# Kentucky Legal Cases of Note
# April 26, 2007

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## KY COURT OF APPEALS:

**Workers Comp Exclusive Remedy and Subcontractors**
**Case No. 2005-CA-001587**
**Johnston v. Labor Ready, Inc.**
**Rendered 4/6/07**
This was an appeal from Jefferson Circuit Court, where the Judge granted summary judgment against the plaintiff based on immunity from civil suit granted by the workers' compensation statute. The lawsuit was by an employee of Midamerica Auto Auction, who was struck by a car driven by a temporary worker, contracted through Labor Ready.

The undisputed facts were that Midamerica was the contractor, and Labor Ready was the subcontractor. Therefore, any lawsuit brought by an employee of Labor Ready against Midamerica or its employees would be barred. However, this lawsuit was brought by an employee of the contractor against the subcontractor. Labor-Ready would never have any workers' compensation liability to any Mid-America employee if Mid-America was uninsured, as a general contractor may be as against the employee of a subcontractor. The Circuit Judge expanded the "up-the-ladder" immunity provisions of the workers' compensation law to "down-the-ladder" employees, and the Court of Appeals reversed, holding that the lawsuit could proceed. (From KY Cases)

**Insurance – Substantial Compliance**
**Case No. 2006-CA-000657**
**Mims v. Western Southern Agency, Inc.**
**Rendered 4/6/07**
Mims appealed order of the Jefferson Circuit Court which granted Western-Southern's motion to dismiss suit claiming that the company and its agent had negligently failed to effectuate Mims's late father's intent to make her the sole contingent beneficiary of his life insurance policy.

COAKY held Mims has stated a cognizable claim for recovery of proceeds under the doctrine of substantial compliance, and thus it did not find it necessary to consider whether Kentucky law permits a third party beneficiary to pursue a negligence claim against an insurer, and thus vacate and remand. (From KY Cases)

**Uninsured Motorists Benefits**
**Case No. 2005-CA-002236**
**Dyer v. Providian Auto & Home Ins. Co.**
**Rendered 4/6/07**
The CA affirms grant of summary judgment to Providian Auto & Home Insurance in this uninsured motorist (UM) claim.

Appellants' decedent was struck and killed by an intoxicated employee of B&H Coal who was driving a company vehicle for personal use. He had no personal auto liability insurance. B&H was insured by Hartford. Appellants sued the driver, B&H, its directors and officers, and several

insurance companies in state court. Hartford filed a dec action in federal court on whether the driver was a permissive – and therefore insured – user. The state action was settled with a lump sum and payments over a number of years. The settlement agreement expressly excluded the waiver of any claims against Providian. Hartfords action was dismissed.

Appellants then sued Providian in federal court alleging a bad faith failure to pay UM benefits arising from the driver's status as an uninsured driver. That action was dismissed and appellants filed the instant action in state court with the same allegations. The state court granted SJ to Providian, holding that appellants were "ultimately fruitful in ascertaining the existence of a liability policy applicable to the offending vehicle."

On appeal, appellants argue that the receipt of a collateral payment (i.e., the settlement payout) is irrelevant for purposes of ascertaining their entitlement to UM benefits under Providian's policy. The question for the CA is: does the acceptance of the settlement payout from Hartford preclude her recovery under Providian's UM policy, notwithstanding Hartford's continued denial of coverage? In this case of first impression, CA holds "yes." This holding reasonably achieves the underlying purpose of KRS Chapter 304 by triggering UM coverage only when the tortfeasor's liability insurer (if any) cannot or will not provide coverage. "Coverage characterized as a settlement is coverage nonetheless." (From KY Cases)

**UIM/UM Stacking**
**Case No. 2005-CA-002213**
**Adkins v. KY National Insurance Co.**
**Rendered 4/6/07**
In this appeal, Adkins argued that Kentucky National improperly sought to unilaterally amend an insurance contract for the purpose of preventing Adkins from stacking three units of UM (uninsured motorist benefits) coverage.

Adkins had been paying three separate premiums for UM coverage for three vehicles, representing one unit of coverage per vehicle. Under that situation, the three policies would have been stacked for insureds of the first class (eg., the Adkins). However, Kentucky National mailed renewal materials, which stated that it would begin charging a single UM premium for the three units of coverage on the three vehicles. The Adkins began paying premiums according to these new terms. However, Adkins now argues that he was not given notice of Kentucky National's intention to change the terms of coverage and he never consented to the policy change.

The Court of Appeals disagreed noting the changes were mailed and a new "dec" page and policy were issued. Even though Adkins further claimed he was not told of the ramifications of this policy change, the notices were unambiguous.

More important than the notice issue was this underlying question of whether UM coverage may be stacked where a single UM premium is charged for multiple vehicles, and where the premium is not based on the number of vehicles covered.

Since SCOKY has treated the application of underinsured motorist benefits coverage (UIM) the same as UM coverage, COA relied upon a SCOKY decision and held an insurer is not required to stack multiple units of UM coverage which have been paid by a single premium, if that premium is not based on the number of vehicles insured. An insured has no reasonable expectation of stacking where he or she pays a single premium which does not vary based on the number of vehicles insured. (From KY Cases)

## KY SUPREME COURT:

**Damages (Permanent Impairment)**

**Case No. 2005-SC-000079-DG**
**Reece v. Nationwide Mutual Insurance Co.**
**Rendered 3/22/07**
SCOKY held that "the plaintiff need only prove with reasonable probability that the injury is permanent in order to obtain an instruction on permanent impairment of earning power".

This decision is significant for several reasons. First, SCOKY was unanimous with all concurring in Justice Schroder's majority opinion. Second, the rule is now clear when the plaintiff is entitled to instructions on what are typically referred to as "future wages" or "impaired capacity to labor and earn money."

A permanent injury entitles plaintiff to an instruction on capacity to earn money in the future. . . . period. No requirement for a vocational expert of other expert to connect any permanent restrictions to employment; no requirement for an AMA impairment rating. The jury is trusted to handle the decision based upon the doctor stating a permanent injury, and the plaintiff can simply testify how he or she is affected. (From KY Cases)