

SUPREME COURT OF KENTUCKY
2015-SC-000366-D
(NO. 2013-CA-002152-MR)

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY

APPELLANT

v.

RONIESHA ADAMS, F/K/A RONIESHA SANDERS; and
RONIESHA ADAMS, as Mother and Guardian of B.A., a Minor Child

APPELLEE

**AMICUS CURIAE BRIEF OF COALITION AGAINST INSURANCE
FRAUD AND NATIONAL INSURANCE CRIME BUREAU
ON APPEAL FROM THE KENTUCKY COURT OF APPEALS
CASE NO. 2013-CA-002152-MR**

Respectfully submitted,

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NATIONAL INSURANCE CRIME BUREAU

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Amicus Curiae Brief was served via U.S. Mail, First Class, postage paid, this ___ day of June, 2016, upon Aaron Michael Murphy, Esq., Murphy & Powell, PLC, 445 S. 4th St., Ste. 1250, Louisville, KY 40202, Counsel for Respondents; and Richard W. Edwards, Esq., Raymond G. Smith, Esq., Jared L. Downs, Esq., John L. Hardesty, Esq., Boehl Stopher & Graves, LLP, 400 W. Market St., Ste. 2300, Louisville, KY 40202; Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; and Hon. Mitch Perry, Jefferson Circuit Court, Div. 3, 700 W. Jefferson St., Louisville, KY 40202.

I.

STATEMENT OF THE CASE

The Coalition Against Insurance Fraud and the National Insurance Crime Bureau (“NICB”) respectfully submit this Amicus Curiae Brief in support of the Appellant, State Farm Mutual Insurance Company (“State Farm”). The Coalition is a national anti-fraud alliance uniting and advancing the interests of consumers, insurers, and government agencies in combating fraud. Since 1993, the Coalition has been uniting, defending and empowering the interests of these diverse groups. The Coalition’s outreach is wide-ranging, consisting of information, research, data and service. This ongoing mission includes identifying court cases such as the instant case which present opportunities to strike back against fraud.

The NICB is a not-for-profit organization that partners with insurers and law enforcement agencies to facilitate the identification, detection and prosecution of insurance criminals. The NICB receives support from over 1,100 property and casualty insurance companies and self-insured organizations.

This case presents the Kentucky Supreme Court with a compelling opportunity to correct the holding of the Court of Appeals that “a policy clause which required an EUO [Examination Under Oath] prior to payment of the claim and as a bar to the claim should one not be done, would be in direct opposition to the purpose of the MVRA.¹” *Adams v. State Farm Mut. Ins. Co.*, 2015 Ky. App. Unpub. LEXIS 875 at *4. This holding misunderstands and misinterprets the purpose of the Kentucky Motor Vehicle Reparations Act (“KMVRA”) and the role that EUOs play in that statutory framework. It jeopardizes the ongoing efforts of insurance companies to

¹ State Farm refers to these examinations in its policies as Questioning Under Oath, or “QUOs.” Insurance policies issued by other insurers frequently refer to this as an Examination Under Oath (“EUO”). This Brief will adopt the term EUO to remain consistent with the decisions of the lower courts.

identify potentially fraudulent claims for benefits, investigate them, and make informed coverage decisions without unnecessary and protracted litigation.

The effects of a ruling upholding the Court of Appeals' decision will both in the long run and short run negatively impact insurers, policyholders and claimants in the Commonwealth of Kentucky. First, rather than achieving the purpose of the KMVRA and ensuring prompt payment of claims, an adverse ruling will cause the claims process to become more protracted. Second, a ruling upholding the Court of Appeals in this case encourages litigation by forcing insurers to obtain a discovery order from a court every time it is necessary to investigate a claim. The alternative would be to encourage perpetrators of fraud by removing any ability of insurers to investigate.

Next, upholding the Court of Appeals decision would create inconsistencies in Kentucky law. EUOs are a time-tested, valuable tool. They are utilized in every form of insurance coverage and recognized by these Courts. Kentucky already recognizes an insurer's right to invoke their policy's EUO provision for uninsured and underinsured motorists claims. In this case, there is also an uninsured motorist claim pending. State Farm's right to seek an EUO is not being questioned relating to that claim. A ruling in favor of Appellee Adams would create a very confusing set of circumstances for both insurers and policyholders if an insurer may seek an EUO for a UM claim from one accident, but not from a Basic Reparations Benefit claim stemming from the same accident.

Finally, the long-term effect of a ruling in favor of Adams in this case would be to contravene the stated purpose of the KMVRA to provide prompt payment of claims, ensure that Kentuckians are encouraged to remain insured by keeping rates as reasonable as possible, and

making insurance affordable for all. Increased litigation imposes increased costs as insurers are forced to fight claims suspected of fraud in the Courts. The result is higher premiums, potential higher coverage deductibles, and the threat that insurers will cease doing business in Kentucky if they cannot efficiently combat suspected fraudulent claims and financial loss becomes guaranteed. This burden falls the heaviest on policyholders who are required to maintain insurance policies. It is especially burdensome on policyholders for a mutual insurance company like State Farm, where the policyholders are the shareholders of the insurer.

For these reasons, it is imperative that the Kentucky Supreme Court overturn the decisions by the Court of Appeals and uphold the right of insurers to conduct EUOs and utilize the information gained in those examinations to make informed coverage decisions.

II. ARGUMENT

A. EUOs Fulfill the Purpose of the KMVRA Rather Than Contravene It.

A major reason why the decision of the Court of Appeals should be reversed is its reliance upon a misunderstanding of the purposes of both the KMVRA and EUOs promulgated by Appellee Adams. The arguments by Appellee characterize EUOs as “obstacles.” *Adams* at *2. Appellee argued at the Court of Appeals that the KMVRA had its purpose “circumvented by requiring an EUO and that a deposition must be taken under the oversight of the Circuit court.” *Id.* at *3. The Appellees argued that “EUOs are often used as a tool to harass, annoy, embarrass or oppress claimants in opposition to the purpose of the MVRA.” *Id.* Appellees also contended that State Farm was “attempting to supersede the MVRA with its policy provisions.” *Id.*

The Court of Appeals agreed with these characterizations. The Court of Appeals characterized EUOs as being in direct opposition to the no-fault system in Kentucky, and stated

that State Farm’s only remedy would be “to seek a court order requiring Adams to submit to discovery.” *Id.* at *4. This analysis does not hold up upon an examination of the stated purpose of the KMVRA and EUOs.

The Court of Appeals cited *Crenshaw v. Weinberg*, 805 S.W.2d 129, 132 (Ky. 1991) for the proposition that the General Assembly in passing the KMVRA “was seeking to promote ‘a system’ where motor vehicle accident victims will seek payment for their losses before and, where possible, instead of filing tort actions.” The KMVRA was meant “to provide speedy settlement of claims and to do away with litigation in cases where damages do not exceed the threshold limits by making the basic reparations obligor solely responsible for payment of loss.” *Fireman’s Fund Ins. Co. v. Bennett*, 635 S.W.2d 482 (Ky. Ct. App. 1981). Courts have long recognized that the practical purpose of the KMVRA is to prevent costly and unnecessary litigation in motor vehicle accident cases and to ensure that these claims are handled in an efficient, speedy manner.

However, the KMVRA was designed to carry out additional goals beyond judicial economy and efficiency. This is supported by the text of the KMVRA itself. KRS § 304.39-101 contains a definite statement of its policy and purposes. In that section, the Legislature stated that the “improvements” the KMVRA represents encompass “the interests of victims, the public, policyholders and others.” This means that one must look beyond a claimant’s desire to be paid in a speedy manner. We must look towards creating a no-fault system that benefits the citizens of the Commonwealth of Kentucky as a whole. The KMVRA thus encompasses policy goals that include, but extend beyond, speedy payment of claims.

First among these goals is to require owners and operators of motor vehicles to purchase insurance and maintain coverage for their own injuries stemming from motor-vehicle accidents. KRS § 304.39-010(1). The next stated purpose is to “provide prompt payment to victims of motor vehicle accidents.” KRS § 304.39-010(2). The necessity of this provision is to “eliminate the inadequacies which fault-determination has created,” not speedy payment merely for speedy payment’s sake. *Id.* The delays in payment sought to be avoided were prompted by determinations of fault, which the KMVRA eliminated. In Subsection 3, the necessity of “prompt payment” is qualified and limited to “*needed* medical care and rehabilitation.” KRS § 304.39-101(3) (emphasis added). Under the KMVRA, prompt payment is indeed a goal, though it is not a goal in and of itself. It is a goal needed to eliminate time-consuming liability determinations and encourage “prompt medical treatment and rehabilitation” of motor vehicle accident victims. *Id.* It does not waive the requirement that the treatment be necessary and related to the accident. *Id.*

Also among its goals and policies, the KMVRA emphasizes avoiding “the delay, expense, aggravation, inconvenience, inequities and uncertainties of the liability system.” KRS § 304.39-010(5). This provision is not limited to avoiding litigation by claimants for payment of their insurance benefits. It is meant to create a system within a framework that allows all parties involved to a motor vehicle accident personal injury claim to resolve these claims without court intervention.

Another major stated goal of the KMVRA is to “guarantee the continued availability of motor vehicle insurance at reasonable prices by a more efficient, economical and equitable system of motor vehicle accident reparations.” KRS § 304.39-010(6). Thus, the system of no-

fault insurance created by the KMVRA has purposes that go beyond simply paying every claimant's claim as quickly as possible without them needing to file a lawsuit. It is a comprehensive system of automobile insurance designed to encourage residents of Kentucky to maintain automobile insurance; allow them to seek reimbursement of injuries regardless of fault; allow determinations on the necessity of treatment to be made without seeking recourse in the courts; and ensure the cost of automobile insurance remains reasonable for the citizens of Kentucky who are required to carry it.

To carry out these goals, the system requires more than just prompt payment of claims by insurers. It requires means by which insurers can evaluate the necessity of the treatment submitted for payment. It also requires means for insurers to control their costs to ensure insurance coverage remains affordable so Kentuckians can maintain this coverage for themselves. This system does not merely encourage; it demands insurers providing basic reparations benefits to investigate the necessity of a claimant's treatment, and identify potential fraud cases to prevent payment of fraudulent claims without the necessity of seeking a court order at every step of the process.

In this light, it is clear that EUOs are not an obstacle to carrying out the purposes of the KMVRA; they are an important tool in carrying them out. An EUO does nothing more than allow an insurer "to determine if a claim can be paid as a covered loss."²

The EUO aids insurers in "combating suspected fraud and material misrepresentations."³ It allows insurers "to obtain additional claim information so [an insurer] can formulate a

² National Insurance Crime Bureau ("NICB"), *Examination Under Oath (EUO) and Statement Guide* 11 (2013).

³ *Id.*

knowledgeable decision regarding whether coverage should be afforded.”⁴ The EUO is not a tool to harass or annoy claimants, nor is it an obstacle to the payment of their claims. The EUO allows insurers to make a coverage determination knowledgeably and intelligently.

The KMVRA tasks insurers with prompt payment but it also limits that payment to necessary charges. To carry out this purpose without seeking recourse in the courts, the EUO becomes an effective tool. It is only sought where “there are objective reasons to justify the request.”⁵ It allows insurers to resolve a number of issues that may arise in determining whether a claim is suitable for payment. Among these are to determine whether “coverage exists, establish proof and/or dollar amount of a claim, [and] identify fraud and legal violations.”⁶ An EUO is usually sought only after “a large part of the investigation is already complete” and a need is identified “to gather additional information or documentation and memorialize statements in order to determine whether coverage exists for a given claim.”⁷

It is worth noting at this point that much of the fraud insurers combat originates with medical providers, rather than the injured parties. To view EUOs in a strictly adversarial light with claimants is to misunderstand and underestimate their investigative function. EUOs allow the insurer to investigate the veracity of medical reports generated by providers that Appellee would have insurers take at face value. It allows the insurer to verify that treatment actually took place, that the stated treatment was of the nature the provider claims, and that the value of the services actually provided comports with the bills the provider submits. EUOs are not anti-

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

claimant; they are in support of determining the necessity of treatment billed, in compliance with the law, and rooting out any fraudulent claims.

For this reason, EUO provisions exist “in nearly every type of insurance policy, including but not limited to, motor vehicle policies and homeowner/renter policies.”⁸ It is one of the “strongest methods to ascertain a reported loss’ circumstances.”⁹ Applying this analysis to the instant case, one sees that Appellee has mischaracterized the purposes of the KMVRA and the purposes of EUOs. To carry out the broad range of purposes named by the Legislature in establishing the KMVRA, the insurer must be able to make a claim determination quickly and efficiently, root out fraudulent and unnecessary claims, avoid the time and expense of litigation, and control costs to maintain affordable insurance coverage. This tool benefits insurers and honest claimants by providing a means for determining the circumstances of accidents and the nature of injuries, and an intelligent well-formed decision as to the applicability of coverage to be made without additional time and expense used in procuring a court order for discovery or deposition.

The ability of insurers to use this tool in making their claims determinations should be encouraged and protected. The Court of Appeals erred in accepting as fact the self-serving mischaracterization of the EUO process by Appellee. An EUO will not be an obstacle to prompt payment of claims in cases where the claim is for necessary treatment. An EUO is not usually ordered unless questionable facts regarding the claim are identified. It allows the parties to sit down and get a definite statement of what occurred in order to make a proper determination. The information gathered from an EUO in a legitimate claim will, in fact, help the claimant receive

⁸ *Id.*

⁹ *Id.*

payment. For this reason, the ability of an insurer to order an EUO should be upheld by this Court and established under the laws of Kentucky.

B. Denying Insurers the Right to EUOs Will Create an Illogical and Damaging Inconsistency in Kentucky Law.

The EUO is an established part of the claims investigation process. As stated above, it plays a crucial role in fulfilling the purposes of the KMVRA. Preventing insurers from ordering EUOs would also create a legal split in Kentucky law between other types of insurance claims where EUOs are explicitly permitted and claims for basic reparations benefits under the KMVRA where they would no longer be permitted.

For instance, in the context of uninsured and underinsured motorist (“UM”/”UIM”) claims, this Court has specifically recognized an insurer’s right to require their insured to provide information pursuant to a policy of insurance. In *Temple v. State Farm Mut. Ins. Co.*, 548 S.W.2d 838 (Ky. 1977), this Court explained how these contractual provisions requiring sworn testimony enable the insurer to make appropriate and well-informed coverage decisions. In *Temple*, Appellant’s attorney advised them not to give sworn testimony to their insurer, in violation of their policy. This Court found that State Farm was correct in not paying UM benefits to the Appellant because such failure violated their policy.

The Court reasoned, “Although the Temples notified State Farm of the accident and provided an accident report to State Farm’s agent, such information was insufficient for State Farm to evaluate the claim for settlement purposes.” *Id.* at 840. Similar to the lower courts in this case, the Court in *Temple* was presented with a situation where the claimants had provided some information, but not all. The Court elaborated:

State Farm was entitled not only to an explanation of the circumstances of the accident contained in a police report, but was entitled also to the sworn statements of its insured as to the details of its occurrence, and, further, the ‘nature and extent of injuries, treatment, and other details entering the determination of the amounts payable.’ *Id.*

The Court concluded, “such information, exclusively within the control of the Temples, was essential for State Farm to fulfill its responsibilities under the terms of the policy; and, provisions of the policy reasonably designed to secure a truthful disclosure of such information are valid and reasonable conditions precedent to an insurer’s liability.” *Id.* In *Temple*, the insureds’ refusal to provide sworn testimony “imposed upon State Farm considerable expense and expenditure of time to obtain the information which it had the right to receive without any expense.” *Id.* Thus, in the context of UM claims, this Court gave a thorough and detailed explanation of exactly why EUOs are necessary in motor vehicle accident injury claims, even when items such as accident and police reports are available. The information the insurer needs to make the correct claim determination is in exclusive control of the claimant; in order for the insurer to carry out its duties under the policy in good faith, it needs a way to gain the information possessed by the claimant.

It makes little sense then to espouse the arguments of the Appellee and deny insurers so useful and necessary a tool in the PIP context when it can avail itself of EUOs in claims under different coverages. The relationship between insurer and claimant is the same in the UM context as in the PIP context. The only difference is the presence of the KMVRA which neither explicitly prohibits nor limits EUOs. Thus, this is not a situation where a policy provision is inconsistent with the KMVRA and therefore unenforceable. This is a situation consistent with the purposes of the KMVRA as outlined in the previous argument. It also is consistent with

Kentucky case law regarding the investigation of claims and the enforcement provisions of the insurance policy.

Further, consistency among how claims are handled under different coverages resulting from the same accident has been a priority of this Court. In *State Farm Mut. Auto Ins. Co. v. Riggs*, 484 S.W.3rd 724 (Ky. 2016), this Court found that the name given to a particular kind of coverage in the same accident should not be dispositive of the way the claims are treated as a matter of law. The Court stated that they were “not so much concerned whether an UIM claim should be labeled a tort claim or a contract claim as whether State Farm and Riggs have contracted for a . . . claim limitation that accomplishes the policy and purpose of UIM coverage in a reasonable way.” *Id.* at *17. In that case, the Court found that it was “difficult to condemn State Farm’s provision as unreasonable because, at its simplest, it encourages the prompt presentation of all the potential insurance claims relating to a single accident and forces them to progress . . . in a more cohesive way – a way that insurance claims have proceeded through our court system for decades.” *Id.* The Court concluded, “This is not contrary to public policy – in fact, a strong argument could be made that it benefits the public.” *Id.*

Applying that logic here, the Court makes it clear that a valid contractual provision is not invalid simply because it describes one type of coverage versus another. A contract provision requiring an EUO in a PIP case is as valid as one requiring it in an UM case. The court found a stronger interest of the courts and the public in having all claims adjudicated consistently. Absent a provision in the KMVRA to the contrary, there is no justification for having an entirely different set of rules for PIP claims than for UIM claims. The rationale for allowing EUOs in

UM claims espoused by this Court in *Temple* are no less true simply because they take place in the context of PIP under the KMVRA.

C. Denying Insurers the Use of EUOs Encourages Fraud and Increases the Burden on Policyholders

Fundamentally, this case is about the tools that insurers are allowed to use to investigate claims, identify potential fraud, and prevent paying fraudulent claims. The KMVRA was designed to effectuate a number of policy goals all of which sought to improve the way claims are handled in the Commonwealth of Kentucky. Insurers have a role to play in this framework. The role is not only to pay out claims as quickly as possible, but also to protect their policyholders from the increased costs associated with combating fraudulent claims.

A ruling in favor of the Appellee would weaken the fraud fighting abilities of insurers in Kentucky thereby opening the door to increased fraudulent claims, unless insurers petition the court to take the sworn testimony of claimants. This result would undermine the stated purposes of the KMVRA. It would defeat notions of judicial economy, prevent legitimate claims from being paid in a timely manner, and make insurance more expensive and potentially out of the financial reach of some Kentucky residents. A ruling in favor of the Appellee would create a set of circumstances which would have far reaching negative impacts in the Commonwealth of Kentucky.

When insurers are forced to invest increased time and financial resources into the investigation of fraud, the burden ultimately shifts to policyholders. This is especially true for a mutual insurance company like State Farm which is owned entirely by its policyholders. The ability of an insurer to control costs and not suffer financial loss allows policyholders to maintain insurance with lower premiums. Controlling the cost of insurance premiums makes insurance

affordable and encourages citizens to maintain their insurance policies in compliance with the law. Insurance coverage is state mandated and policyholders cannot avoid paying for coverage. Some Kentucky citizens will eventually be forced to choose between paying higher premiums or allowing their insurance to lapse in violation of the law.

Further depriving insurance companies of the ability to mandate EUOs damages the ability of insurance companies to combat fraud and will increase the burden on circuit courts in Kentucky. Combating fraud requires a partnership between insurers and policyholders which is governed by the terms of the insurance contract. Claimants under a policy of insurance are not entitled to receive payment for claims for unnecessary or fraudulent treatment. An insurance company needs to know all the factual circumstances related to how an accident occurred and what injuries resulted in order to make an educated and correct claim determination. If this ability to investigate claims is taken away, the only recourse insurers will have to petition the court for discovery orders.

These petitions will be a substantial burden on the courts. Now, more than ever, it is in the public's interest to seek to slow the growth in fraud. Kentucky has been deemed a hot sport for PIP fraud in recent years. As a result, the state has gone on record in supporting aggressive anti-fraud activities and enacted anti-fraud legislation. Kentucky also has a fraud investigation unit in its Department of Insurance and mandates anti-fraud measures to be undertaken by insurers. If insurers lose the ability to investigate and make determinations on their own, the burden on state agencies, law enforcement, and courts will increase.

The necessary consequence will be a drastic increase in the number of petitions filed in civil courts and a shift away from the no-fault scheme enacted by Legislature and a shift into

expensive and time-consuming litigation. Increased litigation brings with it increased delays in the resolution of claims and increased costs on the part of insurers seeking these orders. Thus, an adverse decision in this case will create the very situation the KMVRA was implemented to avoid. Claims determinations will be made in the courtroom instead of between insurers and claimants directly. The increase caseload will further burden Kentucky courts and make the claims process slower and more expensive for everyone involved. Policyholders will be forced to endure increases in the cost of their premiums and potentially high deductibles and stricter requirements on the payment of benefits found in other states where the cost of insurance is artificially inflated by the necessity of combating fraudulent claims in court.

In the long term, if doing business in Kentucky becomes too expensive for insurers without guaranteed financial loss, they may follow the lead of insurers in other states and eventually attempt a cessation of business in the State. The net result will be fewer choices for consumers and a climate where fraud is encouraged. The insurers that have attempted to combat fraud and lost will avoid allocating their resources to Kentucky.

Insurers and the insured have a mutual interest in combating fraud. The benefits to both parties are the insurer is able to provide benefits at a reasonable cost and the insured can receive benefits in the most cost-effective and efficient manner possible. For this reason, it is imperative that insurers be given the tools to correctly identify illegitimate claims. Without this ability, every claims' determination becomes the subject of litigation and the purpose of the KMVRA is defeated.

As a result, the Court should take the opportunity presented by the instant case and reinforce rather than hinder the ability of insurers to combat the incidents of fraudulent claims

through their contractual provisions. Otherwise the result runs counter to the legislative intent behind the KMVRA, and could lead to a substantial increase in the financial burden placed upon policyholders in Kentucky and an overly litigious environment for PIP claims. In that scenario, no one wins except for those whose seek to avoid cooperation with their insurance company in the hopes that they can drive up the costs of combating fraudulent claims to the extent that insurers become dis-sensitized to fight them.

III.

CONCLUSION

Upholding the decision of the Court of Appeals in this case will have negative effects on insurers and policyholders in the Commonwealth of Kentucky. The purpose of the KMVRA was to create a framework in which injury claims can be paid in an efficient manner without recourse to the courts. However, achieving these goals, and the wider goals of encouraging Kentuckians to maintain insurance and keeping the cost of maintaining insurance reasonable, requires cooperation between claimants and insurers. In order for a system of no-fault insurance to function, there must be good faith and a free exchange of necessary information between claimants and insurers. This cooperation extends to the provisions of the insurance contract including the utilization of EUOs to investigate claims. Far from being in opposition to the KMVRA, EUOs bring the legislative intent behind it to fruition.

Otherwise, the result will be that a misinterpretation of the legislative intent behind the KMVRA and the EUO provisions in insurance contracts is made law. This will create conflict in the law between the mechanisms insurance companies can use to investigate claims under different coverages. This will lead to inconsistent results and an increased burden on the courts. Further, forcing insurers to seek a court order to investigate their claims will increase the cost of

providing coverage and those costs will become an undue burden on policyholders within the Commonwealth of Kentucky.

For all the above reasons it is imperative that the Kentucky Supreme Court overrule the Court of Appeals and reinstate the Summary Judgment granted by the trial court.

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