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CELEBRATION OR CAUTION?

Reassessing Adjuster Personal Liability Post-Keodalah

by Kevin Quinley and Paul Rosner

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This article continues an earlier discussion[1] of the specter of bad-faith and negligence claims against individual claims handlers employed by insurance companies, a right of action that a Washington state appellate court seemed to affirm in Keodalah v. Allstate. *An October 2019 ruling by Washington's Supreme Court that renounced this decision was widely applauded by the insurance industry—a reaction that may have been premature. This article questions whether the recent decision represents a resounding victory for insurance adjusters and a cause for celebration, or rather a cautionary tale that portends genuine risks for adjusters who replicate claims handling actions found in the underlying* Keodalah *claim. Further, the article blends perspectives from an insurance claims consultant and a coverage attorney to spotlight positive and cautionary legacies represented by Washington's Supreme Court ruling in* Keodalah v. Allstate.

Insurance claims professionals have long known that they have challenging jobs.

High caseloads, stress, and interpersonal conflict are woven into the fabric of their roles. They understand that this is part of the ecosystem in handling claims and often delivering unwelcome news and perspectives.

What these professionals have only more recently come to realize, however, is that the specter of becoming named defendants in bad-faith lawsuits looms large and can threaten both their peace of mind and financial solvency.

A recent and widely heralded lawsuit in Washington state, *Keodalah v. Allstate,* highlighted in bold relief the potential risk of individual liability by adjusters while performing activities within the course and scope of their employment for insurance companies. More recently, in October 2019, insurance companies and claims professionals rejoiced when the Washington Supreme Court ruled against the earlier appellate court's finding that adjusters could be found personally liable, along with their employers, for bad-faith claims handling.

But was this celebrating warranted or does the seemingly favorable Washington State Supreme Court decision mask genuine perils that still loom for insurers and claims professionals? That is the focus of this discussion, which blends perspectives from an insurance claims consultant and a seasoned coverage attorney.

Recap of the Underlying Claim

Keodalah v. Allstate involved a two-vehicle collision at a controlled intersection. Mr. Keodalah had stopped at a stop sign and drove forward when a motorcyclist struck him. The collision killed the motorcyclist and injured Keodalah. Keodalah's policy included underinsured motorists (UIM) coverage, and the motorcyclist was uninsured—which, in Washington state, falls within UIM.

Police determined that the motorcyclist that hit Keodalah was traveling between 70 and 74 mph in a 30-mph zone.[2] Police also reviewed Keodalah's cell-phone records, concluding that he was not on his phone at the time of the crash. Allstate interviewed several witnesses who said that the motorcyclist was speeding, had driven between cars in both lanes, and "cheated" at the intersection. Allstate hired an accident-reconstructionist, whose findings aligned with the police investigation: that Keodalah stopped at the stop sign and that the motorcyclist's speed was at least 60 mph, which caused the crash.[3]

Keodalah demanded his $25,000 UIM policy limit. Allstate refused and offered $1,600, saying that Keodalah was 70 percent at fault. After Keodalah asked the adjuster to explain that evaluation, Allstate raised its offer to $5,000. Keodalah filed suit asserting a UIM claim.

During discovery, the adjuster was designated as Allstate's Civil Rule 30(b)(6) deposition representative. The adjuster contradicted the conclusions reached by the police and Allstate's accident reconstruction analysis by claiming, for example, that Keodalah had run the stop sign and had been on his cell phone at the time of the accident. At trial, Allstate continued to contend that Keodalah was 70 percent at fault. The jury determined that the motorcyclist was 100 percent at fault and awarded Keodalah $108,868.20 for his injuries, lost wages, and medical expenses.[4]

Keodalah filed a second lawsuit against Allstate that included claims against the adjuster for bad-faith and Consumer Protection Act (CPA) violations. Allstate moved to dismiss claims on the pleadings under CR 12(b)(6). The trial court dismissed the claims against the adjuster and certified the issue for interlocutory appeal. The Court of Appeals disagreed and concluded that the bad-faith and CPA claims against the adjuster could proceed. It found that Washington law imposes a duty of good faith on the adjuster, not just the employer, and applies equally to both individuals and corporations acting as insurance adjusters. Similarly, it found that the adjuster could be liable for a CPA violation even absent the existence of a contractual relationship between Keodalah and the adjuster.[5]

The case headed to the Washington Supreme Court. On October 3, 2019, that court, in a five-to-four ruling, held that employee adjusters are not subject to personal liability for insurance bad-faith or per se claims under Washington's Consumer Protection Act.[6]

It is safe to say that this decision was well-received by insurance companies, claims adjusters, and defense attorneys representing insurers in bad-faith cases. But should it have been?

A Claims Professional's Perspective: Notes From Kevin Quinley

Even if the most recent ruling insulates claims handlers from facing viable bad-faith claims in their individual capacities, it does not legislate risk-free adjuster lapses. In fact, the very real risk of job loss remains.

A claims professional who fails to reasonably investigate, evaluate, or negotiate and whose actions lead to the employer's extracontractual liability represents a huge peril. One is termination for cause, based on poor performance.

In today's job market, well-paying white-collar positions are at a premium. Claims professionals who take untenable positions on claims and whose lapses cause their employer to incur additional costs can find themselves facing disciplinary action or unemployment—and sometimes both.

So adjusters have the same responsibilities they always did: engaging in sound, good-faith claims handling.

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The second lesson from *Keodalah* is the importance of claims supervision and oversight.

Keodalah highlights the importance of round-tabling as a claims evaluation discipline. It is important to have another set (or multiple sets) of eyes on a file before deciding on a claims strategy or when evaluating policy limit demands. With *Keodalah*, it is hard to imagine that a claims supervisor would not have quickly sized up the facts and then either shielded the insurer from extracontractual liability or changed course to avert an excess verdict. A prudent claims supervisor or even a fellow adjuster would likely pose the following types of questions in a roundtable discussion of the underlying *Keodalah* case:

- Given the police report, the insured's cell phone records and accident reconstruction findings, why are we contesting liability?
- Given the police report and the cell phone records showing our policyholder wasn't on his phone at the time of the accident, why did we go to the trouble and expense of hiring an accident reconstructionist?
- How do we assess 70 percent fault on Mr. Keodalah, given these factors?
- When Mr. Keodalah asked the adjuster to explain the claim evaluation, did we offer an explanation?
- Should we consider offering policy limits before this case goes to trial?
- We're in Washington state. Do we really want to pick this case as one to gamble on in front of a jury?

These kinds of pointed questions might have stopped an unfolding disaster and averted the dumpster fire into which the claims file morphed.

The moral and takeaway: Convene claims roundtables among peers and supervisors at an early stage in cases with policy- and/or time-limit demands or imminent trials. Better to wrestle with these issues and change course before the proverbial train goes off the rails—or over the cliff.

A third lesson: Just because a viable claim cannot be made against an adjuster individually in Washington does not mean that adjusters are immunized from being named as separate defendants in lawsuits in other states. Even if an adjuster is eventually dismissed by dispositive motions, being named as a defendant in a lawsuit, even one destined to fail, can be stressful.

This author once worked with an adjuster who was named individually as a defendant in a bad-faith lawsuit against a major third-party claims administrator (TPA). The adjuster handled a lost-time workers compensation claim and terminated benefits to an employee/claimant because the claimant failed to show for an independent medical examination the adjuster had arranged.

A prominent local personal injury firm who represented the employee sued the TPA and the adjuster individually. In time, the adjuster was dismissed from the suit. Until then, though, the adjuster suffered significant stress from being named as a defendant. Moreover, if the adjuster in the future ever had to answer questions such as, "Have you ever been sued or named in litigation?" the adjuster would have to truthfully answer "yes," even though that yes had an asterisk.

When my two sons were small, they would hear news reports of various calamities and ask, knowing that their father worked in insurance claims, "Dad, can they sue for that?" I often answered, "You can sue for anything. Winning or collecting is another story."

The victory represented by the *Keodalah* Supreme Court ruling should not prompt adjuster merriment or celebration. Make no

mistake, bad-faith lawyers can still sue adjusters as individuals, even if those attempts fail. They can wield lawsuits as leverage points to rattle adjusters or sow disunity, undermining a united front between adjusters and their employers.

Meanwhile, an adjuster may not necessarily experience pain and suffering, but may still suffer unneeded stress in his or her life. In addition, the stigma of being sued remains, even if it's for a groundless lawsuit. This reignites the issue of an adverse domino effect against the so-called victorious adjuster. The claims professional may be obliged to disclose having been sued when applying for a mortgage, car loan, home equity line of credit, or even a job.

As noted by some of the Washington Supreme Court justices in their dissent to *Keodalah*, several states already recognize a common-law cause of action for bad faith against individual claims adjusters. These include Mississippi, New Hampshire, Alaska, and Montana. This author has served as an expert witness in Kentucky cases, for example, where insurance adjusters found themselves in the role of defendant. While this is not exactly a groundswell or trend, such states may give traction to litigants in Washington and other states who seek to hold individual adjusters, along with their employers, liable for bad-faith claims handling.

Bottom line: The Washington Supreme Court's ruling in *Keodalah*—while a positive development—does not insulate claims professionals from the adverse effects of a bad-faith lawsuit. Further, while admittedly a minority, certain states still allow bad-faith lawsuits against individual adjusters. As claims professionals applaud and sigh with relief over the Washington Supreme Court's ruling in *Keodalah*, cooler heads say, "Keep the champagne on ice. Hold the celebration and hew to the path of sound claims handling."

A Washington Insurance Coverage Attorney's Perspective: Notes From Paul Rosner

The day the Washington Supreme Court issued its decision on *Keodalah*, I did in fact order champagne and, with a group of Washington claims professionals, agents, brokers, underwriters, lawyers, and consultants, literally raise a glass to toast the ruling. The reasons for celebrating, especially in Washington, were laid out in an amicus brief I co-authored with my partner Geoff Bedell, a CPCU Society candidate member, and Terri Sutton, JD, CPCU. They included the following:

- Insurance companies domiciled outside Washington often prefer to litigate coverage and bad-faith claims in federal court. If the Court of Appeals decision had not been overturned, opposing counsel would seek to destroy diversity jurisdiction by including adjusters, coverage lawyers (like me), and others who reside in Washington as named defendants.
- If affirmed, the Court of Appeals decision would have encouraged out-of-state insurers to assign Washington claims to adjusters who reside outside of Washington to preserve diversity jurisdiction. The same incentives apply to outsourcing of legal services.
- Any precedent established for allowing adjusters and attorneys to be faced with potential personal liability related to the investigation of and coverage for suspected fraudulent claims would undoubtedly result in more fraudulent claims.

In addition, being subject to personal liability would harm adjusters and others personally. Being named in a lawsuit could damage a claims professional's credit rating, reputation, and employability and cause emotional distress. Accordingly, there is reason to celebrate the Washington Supreme Court's decision.

The *Keodalah* decisions appear to apply broadly to abrogate another Washington Court of Appeals decision, *Merriman v. Am. Guarantee & Liab. Ins. Co.*[7] Merriman held that independent adjusters could be liable for bad faith and for non-per se CPA claims. Thus, there is plenty of reason to celebrate—in Washington State.

However, as soon as we drain our celebratory glasses of champagne, we must return to the sobering fundamentals. As Mr. Quinley notes, claims professionals who make genuinely unreasonable decisions face adverse employment consequences. When such conduct results in bad-faith liability for the employer, the claims professional may face demotion or even termination.

Claims management must remain vigilant, providing training and education on good-faith claims handling. On that point, optimists and skeptics alike can find common ground and raise a glass, toasting to the benefits of claims professionalism! ■

1. See Kevin Quinley, "Adjusters in the Crosshairs: Rethinking *Keodalah* and Bad-Faith Liability," *Insights*, summer 2019, pp. 14–18.
2. *Keodalah v. Allstate Ins. Co.*, 3 Wn. App. 2d. 31, 32, 413 P.3d 1059, 1060 (Wash. Ct. App. 2018).
3. Id. at 33.
4. Id. at 34.
5. Id. at 40–43.
6. After *Keodalah v. Allstate Ins. Co.,* 194 Wn.2d 339, 449 P.3d 1040 (2019).
7. 198 Wn. App. 594, 396 P.3d 351 (2017), review denied, 189 Wn.2d 1038, 413 P.3d 565 (2017).