfeasor's conditioned settlement. *True v. Raines*, 99 S.W.3d 439 (Ky. 2003).

When a tortfeasor makes a limits offer, it is conditioned upon a release from any further liability to the plaintiff. *True* at 448. In many cases where the tortfeasor offers the liability limits, the UIM carrier consents to the settlement and does not advance the tortfeasor's money. In this situation, the plaintiff's claim proceeds against the UIM carrier only as the tortfeasor is completely out of the case.

True introduces the problems that can occur when the UIM carrier advances. When the plaintiff follows *Coots* and the UIM carrier advances, the plaintiff has impliedly accepted the tortfeasor's conditioned offer. *True* at 448. For cases in which the plaintiff settles with both the tortfeasor and UIM carrier, there is no concern. In cases where the plaintiff is only concerned about collecting the available insurance coverages, there is no concern. However, there is a concern in cases where the jury's verdict exceeds all insurance coverages and the plaintiff wants to collect the excess money from the tortfeasor.

In *True*, the plaintiff went to trial against the tortfeasor and UIM carrier. During trial the tortfeasor tendered limits and the UIM carrier advanced. The jury returned a verdict in excess of the tortfeasor's and UIM carrier's limits. The plaintiff sought recovery of the excess judgment from the tortfeasor; but the Court disallowed it ruling that by reaching a *Coots* settlement the plaintiff waived any additional recovery against the tortfeasor. The Kentucky Supreme Court agreed.

What can you take from *True v. Raines*? Explain the effect of the *Coots* letter to your client. If your client has a case where there is not enough insurance coverage from the tortfeasor and UIM carrier, then make sure your client will not want to pursue any excess judgment against the tortfeasor before mailing this letter to the UIM carrier.

Earle v. Cobb: **UIM Carrier Must Be Identified At Trial If Tortfeasor's Limits Are Advanced Pursuant To *Coots***

Many of us have been faced with the scenario where a case is about to proceed to trial against the tortfeasor and UIM carrier. The UIM carrier wants to be bound by the jury's verdict and not participate or be identified at trial. The jury would then hear the case of Plaintiff v. Tortfeasor, and never be informed of the existence of the UIM carrier. The jury, believing the case is person v. person, returns a conservative verdict not wanting to overburden the tortfeasor. In the meantime, the UIM carrier gets to sit back watching this "legal fiction" and most of the time has no verdict to fulfill.

This "legal fiction" was denounced in *Earle v. Cobb*, 2004 Ky. Lexis 324, 2003-SC-0818 (Final as of 03/17/05). The Supreme Court in *Earle* held that if a UIM carrier advances the tortfeasor's liability limits pursuant to *Coots*, then it must be identified to the jury as a named party and defendant at trial. The *Earle* opinion states, *"In our recent decision in True, we held than when a UIM [carrier] used the Coots procedure, the tortfeasor is released from liability to the plaintiff."* The Court reasoned that when only the tortfeasor is identified, a fictitious presence appears at trial instead of the bona fide party and the jury is left to speculate the exact role of plaintiff's carrier in the lawsuit, perpetuating the "charades" in trials. *Earle* concluded that a UIM carrier should always be identified at trial when it stated, *"Therefore, we hold that the failure to identify to the jury a named party defendant at trial that is also the plaintiff's UIM carrier to be reversible error."*

GEICO v. Winsett: **Don't Forget KRS 411.188(2) Requiring Proper Notice To Other Subrogees**

If you fail failure to notify subrogees you are in violation of KRS 411.188(2). According to the Court in *GEICO v. Winsett*, 153 S.W.3d 862 (Ky. App. 2004), KRS 411.188(2) was not declared unconstitutional and is still applicable. It has been a common misunderstanding that *O'Bryan* held KRS 411.188 unconstitutional in its entirety; but *O'Bryan* only dealt with KRS 411.188(3) which permitted the jury to hear evidence of collateral source payments made to the plaintiff. *Winsett*

KRS 411.188(2) requires a subrogee to assert its rights by intervening in the suit filed by its subrogor (i.e. the plaintiff) once it receives notice. Specifically, this section reads:

> *"(2) At the commencement of an action seeking to recover damages, it shall be the duty of the plaintiff or his attorney to notify, by certified mail, those parties believed by him to hold subrogation rights to any award received by the plaintiff as a result of the action. The notification shall state that a failure to assert subrogation rights by intervention, pursuant to Kentucky Civil Rule 24, will result in a loss of those rights with respect to any final award received by the plaintiff as a result of the action."* (emphasis added)

When you get ready to file suit, or if you have already filed suit and have not already done so, prepare a separate document entitled "Notice to Subrogees Pursuant to KRS 411.188(2)" (or something similar), serve it by certified mail and file it with the Court. This notice should be sent to any UIM carriers, health insurance carriers, Medicare, Medicaid, etc. which might have a subrogation interest in your client's case. However, KRS 411.188(2) does not apply to No Fault/PIP carriers as these are not "collateral source payments." *Ohio Cas. Ins. Co. v. Ruschell*, 834 S.W.2d 166 (Ky. 1992).