

## LouisvilleLaw.Commentary

### Earle v. Cobb and the Real Party in Interest in UIM & Coots Cases

**Opinion, Editorial, and Just Plain Late-Night Ruminations on Probably the Hottest Topic in Insurance Law (this week that is)**

In **Earle v. Cobb**, [2000-SC-000818-DG.pdf](#) Chief Justice Lambert, joined by Justices Wintersheimer, Stumbo, and Graves, held in a 4-3 decision (currently pending petition for reconsideration) that an underinsured motorist carrier (UIM) is a real party in interest and will be identified at trial when it has elected to preserve its subrogation rights and tenders the payment of the liability insurance carrier pursuant to *Coots v. Allstate Insurance Co.*

*Earle v. Cobb*, together with the Supreme Court's earlier decision in *Grange Ins. Co. v. Trude*, probably reflect the most significant decisions in insurance and tort law for the year 2004, and will change the way cases are tried in this Commonwealth.

- In a unanimous decision in *Grange v. Trude*, [2003-SC-000772-MR.pdf](#) the Supreme Court in an opinion authored by Justice Keller, opened the discovery door in bad faith actions to a multitude of documents regarding similar claims, reserves, policy manuals, and procedures, etc. which are considered relevant to bad faith claims. Although Justice Keller did not express a policy or purpose in that decision, the natural and probable effect is that an attempt has been made to put the individual on more parity with the large financial resources of the insurance companies.

Hopefully, the Courts are now recognizing that an individual insured in an individual case has little impact on insurance companies who have vast financial resources available to them to shape their image with the public through advertising and to control litigation on a case by case basis. Insurance companies are fiduciaries and government regulated. The very heart of the antitrust laws was to prevent the large companies from crushing competition unfairly. The very heart of our bad faith laws should also be to prevent the insurance company from crushing their insured's and those who have to face them by their sheer size and financial resources by adding some parity to the process. As most lawyers are painfully aware, the individual costs of litigation (eg., attorneys fees) do not dissuade an insurer often in their case evaluation. With that in mind, I am reminded of Atticus Finch's Closing Argument to the Jury in [To Kill A Mockingbird \(click here for audio\)](#) "Now, gentlemen, in this country our courts are the great levelers. In our courts, all men are created equal. I'm no idealist to believe firmly in the integrity of our courts and of our jury system. That's no ideal to me. That is a living, working reality!"

Now with *Earle v. Cobb*, the insurance lawyers will have to deal with another significant decision which upsets the status quo and is a natural progression and limitation thrust upon our tort system as a result of the *Coots v. Allstate* decision, as legislated in KRS 304.39-320(2). Let us examine *Earle v. Cobb* in more detail.

#### **First and foremost, the holding.**

An underinsured motorist carrier (UIM) is a real party in interest and will be identified at trial when it has preserved its subrogation rights and tenders the payment of the liability insurance carrier pursuant to *Coots v. Allstate Insurance Co.*, 853 S.W.2d 895 (Ky.,1993).

#### **Two, the Coots Procedure explained.**

*Coots* set up the procedure which allows insured to settle with his tort-feasor and its carrier for limits of tortfeasor's

liability coverage and pursue his underinsured motorist (UIM) coverage provided the insured notifies UIM carrier of intent to settle and gives the UIM carrier the opportunity to protect its subrogation rights by paying the amount of contemplated settlement before release. This is what Chief Justice Lambert referred to as the "Coots Procedure." The net effect of the Coots procedure used to be that the UIM carrier would advance the tortfeasor's offer to the injured plaintiff, the defendant would still be in the lawsuit, and the UIM carrier would then "hide" until after the verdict and be bound by the verdict. The old result was the jury never knew the liability limits had been paid, UIM benefits were at stake, and the UIM carrier was hiding in the wings. Basically, everyone lived the "lie" to keep out insurance.

**Three, the Coots "lie" exposed - the real reason is to keep the suit in the tortfeasor's name and not just to protect those putative subrogation rights OR you can't get blood out of a turnip.**

The majority did not specifically address the underpinnings for preserving subrogation rights, to wit: assets or the reasonable likelihood of collecting on that right of subrogation. Of course, the major fallacy in this analysis is the assumption that the UIM carrier advanced the liability limits to protect its right of subrogation against the tortfeasor for any amounts of UIM benefits it ended up paying its own insured. *This was the stated purpose in Coots*, but there is another un-stated purpose which minimizes the UIM carrier's exposure by using the cloak of invisibility. The real advantage of the advancement is to "hide and wait" on the verdict and avoid a direct action against the insurance company which would change all of the trial's dynamics.

As one insurance defense lawyer recently commented - "You advance so that you preserve the right" to go against the tortfeasor, but "[t]he real reason that insurance companies advance . . . is so that you can try the case in the name of the tortfeasor rather than the insurance company's own name." This is so even though it was like getting "blood out of a rock" to recover those subrogated proceeds later. Of course, this stealth party in interest rule only applies when it is economically advantageous to the insurer based upon the relative coverage amounts on the liability and UIM policies. There is no percentage in advancing the limits when there is a large liability policy (e.g., \$200,000) and a small UIM policy (\$25,000) as opposed to when the available coverage limits are reversed.

**Four, the accusatory dissent - The majority is anti-insurance and anti-business.**

Justice Cooper wrote a lengthy and detailed dissent which, to be brutally honest, is consistent with the precedent followed in this Commonwealth for the last century. However, blind adherence to precedent would result in no changes in the law and no need for our appellate courts. Unfortunately for the reader, the Courts, and our judicial system, Justice Cooper went a paragraph too far when he attacked the character of the majority. Specifically - "In holding that a UIM-covered plaintiff is entitled to a prejudiced jury and a poisoned verdict, the majority opinion has seriously misstated and/or misrepresented the holdings of our own precedents and those of other jurisdictions. That, of course, will not surprise anyone familiar with the anti-business, anti-insurance opinions of this Court over the past fifteen years. See, etc .., *Nationwide Mut. Ins. Co. v. Hatfield, Ky.*, 122 S.W.3d 36, 44-61 (2003) (Cooper, J., dissenting)"

In fact, Justice Keller, dissented and "would affirm the Court of Appeals in accordance with the legal analysis contained in Justice Cooper's dissenting opinion, but does not join that opinion because he strongly disagrees with the dicta contained therein that the majority opinion "seriously misstated and/or misrepresented the holdings" of precedents in furtherance of an alleged "anti-business, anti-insurance" agenda of this Court.

I am confident that if Justice Cooper had the opportunity to edit his dissent and remove these comments, I am sure he would. However, the bell has been rung.

**Five, the reasoned concurrence - Justice Graves cut through the chase and got it right in just 300 words, no less!**

"I concur with the majority because I believe it would be a fraud upon the jury not to let them know the entire truth. The direct inquiry by the jury concerning insurance reveals there is a pervasive commonality concerning automobile insurance in Muhlenberg County, Kentucky. We live in a state where liability insurance is compulsory and most jurors

operate motor vehicles.

In paying for insurance, jurors are made aware of the direct correlation between premiums and losses, especially since insurance companies advertise to protest jury awards. Today liability insurance is prevalent, and jurors likely assume insurance is involved in vehicular accidents. Prejudice should no longer be presumed merely because insurance is mentioned. When the rule against mentioning insurance originated, most people neither owned nor operated motor vehicles and insurance was not common.

After all, Louisiana has a direct action statute in which insurance companies may be named as a party along with the defendant and the sky has not fallen yet."

What Justice Graves did not do (and there was really no reason to do it) was recognize that the decisions from over a half century ago prohibiting the mention of insurance are out-dated, out-moded, and can actually harm the plaintiff rather than avoid a harm for the defendant. In the days when "no insurance" was the rule, then a prohibition against allowing the introduction of "deep pockets" was a real problem and the insurance company should have been protected from a runaway jury. However, Kentucky has mandatory insurance laws, and presumably we want jurors who are knowledgeable and law-abiding themselves such that the cars they drive are also insured. The result is that when the question of insurance is asked by a juror or is the lawsuit against the named defendant or his insurance company, then side-stepping answer only begs the question and allows the jury to speculate. When the judge refuses to tell the truth (or mislead the jury, or permit the lie to go unchallenged and unexposed), then the jury is given the mistaken impression that there is no insurance, else they would have been told. Do not forget that each juror has taken an oath to follow the instructions, each witness affirmed to tell the truth, and all the trial players (judge and lawyer) are under ethical rules to be truthful. Why did the rules change when the jurors ask the question? Now, the jury will lean towards a smaller verdict. The presumption has shifted, and the law should shift too. Else, the goal of fairly and reasonably compensating the victim will rest on speculation and filling in the blanks based upon the judge's silence and concerns that the defendant cannot pay the verdict. Almost a silent "golden rule" argument.

**Sixth, the evidentiary prohibition under KRE 411 on insurance goes to liability alone.**

"Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness." KRE 411.

Getting fiction out of the law sometimes causes friction among the lawyers. The "loan receipt" is all but gone, and PIP intervention in lawsuits has been sanctioned by statute for over 25 years. If an adjuster testifies about a car's value, then he can be impeached by his occupation and by whom he is employed. Insurance is not the boogie man, but the way it is presented to the jury is the evil to be avoided. Again, you pay, you play, and no free rides at the expense of the tortfeasor. By advancing the settlement, the UIM carrier gets to dangle the tortfeasor in front of the plaintiff with the risk of further personal exposure. If the settlement is not advanced, then the tortfeasor is out and the UIM carrier is in.

**Seven, the legislature has already spoken on insurance and PIP intervention; and still the sky has not fallen yet.**

For over a quarter of a century, the Kentucky courts have operated within the bounds of the No Fault Act in which the insurance company which has paid the plaintiff's medical expenses (PIP) is permitted to intervene in a direct action against the defendant's liability insurer and both parties are identified to the jury upon participation at trial. The permission to intervene created by statute did not establish a rule of hiding by agreement, and obviously contemplated rules of engagement where the players are seen and heard on their claim. And again, the sky has NOT fallen. Justice

Cooper obviously should be aware of this since the practice occurred in his own trial court when he was the presiding judge.

**Eight, the false premise -Katie bar the door on the mention of insurance.**

Justice Cooper, in the substantive portion of his dissent, raised the false premise that allowing the mention of insurance in a UIM case where the limits were advanced would allow the mention of insurance and UIM in all UIM cases - even those in which there was no advancement of limits.

I am not convinced this conclusion is warranted based upon the majority decision and facts of the particular situation. Please note the actual holding is limited to Coots advancements only.

Now, let us look at the four possible scenarios:

(1) Plaintiff sues defendant and no UIM coverage. Liability insurance will still not be mentioned, and the landscape remains unchanged.

(2) Plaintiff sues defendant and UIM carrier and UIM advances the liability limits. This is the Earle v. Cobb situation. UIM carrier is identified since they are the real party in interest and the party directly exposed. Under True v. Raines, the tortfeasor is only secondarily exposed should the UIM have to pay anything under its policy as it will be indemnified by the liability carrier for the amounts it advanced not to exceed the jury verdict. If the jury verdict is less than the liability limits, then that ends it. The UIM carrier is the primary target.

(3) Plaintiff sues defendant and UIM carrier, and there is no proposed settlement. Consequently, there are no moneys to be advanced by the UIM carrier. Here, the tortfeasor and his liability limits are the primary targets, and the primary real party in interest. The UIM carrier is only secondarily liable. If the UIM carrier elects not to participate in trial, then the UIM carrier should not be identified so long as it agrees to be bound by the verdict. This is consistent with the typical policy language, and the issue will be whether or not there was an "participation" by the UIM carrier.

(4) UIM carrier does not tender the liability limits when offered to the plaintiff. Plaintiff then settles with the defendant, defendant is dismissed, and the case proceeds directly against the UIM carrier. Needless to say, insurance is identified.

In the first and second scenarios, the UIM claim is clearly secondary and contingent, and if the UIM carrier had not been included would have been bound by the verdict upon notice and lack of intervening. But, in the Coots advancement scenario, the UIM carrier has a claim and that claim is to recover the moneys advanced against the liability insurer (eg., the \$25,000 liability limits in Earle v. Cobb) and to recovery any moneys it should pay under its UIM policy. The moneys advanced is direct and real while the UIM exposure is contingent. This is the "if you pay, you play" rule.

In the first scenario, there is no UIM and no change in the law. In the fourth scenario, the claim is against the UIM carrier directly and insurance would be identified.

**Nine, the forgotten evaluation and settlement - somebody (eg., the liability carrier) already placed a \$25K value on this case, not counting the \$10K in PIP! So it had to have been worth something.**

Oddly enough, the underlying basis for this trial and the advancement of the \$25,000 in the first place has apparently gotten lost in the rhetoric and posturing by a divided court. Specifically, an experienced adjuster and their defense counsel evaluated the case and determined that the value of the case warranted an offer to settle for its \$25,000 policy limits. Now, the jury comes back with a "zero" for pain and suffering? Some may say the plaintiff was compensated; others may say something happened at trial which upset this earlier evaluation, but something did happen between the sip

and the lip to change the dynamics of this trial in light of the evaluation, offer, advancement and the verdict.

**Ten, out of the waiting room into the courtroom: FACT - UM is not UIM when you hit the courtroom as the dynamics and trial tactics are completely different.**

Coots v. Allstate brought the UIM carrier into the courtroom. Prior to that decision, the UIM carrier could wait until the underlying litigation and verdict had been completed. But, if you wish to protect your rights under your policy, then you must *pay to play*. The precedent relied upon by Justice Cooper applicable to the uninsured motorist (UM) cases is not directly on point for the underinsured motorist cases.

- In the UM case, the UM carrier takes a major risk in placing their fate in the hands of the unrepresented and potentially defaulting or even absent uninsured defendant.
- In the UIM case, the duty to defend permits the UIM carrier to advance in reliance upon the liability carrier continuing its defense under the policy since the two duties are distinct and separate (duty to defend and duty to indemnify).

If I had my preferences, I would have rather seen the Graves' concurrence serve as the bulk of the majority opinion with a recognition that advancing the liability limits constitutes participation in the trial. This would, of course, constitute a recognition that trial participation is not limited to the courtroom setting alone. Legal fictions regarding the real party in interest were denounced in Coots, and Wheeler v. Creekmore required identification of the UM carrier and its attorney if they participated in trial (rather than misleading the jury as to the attorney's presence).

Once upon a time, the UIM carrier's attorney would operate as shadow counsel and tag team the plaintiff in motions, discovery, and depositions. In a case reported in Kentucky TRIAL COURT REVIEW - 6 KTCR 11, Nov 2002, the trial court determined that cross-examining the plaintiff's expert at a deposition constituted participation at trial. Concluding that if the UIM carrier advances the settlement to the plaintiff, then such an act constitutes participation in the trial (or at least the trial process) since it clearly affects the parties presence and procedures.

**Eleven, words of wisdom from an earlier day: Liebson, Brandeis, Holmes and Sutherland - Shoulders worth standing on.**

When I read Justice Grave's wise counsel and recognition of the obvious, I am reminded of Justice Liebson when he led our Supreme Court to a more modern legal landscape in adopting the law of comparative negligence in Hilen v. Hayes, 673 S.W.2d 713 (Ky.,1984). Maybe, just maybe, we can hope that our current set of Supremes can stand on the shoulders from the past and get a clearer and better view of this Court's direction in this ever-changing world. Justice Liebson had the wisdom to stand up on the shoulders of Justice Brandeis (a Louisville native and the namesake of our local law school) and Justice Sutherland in opinions from the United States Supreme Court.

**The common law is not a stagnant pool, but a moving stream.** City of Louisville v. Chapman, Ky., 413 S.W.2d 74, 77 (1967). **It seeks to purify itself as it flows through time. The common law is our responsibility; the child of the courts. We are responsible for its direction.** In International News Services v. Associated Press, 248 U.S. 215, 39 S.Ct. 68, 63 L.Ed. 211 (1918), Mr. Justice Brandeis wrote:

**"The unwritten law possesses capacity for growth; and has often satisfied new demands for justice by invoking analogies or by expanding a rule or principle."** 248 U.S. at 262, 39 S.Ct. at 81.

Mr. Justice Sutherland wrote in Funk v. United States, 290 U.S. 371, 54 S.Ct. 212, 78 L.Ed. 369 (1933):

**"(T)o say that the courts of this country are forever bound to perpetuate such of its rules as, by every reasonable test, are found to be neither wise nor just, because we have once adopted them as suited to our situation and institutions at a particular time, is to deny to the common law in the place of its adoption a 'flexibility and capacity for growth and adaptation' which was 'the peculiar boast and excellence' of the system in the place of its origin."** 290 U.S. at 383, 54 S.Ct. at 216.

Hilen v. Hayes, 673 S.W.2d 713 (Ky., 1984)(Emphasis added).

Our law is not married to the past nor should it be the misbegotten step-child of our founding fathers who shaped our laws and Constitution centuries ago. Else, our judges would still be wearing powdered wigs and riding to the court rooms in horse and buggy. Concepts that are both outmoded and out of place in a just and modern world.

Whether the majority's analysis is reasoned or tortuous is immaterial. The mention of liability insurance is no longer the sweet perfume for large verdicts it once was at the turn of the century, and even if it is, then which side should the pendulum fall? Protecting the plaintiff from the prejudice of believing there is no insurance and the personal liability of the defendant vs. favoring the defendant by allowing a misleading and erroneous assumption to exist in the jury's mind to the detriment of the plaintiff. Running from the mere question of the juror about the availability of insurance compounds the problem by excluding the jury from a dirty little secret that is not a secret. That is the smell that needs to be removed from our courtroom.

Over a century ago, Justice Holmes coined the aphorism in his treatise on the common law - **'[t]he life of the law has not been logic: it has been experience'**. O. Holmes, *The Common Law* (1881), Dover Publications edition, 1991, 1.

The object of this book is to present a general view of the Common Law. To accomplish the task, other tools are needed besides logic. It is something to show that the consistency of a system requires a particular result, but it is not all. *The life of the law has not been logic: it has been experience.* The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage. The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past.

Id.

Rules of law, like speed limits, developed at a time when horse and buggies were giving way to the internal combustion engine must now give way to interstate highways and compulsory insurance laws. Justice Cooper (minus the gratuitous remarks on attitude) writes incisive and logical opinions. Mathematical rules are for the trial judge, but when divining the law of this Commonwealth, then logic in all its dryness and sterility strips our society and our rules to its barest essence. Justice Cooper's invigorating dissent possesses ample spirit and syllogism but not an ounce of soulful reflection on the prevalent moral and political theories of the present; the intuitions of public policy in light of compulsory insurance, PIP intervention, relaxed evidentiary rules on the admissibility of evidence; and the desire of the insurer to continue placing the tortfeasor in harm's way for no other purpose than to avoid identification at trial.

However, this story is not over. *Earle v. Cobb* is pending a petition for reconsideration. Probably because Justice Stumbo who voted with the majority was replaced by Justice Scott. One insurance defense lecturer commented that the decision is really 3-3. Obviously, the defendant is advocating his client's interest and seeking another bite at the apple with another biter on the court. Will the new justice take the bait, much less the bite? It is one thing for precedent to change and grow due to the times, it is an entirely different matter when one attempts to change precedent (no matter how new) simply because of a change in the court's composition. Although reconsideration is a proper avenue for the advocate, it is not necessarily the right road for this Court to take. A change of heart following a change of composition in the court creates fickle precedent and breeds "scary indecisis".

*"Half a truth is often a great lie." Ben Franklin.*

*"Sunshine is the best disinfectant." Justice Lewis Brandeis*

Mike Stevens, Editor

These are just opinions, analysis, and commentary and are not to be considered legal advice. More importantly, they are just food for thought and a starting point for some to simply say 'hmmmmmm.'