By Amanda Hartley

Identifying UIM Carriers at Trial: Participation without Identification is Manifestly Unjust

Over the last few decades, the Kentucky Supreme Court systematically addressed various scenarios in which an insurance carrier is properly identified as a defendant during trial. Despite the seeming regularity with which the Kentucky Supreme Court addresses the issue, the decisions leave open a small gap, which the Court has never squarely addressed. Namely, if no settlement is reached with the at-fault driver and the underinsured motorist (UIM) carrier does not participate in trial, but the UIM carrier participates in pretrial motion practice and discovery, how much pretrial participation supports the identification of the UIM carrier—as a party—during trial?

In order to answer this question, it is important to first understand how the case law evolved to this point. If the plaintiff's UIM carrier elects to substitute per the *Coots* procedure, the UIM carrier is properly identified as a party during trial.[1] For obvious reasons, if the plaintiff's UIM carrier declines to substitute, the UIM carrier is also properly identified during trial because the carrier is the only named defendant. Similarly, if the plaintiff proceeds to trial against an uninsured motorist (UM) carrier, the jury is entitled to know the identity of the UM carrier.[2] In fact, if counsel for the UM or UIM carrier participates during trial—under any circumstances—the plaintiff is entitled to identify the carrier to the jury. Conversely, if the UIM carrier makes no *Coots* election and does not participate in trial, the jury never learns of the carrier's existence.[3]

After thoroughly understanding the evolution of Kentucky law thus far, the significance of pre-trial participation by a UIM carrier requires further exploration.

We have all litigated cases against both the tortfeasor and our client's UIM carrier. Frequently, the UIM carrier issues written discovery, appears for motion hours, subpoenas medical records and asks questions during depositions. Even if counsel for the UIM carrier does not ask questions during depositions, we've all waited through "breaks" during which counsel for the at-fault driver and counsel for the UIM carrier step into the hall and discuss additional questions for our clients. When it comes time for trial, the UIM carrier inevitably declines to participate. However, by participating in motion practice and the discovery process, are we entitled to identify the UIM carrier as a party to the jury—even if the carrier is not present during trial? We believe the answer is—yes. According to well-established precedent, "*one cannot be a party for purposes of motion and discovery, and later strategically conceal its identity at trial.*"[4] A UIM carrier, therefore, cannot participate in discovery and pretrial motions if the carrier does not intend to be named as a defendant during trial.

Legal Precedent

In *Earle v. Cobb*, 156 S.W.3d 257 (Ky. 2004), the Kentucky Supreme Court addressed the circumstances under which courts must identify a UIM carrier to the jury. Specifically, such identification is required under one of three circumstances: 1) a UIM carrier does not elect to retain subrogation and substitute payment via *Coots*,[5] 2) a UIM carrier elects to substitute via *Coots*, or 3) a UIM carrier actively participates in the litigation of a case. *Id.* at 259. In *Earle*, the UIM carrier defended by participating in pre-trial motions and discovery. *Id.* The trial court, however, excluded the UIM carrier's identity from the jury. The plaintiff, Earle, argued it was "improper to maintain the 'legal fiction' of permitting the UIM carrier to participate or sit idly by and allow the tortfeasor to defend at trial, thereby hiding the identity of a bona fide party." *Id.* at 261. The Kentucky Supreme Court agreed with Earle and reversed the trial court's decision.

While the *Earle* holding applies in the context of a *Coots* election, nothing in the opinion limits application of the well-established rule that *one cannot be a party for purposes of motion and discovery, and later strategically conceal its identity at trial.*[6] Nothing in *Earle* requires participation in motion practice and discovery *and* a *Coots* election. In *Earle*, the court noted the general rule of excluding liability coverage, but found "where a direct contractual relationship exists between a plaintiff and a defendant insurance company

no such policy is warranted." *Id.* The court reasoned that every action shall be prosecuted in the name of the real party in interest. *Id.* When an insurance carrier defends and participates, failure to identify the carrier by name, therefore, perpetuates a fiction and fundamentally misleads the jury. *Id.* Moreover, failing to identify the UIM defendant deprives the plaintiff of the right to try the plaintiff's case against the party of the plaintiff's choosing. *Id.* Accordingly, the Kentucky Supreme Court found the trial court committed reversible error in failing to identify the UIM carrier to the jury. *Id.* at 261.

Though *Earle* identified its decision as only answering the question of identification following a *Coots* election, the fundamental holding applies equally in the absence of a *Coots* election. In issuing the *Earle* opinion, the Kentucky Supreme Court relied heavily upon the cases of *King v. State Farm Mutual Automobile Ins. Co.*, 850 A.2d 428 (Md. App.2004) and *Medina v. Peralta*, 724 So.2d 1188 (Fla. 1999).

In *King*, the trial court prevented the plaintiff from identifying State Farm, the plaintiff's UIM carrier, as a defendant. On appeal, the plaintiff argued, "The identity of a party is *not a matter of mere evidence, but it is fundamental to the rule that the trier of fact must be aware of the real parties in interest to the litigation.*" *Id.* at 431. In agreeing with the plaintiff and reversing the trial court, the *King* court distinguished UIM coverage from the general rule prohibiting the disclosure of liability coverage by explaining UIM coverage is a promise to pay the insured not a promise to pay a third-party. Specifically, where the insurance carrier is party to the litigation, the existence of insurance cannot be kept from the jury. *Id.* at 432.

As policy, the *King* court drew an interesting analogy with cases where a party (usually a plaintiff) asks to proceed anonymously. The court noted, "There remains a clear and strong First Amendment interest in ensuring that what transpires in the courtroom is public property." *Id.* at 433, quoting *Craig v. Harney*, 331 U.S. 367 (1947). To overcome the "clear and strong" interest, a party wishing to proceed anonymously must show a compelling need. *Id.* When evaluating compelling need, adverse economic consequences are routinely deemed insufficient. *Id.* at 434.[7] On this point, the *Earle* court quoted the *King* court as follows:

> In the instant matter, the defendant, a corporation, has no personal right of privacy. Further, the unsubstantiated belief by State Farm that its disclosure as the defendant would adversely affect the jury's verdict furnishes insufficient justification for withholding from the jury, and from the general public, State Farm's identity as the defendant at a public trial. The lack of *per se* prejudice to the UM/UIM carrier in being identified at a trial at which the insured's damages, under the policy, are determined by rules applicable to tort cases is shown by the permissibility of joining, as defendants in an action brought by the insured, *the tortfeasor* and *the UM/UIM carrier*. Indeed, State Farm's position here is no different from that of any insurer that

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> is sued directly for breach of its policy or from that of any apparently "deep pocket" corporation that is sued for breach of contract by its promisee. We hold that the circuit court abused its discretion in imposing this partial blackout on public information. (citations omitted).
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> *Id.* at 435; *Earle*, 156 S.W.3d at 260.[8]

In *King*, the plaintiff settled with the at-fault driver before trial. However, the language of the opinion is clearly not exclusive.

Both *King* and *Earle* relied heavily upon the case of *Medina v. Peralta*, 724 So.2d 1188 (Fla. 1999). In *Medina*, the plaintiff sued the at-fault driver and the plaintiff's UIM carrier. There was no settlement with the at-fault driver, and the plaintiff proceeded to trial against only the at-fault driver. *Id.* at 1189. The trial court precluded the jury from learning of the existence of the plaintiff's UIM carrier. *Id.* On review, the Florida Supreme Court found the failure to identify the UIM carrier was a *"miscarriage of justice." Id.* at 1190. The court went on to hold, "It is *per se reversible error for a trial court to exclude from a jury the identity of an uninsured or underinsured motorist insurance carrier." Id.* at 1189. The "per se reversible error" portion of the *Medina* opinion is the precise portion of the opinion quoted by the Kentucky Supreme Court in *Earle*.

Following *Earle*, Kentucky trial courts routinely require the identification of a UIM carrier that actively participates in litigation. In *Hughes v. Lampman*, 197 S.W.3d 566 (Ky.App. 2006), the plaintiff's UIM carrier elected to substitute payment pursuant to *Coots*. Before the Supreme Court's *Earle* decision, the trial court issued a decision to withhold from the jury the fact that the UIM carrier was a party defendant. *Id.* at 567. Specifically, the trial court found 1) the UIM carrier did not need to participate in the trial, 2) no reference could be made to UIM coverage and 3) the UIM carrier could not be identified. *Id.* The case was tried, and the jury returned a verdict against the plaintiff. *Id.* The plaintiff appealed. *Id.* As the plaintiff's sole ground for appeal, the plaintiff argued the trial court committed reversible error in failing to allow the identification of the UIM carrier to the jury. *Id.* In light of *Earle*, the Court of Appeals found the trial court committed reversible error in failing to allow the identification of the UIM carrier to the jury. *Id.*

In reversing the trial court, the *Hughes* court noted the UIM carrier should have been identified by virtue of its *contractual relationship with the plaintiff*. *Id.* The court reiterated "one cannot be a party for the purposes of motion and discovery and later strategically conceal its identity at trial." *Id.*[9] Not only did the Court of Appeals find reversible error, the Court of Appeals described the *exclusion of the UIM carrier's identity as "manifestly unjust." Id.* at 568.

Given the foregoing, only one real question remains. Specifically, what constitutes sufficient participation by a party to require identification? Kentucky has not answered this question.

A UIM carrier, therefore, cannot participate in discovery and pretrial motions if the carrier does not intend to be named as a defendant during trial.

In the unreported opinion of *Akers v. State Farm*,[10] the court indicated a few seconds of deposition questions was probably insufficient, but the court ultimately determined the issue was moot. *Mattingly v. Stinson*[11] and *Combs v. Stortz*[12] prevent the plaintiff from identifying the UIM carrier in the absence of a tort settlement, but neither *Mattingly* nor *Combs* even mentions participation in pretrial discovery and/or motion practice.

Practical Application

So, how do we, as plaintiff's attorneys, use Kentucky precedent to identify the UIM carrier during trial? Our practice files a motion asking the court to require the UIM carrier to either 1) elect to participate in discovery and be named at trial, or 2) elect not to participate in discovery. In support of the motion, we cite the precedent outlined above, and we file the motion immediately after the UIM carrier sends our client written discovery. By making the motion before participation, all parties are on notice.

The overarching principle is really one of basic honesty and fairness. If all parties participate in discovery, all parties should be identified at trial. After all, we are forced to litigate our cases on two fronts: 1) versus tort and 2) versus UIM. We are faced with double discovery, double cross-examination of our clients, double cross-examination of our experts and so forth. From a purely equitable standpoint, two against one is harder. Yet, we do it all the time. Despite litigating for months or years against two teams of defense

attorneys, we are inevitably presented with a motion by the UIM carrier—thirty days before trial—asking the court to prevent us from even disclosing the existence of the UIM carrier, the same UIM carrier that litigated against us for years, in front of the jury. When we respond to the UIM carrier's motion with "one cannot be a party for purposes of motion and discovery, and later strategically conceal its identity at trial," the carrier argues it did not know participating in discovery meant it was going to be identified at trial. Courts frequently buy the argument. By making the motion to elect participation at the start of litigation, carriers may choose how to proceed. Most importantly, asking carriers—up front—for an election gives trial judges the ability to make fair and informed decisions.

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1 See for example *Earle v. Cobb*, 156 S.W.3d 257 (Ky. 2004).
2 See for example *Wheeler v. Creekmore*, 469 S.W.2d 559 (Ky. 1971).
3 *Mattingly v. Stinson*, 281 S.W.3d 796 (Ky. 2009).
4 *Williamson v. Schneider*, 205 S.W.3d 224 (Ky.App. 2006); *Hughes v. Lapman*, 197 S.W.3d 566, (Ky.App. 2006); *Earle v. Cobb*, 156 S.W.3d 257 (Ky. 2004) (*internal citations omitted*).
5 The procedure outlined by *Coots v. Allstate*, 853 S.W. 2d 895 (Ky. 1993) and codified as KRS 304.39-320 is referred to herein as the commonly termed "*Coots*" procedure.
6 *Id.* at 259 (citing *King v. State Farm Mutual Auto Ins. Co.*, 850 A.2d 428 (Md.App. 2004).
7 In making this observation, the *King* court provided a number of examples including *Southern Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707 (5th Cir. 1979) and *Free Market Compensation v. Commodity Exch., Inc.*, 98 F.R.D. 311 (S.D. New York 1983).
8 Interestingly, the *King* court cited the Kentucky opinion of *Wheeler v. Creekmore*, 469 S.W.2d 559 (Ky. 1971) as support and quoted the *Wheeler* opinion at length.
9 (internal quotations and citations omitted).
10 2010 WL 1133083.
11 281 S.W.3d 796 (Ky. 2009).
12 276 S.W. 3d 796 (Ky. 2009).