Insurance Adjuster Liability in Bad Faith Claims

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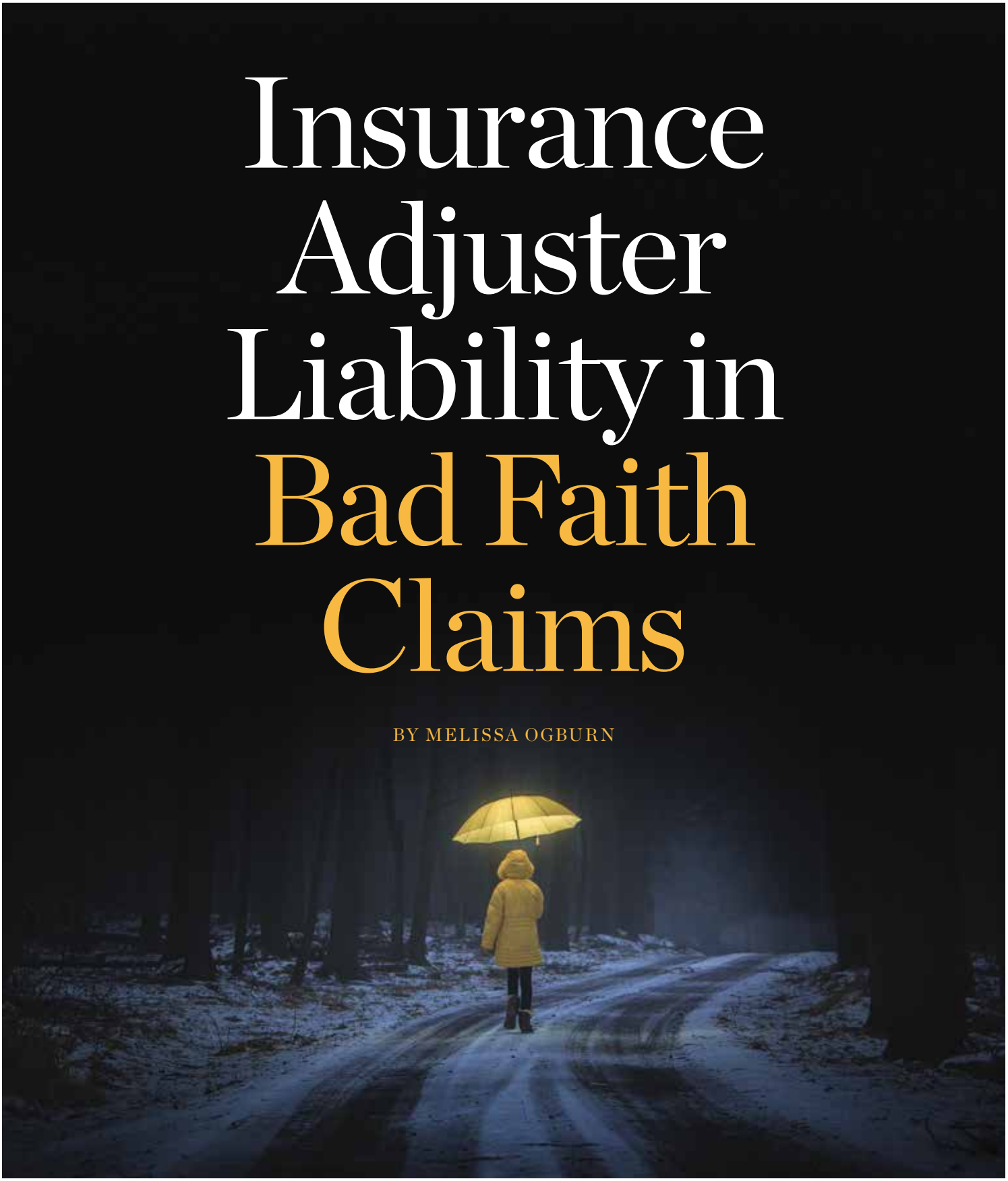

This article discusses whether individual insurance adjusters can be held personally liable for bad faith for failing to act reasonably in adjusting a claim.

On March 14, 2022, the Colorado Supreme Court issued its ruling in *Skillett v. Allstate Fire and Casualty Insurance Co.*, answering the question of whether insurance adjusters themselves—not just their employers—can be held liable for unreasonably delaying or denying benefits under an insurance policy under CRS §§ 10-3-1115 and -1116. This article addresses legislative history and court decisions affecting individual insurance adjuster liability.

History of Bad Faith Cases

Colorado has historically recognized bad faith claims against insurance providers under common law. However, in 2008, the Colorado General Assembly enacted HB 08-1407, which amended Colorado statutes governing insurance companies' conduct by adding two new sections: CRS §§ 10-3-1115 and -1116. The House Bill's title indicated that the new sections were directed to insurance companies, not individual adjusters. It was titled, "An Act Concerning Strengthening Penalties For The Unreasonable Conduct Of An Insurance Carrier, And Making An Appropriation In Connection Therewith."[1] In general, those provisions prohibit "a person engaged in the business of insurance" from "unreasonably delay[ing] or deny[ing] payment of a claim for benefits" to a "first-party claimant."[2] CRS § 10-3-1116 states that violations of CRS § 10-3-1115 carry a penalty of "reasonable attorney fees and court costs and two times the covered benefit." But CRS § 10-4-1114 was also amended to state, "Except as provided in sections 10-3-1115 and 10-3-1116, nothing in this part 11 shall be construed to create a private cause of action based on alleged violations of this part 11 or to abrogate any common law contract or tort cause of action." Piecing these phrases together, claimants have argued that not only can the insurance company be held liable for damages arising from the improper handling of a claim, but insurance adjusters themselves are equally liable.

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Addressing Individual Adjuster Liability

Riccatone v. Colorado Choice Health Plans[3] was the first Colorado appellate decision to address whether the individual insurance adjuster handling the claim can be held liable for damages under CRS §§ 10-3-1115 and -1116. In 2007, 16-year-old Ashlee Duran sustained severe injuries resulting from a single-vehicle motor vehicle accident.[4] After the accident, authorities tested her blood and found alcohol present in her blood samples. At the time of the accident, plaintiffs Kirsten Riccatone, Brian Riccatone, and Duran were plan participants under the San Luis Valley Combined Educators Health Plan (Plan), an employer self-funded health care plan. Defendants Colorado Choice Health Plans, doing business as San Luis Valley Health Maintenance Organization (collectively, Choice), served as the Plan's current third-party administrators; defendant CNIC Health Solutions, Inc. (CNIC) was the Plan's former third-party administrator; and Gallagher Benefit Services, Inc. (GBS), later added as a defendant, was the Plan's broker and advisor. Upon learning that Duran's blood tested positive for alcohol, the Plan denied benefits to the plaintiffs, citing a provision that excluded coverage for injuries sustained as a result of the illegal use of alcohol.[5]

CNIC was granted summary judgment, and although the plaintiffs eventually entered into a settlement with the Plan, they doubled down on their claims against GBS and Choice by moving for leave to amend their complaint to add claims for aiding and abetting tortious conduct.[6] They also sought reconsideration of the summary judgment order in favor of CNIC. The trial court denied the plaintiffs' motion for leave and affirmed summary judgment in favor of CNIC. The plaintiffs appealed.[7]

On appeal, the Court of Appeals agreed with the trial court that defendants CNIC, GBS, and Choice did not owe common law duties of good faith and fair dealings to the plaintiffs and thus could not be held liable for common law bad faith.[8] After reviewing the legal history on the subject, the court ultimately upheld the standards set forth in *Cary v. United of Omaha Life Insurance Co.*,[9] finding that "the duty of good faith and fair dealing supporting a bad faith claim extends to third parties who (1) perform the functions of an insurer and (2) have a financial incentive to limit an insured's claims."[10] Concluding that CNIC, GBS, and Choice did not meet these criteria, the court affirmed the district court's ruling.

Significantly, the Court of Appeals affirmed the district court's summary judgment order pertaining to the statutory claims, again finding that the defendants were not proper parties to such claims. The court's ruling hinged on whether any of the defendants qualified as "a person engaged in the business of insurance," as required by CRS § 10-3-1115. The court first noted that the Colorado General Assembly did not define the phrase "a person engaged in the business of insurance."[11] In fact, the General Assembly did not even define the narrower phrase "business of insurance." But the legislature did define the duties and responsibilities of the "insurer" in CRS §§ 10-3-1115 and -1116. Additionally, the more general statutes under title 10, particularly CRS § 10-1-102(13), define "insurer" as a "person engaged as principal, indemnitor, surety, or contractor in the business of making contracts of insurance." Further, "insurance" is defined as "a contract whereby one, for consideration, undertakes to indemnify another or to pay a specified or ascertainable amount or benefit upon determinable risk contingencies, and includes annuities."[12] The court concluded that the reasonable interpretation of "person engaged in the business of insurance" must mean "a person who 'undertakes to indemnify another or to pay a specified or ascertainable amount or benefit upon determinable risk contingencies.'"[13]

The court went on to analyze how CRS § 10-3-1102(3) defines "person." Under that statute, "'Person' means any individual, corporation, association, partnership, reciprocal exchange, interinsurer, Lloyds insurer, nonadmitted insurer, fraternal benefit society, and other legal entities engaged in the insurance business, including agents, limited insurance representatives, agencies, brokers, surplus line brokers, and adjusters."[14] Because the court could reasonably interpret "person engaged in the business of insurance" to both refer only to persons "who undertake to indemnity another or to pay a specified or ascertainable amount or benefit upon determinable risk contingencies" as well as "any individual, corporation, etc., including agents, limited insurance representatives, agencies, brokers, surplus line brokers, and adjusters," it found the statute ambiguous.[15]

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The court then sought to determine legislative intent by reviewing the bill's legislative history, giving great deference to the testimony of then-Speaker Romanoff. His testimony made clear that while the "purpose of the statutes was to create a private right of action and to reduce the showing required under the common law standard . . . , there is no indication that its purpose was either to expand or restrict the realm of possible defendants."[16] Summary judgment in favor of the defendants was affirmed.

The US District Court for the District of Colorado Reaches a Different Conclusion

Seven years after *Riccatone*, the US District Court for the District of Colorado reached a different conclusion in *Seiwald v. Allstate Property and Casualty Insurance Co*.[17] That case arose from a 2015 auto accident in which Jennifer Seiwald was severely injured.[18] She sued the driver, and a jury awarded Seiwald more than $825,000.[19] Seiwald eventually filed suit against her insurer, Allstate, and two in-house Allstate claims adjusters, Caitlan Gilliland and Collin Draine.[20] Relying on *Riccatone*, Allstate attempted to remove the case from state court to federal court based on diversity jurisdiction, arguing that the two named insurance adjusters were fraudulently joined "because Colorado law unequivocally does not recognize a statutory claim for unreasonable delay against an insurance adjuster."[21]

The US District Court found that the defendants were not fraudulently joined and that relief could be found in the state court. Relying on CRS § 10-3-1102(3)'s definition of "person," the court held that claims under CRS §§ 10-3-1115 and -1116 could be asserted against individual adjusters.[22] Although the court noted that the *Riccatone* court ultimately found the statute ambiguous and ruled that plan administrators could not be held liable for statutory claims, the US District Court ruled that such interpretation and application was not necessarily controlling in determining whether it had diversity jurisdiction: "The reasonable conclusion of one division of the Colorado Court of Appeals regarding an arguably ambiguous statutory provision does not meet defendants' significant burden of demonstrating that there is no possibility of relief in state court against Ms. Gilliland or Mr. Draine."[23] Indeed, a ruling by one division of the Court of Appeals is not binding on another division. Without a ruling

from the Colorado Supreme Court, the US District Court could not say unequivocally that no relief could be found in state courts.[24]

Majority and Minority Rules on Individual Adjuster Liability

The majority rule, recognized by courts in Missouri, New York, South Carolina, and California, holds that insurance adjusters cannot be held personally liable for bad faith.[25] But West Virginia has held the opposite. Under the West Virginia Unfair Trade Practices Act, individual adjusters can be held personally liable for failing to reasonably adjust a claim.[26] The Act specifically includes "any individual" within the definition of "person," meaning that "individual claims adjusters fall within the Act's scope."[27] And the Supreme Court of Appeals for West Virginia has held that "a cause of action exists in West Virginia to hold a claims adjuster employed by an insurance company personally liable for violations of the West Virginia Unfair Trade Practices Act . . . ."[28]

As explained in more detail below, the Colorado General Assembly—like the majority of states—chose not to impose liability on individual adjusters. The Colorado Supreme Court found that the penalties set forth in the statute apply to the insurance company, not the adjuster. The Court stated, "It would seem odd to allow an insured to recover two times the covered benefit from an adjuster, who is not a party to the insurance policy that establishes the covered benefit and has not otherwise undertaken any obligation to pay the covered benefit."[29] In reaching its decision in *Skillett* that liability is limited to the insurance company, the Court considered the plain language of the statute and the General Assembly's intent.

The Colorado Supreme Court's Ruling on Individual Adjuster Liability

In *Skillett*, the Colorado Supreme Court got its chance to clarify individual liability of insurance adjusters. The *Skillett* case arose from an auto accident in 2020 that injured Alexis Skillett.[30] At the time of the accident, Skillett was insured under a policy issued by Allstate that included underinsured motorist coverage. After settling with the at-fault driver, Skillett tendered a claim to Allstate, requesting underinsured motorist coverage. The claim was assigned to Collin Draine to serve as the adjuster on the file. After investigating the claim, Draine, on behalf of Allstate, denied coverage.

After her claim was denied, Skillett filed suit in state court against both Allstate and Draine, asserting statutory claims against the insurance adjuster and arguing that CRS §§ 10-3-1115 and -1116 create a private cause of action against insurance adjusters.[31] Allstate attempted to remove the case to federal court, arguing that the joinder of Draine as a party was fraudulent given that there is no viable relief against him under state law.[32] Recognizing the split in authority, including the recent *Seiwald* case in which the same issue was raised, the US District Court certified the question to the Colorado Supreme Court, which accepted jurisdiction.[33]

In an en banc opinion published March 14, 2022, the Court held that "[a]n action for unreasonably delayed or denied insurance benefits under Colorado law may be brought against an insurer, not against an individual adjuster acting solely as an employee of the insurer."[34] In reaching its decision, the Court noted that although CRS § 10-3-1102(3) provides a definition for "persons" that includes "adjusters," the same statute "does not make its definitions absolute. Rather, those definitions apply 'unless the context otherwise requires.'"[35] Applying the definition within the context of CRS §§ 10-3-1115 and -1116, the Court found that a "person" could reasonably be the insurance provider but not individual claims adjusters.[36] The Court specifically noted in the factual background that "Draine was not a party to the insurance contract between Skillett and Allstate, and he handled Skillett's claim solely in his capacity as an Allstate claims adjuster."[37]

The Court was also persuaded by the language in CRS § 10-3-1115 defining unreasonable conduct. The statute specifically refers to "insurers" throughout its recount of unacceptable practices. The Court acknowledged the ambiguity created in the statute and turned its attention to the insurance company's and the individual insurance adjuster's respective roles.[38] The statute refers to "authorizing payment," "payment of benefits," and "benefits owed . . . under an insurance policy." In each instance, the conduct and obligations refer to an insurance company, not an individual adjuster.[39] For example, the insurance company—not the individual adjuster—issues the policy, authorizes payment, and owes benefits.[40] Even the penalty for violation of the statute refers to "the covered benefit."[41] Moreover, the individual adjuster is not a party to the insurance policy and had no role in deciding to issue the policy or undertake the risk in the first place.[42] The Court further noted certain carve-outs under the statute that would save an insurer from penalties. No such carve-outs were adopted for insurance adjusters, indicating that the penalties imposed would only flow to the insurance carriers themselves.[43] These factors led the Court to conclude that "an action for unreasonably delayed or denied insurance benefits proceeds against an insurer, not an individual adjuster."[44]

Conclusion

Although the question of whether individual adjusters may be held legally liable for bad faith or for violations of CRS §§ 10-3-1115 and -1116 was decided disparately by the Colorado Court of Appeals and the US District Court for the District of Colorado, the Colorado Supreme Court has now settled this question. With its decision in *Skillett*, the Court made clear that such liability cannot extend to individual adjusters, but rather, liability extends only to the insurance company at which the adjuster was employed. Although not directly addressed in *Skillett*, a similar result is likely for other individuals also not identified in the statutes, such as administrators, agents, brokers, and other insurance company employees.

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NOTES

1. HB 08-1407.
2. Construction of the phrases "unreasonably delay or deny payment of a claim for benefits" and "first-party claimant" have also been points of contention among Colorado litigators and courts, but interpretation and discussion of this language is beyond the scope of this article.
3. *Riccatone v. Colo. Choice Health Plans*, 315 P.3d 203 (Colo.App. 2013).
4. *Id.* at 205.
5. *Id.*
6. *Id.* at 206.
7. *Id.*
8. *Id.*
9. *Cary v. United of Omaha Life Ins. Co.*, 68 P.3d 462, 466 (Colo. 2003).
10. *Riccatone*, 315 P.3d at 207.
11. *Id.* at 209
12. CRS § 10-1-102(12).
13. *Riccatone*, 315 P.3d at 209 (internal citations omitted).
14. *Id.*
15. *Id.*
16. *Id.* at 210. The court also noted the potential chilling effect on the insurance industry if administrators and others were assigned liability under the statute.
17. *Seiwald v. Allstate Prop. and Cas. Ins. Co.*, No. 20-cv-00464-PAB, 2020 WL 6946563 (D.Colo. Nov. 24, 2020).
18. *Id.* at 1.
19. *Id.*
20. *Id.*
21. *Id.* at 2.
22. *Id.* at 3.
23. *Id.*
24. *Id.*
25. *See Shobe v. Kelly*, 279 S.W.3d 203, 209 (Mo.Ct.App. 2009); *Youngs v. Sec. Mut. Ins.* Co., 775 N.Y.S.2d 800, 801 (N.Y.Sup.Ct. 2004); *Charleston Dry Cleaners & Laundry, Inc. v. Zurich Am. Ins. Co.*, 586 S.E.2d 586, 588 (S.C. 2003) (no bad faith claim can be brought against an independent adjuster or independent adjusting company); *Filippo Indus., Inc. v. Sun Ins. Co. of New York*, 88 Cal. Rptr. 2d 881, 889–90 (Cal.Ct.App. 1999), as modified (Oct. 20, 1999) ("an agent cannot be held liable for breach of a duty which flows from a contract to which he is not party.").
26. *See Taylor v. Nationwide Mut. Ins. Co.*, 589 S.E.2d 55, 57 (W.Va. 2003).
27. *Id.*
28. *Id.*
29. *Skillett v. Allstate Fire and Cas. Ins. Co.*, 505 P.3d 664 at 667 ¶ 16 (Colo. 2022).
30. *Id.*
31. *Id.* at 665.
32. *Id.* at 665–66.
33. *Id.*
34. *Id.* at 665.
35. *Id.* at 667 (quoting CRS § 10-3-1102).
36. *Id.*
37. *Id.* at 665.
38. *Id.* at 667.
39. *Id.* at 667–68.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at 668.