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COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
CASE NO. 2015-SC-00107-D

INDIANA INSURANCE COMPANY — APPELLANT

v. **ON DISCRETIONARY REVIEW FROM COURT OF APPEALS NO. 2013-CA-000338**
CAMPBELL CIRCUIT COURT NO. 09-CI-1175

JAMES DEMETRE — APPELLEE

AMICUS CURIAE BRIEF ON BEHALF OF INSURANCE INSTITUTE OF KENTUCKY

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that copies of this brief were served upon the following named individuals by first class mail on the 7th day of January, 2016: Jeffrey M. Sanders, Jeffrey M. Sanders, PLLC, 437 Highlands Avenue, Fort Thomas, KY 41075; Robert E. Sanders, Justin E. Sanders, The Sanders Law Firm, 1017 Russell Street, Covington, KY 41011; Donald L. Miller, II, Kristin M. Lomond, Quintaros, Prieto, Wood & Boyer, P.A. 9300 Shelbyville Road, Suite 400, Louisville, KY 40222; Michael D. Risley, Bethany A Breetz, Stites & Harbison PLLC, 400 West Market Street, Suite 1800, Louisville, KY 40222; Kevin C. Burke, 125 South 7th Street, Louisville, KY 40202; and Hon. Fred A. Stine IV, Judge, Campbell Circuit Court, 330 York Street, Newport, KY 41071.

BY: _____
RONALD L. GREEN

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PURPOSE

The within brief is respectfully submitted on behalf of the Insurance Institute of Kentucky as *Amicus Curiae*, in opposition to the analysis set forth in the opinion of the Court of Appeals and in defense of decisions of this Court setting out the parameters for the imposition of extracontractual damages on insurers within the Commonwealth. This case should be viewed in conjunction with the case of *Hollaway v. Direct General Insurance Company of Mississippi, Inc.*, pending before this Court as Case Number 2014-SC-00758. This *Amicus Curiae* likewise filed a brief in that case urging the Court to clarify this area of law, and in particular the confusion that has followed this Court's 4-3 opinion in *Farmland Mut. Ins. Co, v. Johnson*, 36 S.W.3d 368 (Ky. 2000) and its progeny that have had the effect of creating two conflicting views of claims brought under KRS 304.12-230 [the KUCSPA]. As demonstrated in *Hollaway*, one line of cases requires a threshold showing of actual subjective bad faith on the part of an insurer in order to impose liability, while the second line permits "experts" to second-guess claim handling activities as though the case were based on negligence and there was an applicable standard of care, often disregarding the motive of the insurer, the actual language of the KUCSPA, the lack of any causal connection between the alleged violation of statute, and any claimed injury. In this case the Court of Appeals paid lip service to the traditional requirements of extracontractual claims as set forth in *Wittmer v. Jones*, 864 S.W.2d 885 (Ky. 1993), *Guaranty Nat. Ins. Co, v. George*, 953 S.W.2d 946 (Ky. 1997), and *Motorists Mut. Ins. Co, v. Glass*, 996 S.W.2d 437 (Ky. 1997), but conducted no analysis of the facts of the case to determine if Demetre had produced evidence to meet those standards. If the Court of Appeals opinion is at all a guide, this

record is devoid of any evidence that Indiana Insurance made any decisions based on an evil motive or in reckless disregard of the insured's rights.[1] This case raises additional issues concerning the predicate for a "bad faith" claim based on KRS 367.220 and the proof that must be present in order to submit a claim for emotional distress damages to a jury.

ARGUMENT

I. THE COURT OF APPEALS CONFUSED AND CONFLATED THE ISSUE OF WHETHER IT WAS APPROPRIATE TO FILE A DECLARATORY JUDGMENT ACTION WITH THE ISSUE OF WHEN IT WAS FILED.

The Court of Appeals opinion recites the cliché that "[t]he very reason an insured purchases insurance is 'to assure prompt and bargained-for compensation when disaster strikes[.]'"*18. This cliché is harmless in a case where the "disaster" that strikes is one for which the insured purchased insurance. But it is misleading and unfair to invoke such an emotional appeal where the issue is whether the disaster in question is one that the insurer agreed to protect against. While the focus in these cases tends to be on the circumstances under which an insurer has an obligation to pay, there is no real disagreement with the proposition that an insurer should perform the contract where its obligations are clear. Often ignored, but equally important from a public policy standpoint, is the fact that an insurer has an equal obligation to decline to pay claims that it did not agree to cover. In the third party context, if there is no coverage, the insurer has no obligation to even defend. The troublesome area is between those two clear extremes.

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[1] In the *Holloway* case this *Amicus Curiae* made the case that the standard for the imposition of punitive damages is governed by KRS 411.184 and KRS 411.186, and submits that this standard should be applied to this case as well. But the facts of this case cannot withstand the most superficial analysis under the more relaxed reckless disregard standard either.

It may be that the facts relating to coverage are conflicted. Or it may be, as was the case here, that the applicable law was not clear. It is also possible that the pleadings may allege facts that create a duty to defend, but the actual facts suggest no coverage. To suggest that the insurer should pay or settle when it does not believe it there is coverage simply because the insured may be exposed to a self-insured loss is nonsensical.

Part of the Court of Appeals confusion may be a lack of understanding of the two distinct issues presented in a third party case of this kind. A liability policy of this type creates two distinct obligations on the part of the insurer. The first is to provide a defense and the second is to pay any judgment. *James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Ins.* Co., 814 S.W.2d 273, 279 (1991). A liability insurer does not agree to settle any claims, but instead contracts for the right to control any compromise. While it is true that the purchaser of a fire policy has contracted for some degree of security in the event of a fire, the purchaser of a liability does not contract for security from being involved in litigation. Instead, he contracts for a defense and payment of any judgment or settlement, and in this case Demetre received precisely that, even though it was never actually determined that he was entitled to coverage at all or in part.

So the issues of a defense and whether to file a declaratory judgment action are two different things based on quite dissimilar considerations. The contract requires defense, unless the facts plead are clearly outside the coverages of the insurance policy. The concept of a reservation of rights is for the benefit of the insured, not the insurer. Its purpose is to make sure that the insured is not misled by the fact that a defense is being provided. Nor does a defense under a reservation of rights create a paradox, at least not as that term is normally defined. The defense of the tort claim is most often unrelated to

the coverage issues; the Supreme Court has approved of this process unless an actual conflict of interest is created on the part of the attorney retained by a third party payer. KBA E-410. By definition, a defense under a reservation of rights makes perfect sense and cannot be a paradox.

There is no rule of law that governs how the insurer should proceed vis-à-vis the insured where there is a controversy as to coverage. The Kentucky General Assembly has specifically provided for the filing of an action for a declaration of rights under a contract where there is a dispute as to its terms or meaning. KRS 418.040. But there is no rule of law that an insurer must file an action under KRS 418.040, and an insurer would be within its rights to defend under a reservation of rights and defer the determination of coverage until the tort case was resolved. It should be noted that the KUCSPA has no provision that relates to the defense aspect of a liability policy, probably because it was never intended to apply to liability policies at all.[2] In the current case, the Court of Appeals makes an assumption, or more likely adopts the assumption made by Mr. Grayson that, had additional investigation been undertaken, the declaratory judgment action would have been resolved more quickly. But this is sheer speculation since Indiana did not have to file a declaratory judgment action at all, even if it is common practice to do so.[3]

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[2] See pages 1-2 of the Hollaway brief of Amicus Curiae Insurance Institute of Kentucky.

[3] This is one of many lose-lose situations that insurers find themselves in due to the lack of consistent definition and standards in this context. If an insurer filed a declaratory judgment action, the bad faith lawyer through his "expert/advocate" will claim that the insurer sued its own insured after taking the premiums. If no declaratory judgment action is filed, it will be claimed that the insurer should have resolved the coverage issue more quickly. If an action is filed and filed quickly, it will be claimed that the insurer was anxious to avoid coverage, but if the action is filed later in the process, it will be argued, as was the case here, that the coverage issue should have been resolved more quickly. The sad part is that if the insurer is before a judge that follows the relaxed standard as the Court of Appeals applied below, all of

The Court of Appeals at no point held that the decision to challenge coverage was without reasonable basis. There was no dispute that the "loss in progress" doctrine is a legitimate judicially recognized defense, and in fact the "expert" offered by Demetre conceded this fact. In *Guaranty Nat. Ins. Co, v. George*, 953 S.W.2d 946 (Ky. 1997), this Court made it very clear that the filing a declaratory judgment action in this type of case is normally appropriate. It provided a limited exception where the insurer "abuses its legal prerogative in requesting a court to determine coverage issues." *Id.* at 949. The Court's reference to Rule 11 suggests that the Court was referring to cases brought with no basis. This exception clearly does not apply to this case, as there was a clear basis for the coverage dispute. There were no "needless adversarial hoops to achieve any rights" required by Indiana here, because the "adversarial hoops" were intended to determine what those rights were and are "hoops" established by the statutes of Kentucky. Clearly, and as a matter of law, Indiana had a reasonable basis to contest coverage under the circumstances and to defend Demetre, or to defend Demetre and seek a declaration of rights. The issue the Court of Appeals should have focused on instead was whether Demetre had provided evidence other than the filing of declaratory judgment action that constituted a violation of the KUCSPA and caused cognizable damage.

II. THE COURT OF APPEALS OPINION FAILS TO EXPLAIN WHAT EVIDENCE SUPPORTED A FINDING OF CONDUCT THAT WOULD JUSTIFY PUNITIVE DAMAGES.

Beginning at the top of page 19 of the slip opinion through the end of the first full paragraph of page 20, the Court recited the facts which it contends show that Indiana

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these arguments raise a jury issue even though there is no proof of anything approaching bad faith. No industry can sustain a regulatory process where the regulations are determined after the fact, on an *ad hoc* basis by persons with a financial incentive to create a regulation designed to find improper behavior.

"violated the implied covenant of good faith and fair dealing and violated the Unfair Claims Settlement Practices Act." The opinion does not reveal the reasoning underlying this conclusion. The slightest analysis reveals that this is error for a number of reasons.

A. The Agent Was Told a Gas Station Had Been on the Premises

The Court stated that:

> It cannot be ignored that the jury heard evidence Demetre informed Indiana Insurance that a gas station had been operated on the property when he applied for insurance. Despite this obvious red flag warning of possible liability, Indiana Insurance issued the policy and accepted Demetre's premiums.

This "fact" is simply irrelevant. Indiana did not raise coverage issues based on the existence of a gas station on the property. The coverage issue related to the facts that suggested all or part of the pollution and damages had already occurred when the policy was issued. This not a "red flag," it is a red herring, and does not suggest anything relevant at all, let alone bad faith. Furthermore, the opinion does not suggest that the decision maker even knew about this "red flag," and without actual knowledge the adjustor could not have acted in reckless disregard of it.

B. Indiana Initiated a Coverage Defense While Failing to Defend Demetre

The Court of Appeals states that Indiana "immediately set in motion its defense of no coverage." But the gravamen of the claim made by Demetre at trial was that Indiana did not set in motion its coverage defenses quickly enough. This is the type of doublespeak commonly used by the bad faith lawyers, and parties involved in the court system deserve an objective assessment of the issues presented, not merely a regurgitation of bald assertions made by the advocates. Furthermore, there is no

provision in the KUCSPA that has anything to do with the use of declaratory judgment actions. In fact, the entire premise of the theory that Indiana should have filed a declaratory judgment action earlier and that this caused damage is a fallacy. The Court lost sight of the fact that at no time did Indiana have a duty to attempt to settle anything because liability was not reasonably clear. This is an example of the Court allowing an "expert/advocate" to define the law and then abdicate the Court's responsibilities to apply the law to the expert. As this Court recently stated in *Martin v. Commonwealth*, 456 S.W.3d 1 (Ky. 2015): "Seriously troubling to us is the judge's purposeful disregard of the sentencing-cap statute. Our judges are expected to serve as stalwarts of justice, representing the ideologies of fairness and the rule of law." Due process and fundamental fairness, as well as the constitutional right to access the court set forth in Ky Const. § 14, apply to insurers just like any other party, and this right includes an expectation that the court will fairly and impartially evaluate the facts and apply the law to reach an equitable conclusion. This requires more than the acceptance of the conclusory *ipse dixit* of advocates for one side as a substitute for thoughtful and impartial analysis of legitimate inferences.

The flip-side of this point as asserted by the panel below is that while contesting coverage, Indiana failed to provide a defense. But the Court again trips over the actual facts, as opposed to the supposition and spin offered by Demetre's advocates. The Court conceded that Indiana hired counsel for Demetre, but suggests that counsel did not act independently. The Court does not say what proof there was of this fact, but it is counsel's responsibility to exercise independent professional judgment in the defense of

his client. This Court is quite clear about this duty.[4] In SCR 3.130(5.4(c)) this Court has stated:

> (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the **lawyer's professional judgment** in rendering such legal services.

While the insurance contract gives the insurer the right to control the defense, defense counsel must nonetheless exercise his or her own independent professional judgment in conducting the defense. KBA E-410. In KBA E-416, it was noted that: "Kentucky's one-client view differs from the position taken in some states, and expressed by some commentators, that the tripartite relationship (or "eternal triangle") of insured, insurer, and defense counsel actually entails two clients: the insured and the insurer". KBA E-416 at page 6; *see also American Ins. Ass'n v. Kentucky Bar Ass'n*, 917 S.W.2d 568 (Ky. 1996). The defense of the insured is an entirely different matter than the investigation of the insurance claim, and it is ultimately up to the defense counsel on whether the retention of an expert may be helpful.

But more importantly, this assertion by the Court, parroting the bald assertions of the advocates for Demetre, is simply false. On page 5 of the opinion, the Court observes that defense attorney Schenkel requested consultation with an expert to determine the status of the land. In the very next sentence, the Court observed that Schenkel's office consulted with an expert. Furthermore, the Court simply ignores the admission of Demetre's "expert/advocate" at trial that Indiana did in fact hire an expert that Schenkel used to defend a claim by Harris for equitable relief. (TAPE 09/26/12; 01:50:29).

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[4] KBA E-331, KBA E-368, KBA E-409, KBA E-410, KBA E-416.

Finally, even if the KUCSPA applied to the defense of an insured, and if litigation decisions about when to hire an expert could be considered non-litigation conduct in contravention of this Court's decision in *Knotts v. Zurich Ins. Co.*, 197 S.W.3d 512 (Ky. 2006), the alleged delay was related to coverage issues and the hiring of experts had nothing to do with coverage. The Court of Appeals does not even attempt to draw a causal connection between the conduct of the defense by counsel and the damage claimed, because no such connection can be found. Criticisms of how defense counsel conducted the defense are simply not relevant to the bad faith claims Demetre sought to assert. And even if the decisions about when and why to consult with experts could be criticized, there is no proof to suggest that this decision was, more likely than not, based on evil motives as opposed to a difference of opinion, negligence, or even incompetence. All are equally plausible motives, and thus no proper inference can be drawn one way or another.[5]

But no matter what the Court thinks of the decisions about the hiring of experts, or Mr. Schenkel's handling of the defense, Indiana was never under an obligation to attempt to settle the claims because liability was at no point reasonably clear. In fact, Indiana is being punished by this opinion for making the decision to attempt settlement

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[5] One has to wonder if the Court of Appeal's willingness to just assume bad faith is influenced by its observations about Mr. Magi. Early in the opinion, the panel notes that there was evidence that he had closed 75% of his files without payment. To mention this behavior suggests that the panel felt it showed some kind of bad attitude about payment of claims. If Mr. Magi were a front line adjustor handling claims, this might even be justified. But he specialized in environmental claims, many of which are excluded in standard liability policies. More importantly, he was in the Special Claims Unit, so all the claims he saw presented serious obstacles to coverage. Viewed in the correct light of reality, as opposed to unfounded bias, the fact that he paid 25% of the claims could just as easily show that he paid claims that were not actually owed, or where claims were dubious. Litigants are entitled to have their cases decided on facts and proper proof, not speculation fueled by prejudice.

rather than continue to litigate the coverage issue or to fully litigate the tort claims.[6] It had every right to do so, and if this opinion stands it will be used as an example by attorneys to counsel the adjusters they work with that, once a position is taken, the failure to fight to the end will simply prompt a bad faith claim. This is the opposite of the stated goal of the KUCSPA to encourage prompt resolution of claims.

C. The Investigation by Indiana Insurance

A central issue presented by this appeal is whether Indiana violated KRS 304.12-230(4)[7] at all. The statute lists actions that are unfair claims settlement practice, including:

> (4) Refusing to pay claims without conducting a reasonable investigation based upon all available information

First of all, the entire basis for a private cause of action is KRS 446.070. Where a claim is based on a statute, the conditions set out in the statute must be met. *See, e.g., Clark v. Finch's Adm'r*, 254 S.W.2d 934 (1953). KRS 304.12-230(4) only applies where an insurer refuses to pay a claim. Under its policy of insurance, Indiana had a duty to defend, and it performed that duty. It also had a duty to pay any judgment, though there never was one. Instead, Indiana made a decision to settle the tort claim even though it was not required to do so by the KUCSPA or its policy. This statute clearly is drafted to apply to typical first party policies where the insured turns in a loss, explains the

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6 The Court of Appeals adopts a misstatement by Demetre that "[u]ntil new counsel was retained to represent Demetre and after Demetre had been forced to hire personal counsel to defend him in Indiana Insurance's declaratory judgment actions, the Harris family's claims were investigated and quickly resolved." But Grayson testified that Mr. Sanders was hired when the initial claim was made, long before there was a coverage issue raised. (TAPE 09/26/12; 01:51:50).

7 The Court cited a number of provisions of the KUCSPA but never explained how any of them were violated. Slip Opinion at 12. Of course, additional issues are whether the violation was in bad faith, and whether the violation caused any damage.

circumstances of the loss, and the insurer takes the position that the loss is not covered. The language could be stretched to cover a liability insurer's decision as to coverage, but there is no serious argument that any additional investigation was needed on the coverage issues. What Demetre suggests here, and the Court of Appeals adopted, is a rule where an insurer is strictly liable for the exercise of the defense attorneys' judgment by conflating the defense with the insurer's investigation. The Court of Appeals states that the insurer cannot hide behind defense counsel, but this misses the point entirely. It is this Court that has required insurers to hire outside counsel to represent a third party insured, based on the idea that the insurer cannot practice law. Most adjustors are not attorneys and do not pretend to be such. They must rely heavily on counsel in making decisions beyond their expertise in a number of areas, including when and under what circumstances an expert may be beneficial. The Court of Appeals essentially says that the adjustors know better than the attorneys, which raises the question of why the insurance industry is forced to hire them at all. The reality is that attorneys are critical to the defense of insureds. This Court has made it clear that it is important that attorneys exercise their independent judgment about these matters, and in any event, this is litigation conduct which was taken outside the realm of bad faith claims by *Knotts v. Zurich Ins. Co.*, 197 S.W.3d 512 (Ky. 2006).

But even if the Court decides that KRS 304.12-230(4) applies to the defense of a tort claim, the "expert" was allowed to advocate a definition of the duty expressed by that statute that is inconsistent with this Court's expression of what that statute requires. Grayson's view was that an adjustor is to assume the role of the legendary Paul Drake[8] or

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[8] For younger readers Paul Drake was Perry Mason's private detective.

Sherlock Holmes. That is not what the statute requires. In the seminal case defining this tort, this Court rejected the argument that the insurer had an obligation to investigate by obtaining its own appraisals. *Wittmer v. Jones*, 864 S.W.2d 885, 889-90 (Ky. 1993). The available information does not refer to information the insurer could go out and affirmatively discover or uncover, but is the information provided by the insured (or tort claimant) in support of their claim. *See also Lenning v. Commercial Union Ins. Co.,* 260 F.3d 574 (6th Cir. 2001); *Naugle v. Allstate Ins. Co.*, 2003 WL 21774012 (6th Cir. 2003).

However, even if Demetre has shown a violation of §4 of the KUCSPA, and that the violation was motivated by an evil motive or a reckless disregard of known rights, the cause of action must nonetheless fail due to the absence of the most fundamental aspect of tort law, to-wit: ***"but for" causation***. There is no showing that additional investigation would have changed any result, and the Court of Appeals opinion reveals that it conclusively would not have made a difference. A failure to conduct a proper investigation cannot be a cause unless a proper investigation would have revealed some critical fact that more likely than not would have changed events. For example, the Court says as part of the investigation Schenkel consulted with an expert and was advised the property was not a threat and therefore the claim lacked merit. Slip Opinion at 5. Then the Court reports that the successor counsel began an investigation, and reached the same conclusion that Schenkel did. Slip Opinion at 7. In other words, the allegedly inadequate investigation revealed the same conclusion that the allegedly proper investigation did. Thus, not only did Demetre fail to prove causation, the Court itself pointed out that causation was impossible but affirmed the erroneous judgment anyway. And on top of

that, the Court missed entirely that the allegedly deficient investigation had nothing to do with the issue that caused the alleged delay, the coverage position taken.

This Court truly needs to regain control over this tort. As pointed above, the first step is to reestablish the meaning of bad faith and repudiate the "expert" second guessing and nitpicking that has become standard in these cases in practice. But equally important is that the Court stringently enforce the basic rule that there is no cause of action for a violation of the KUCSPA without proof that the violation caused damage. "Absent resultant damage, there can be no cause of action premised upon the violation of a statute, i.e.., the UCSPA." *Motorists Mut. Ins. Co. v. Glass*, 996 S.W.2d 437 (Ky. 1997). While this Court has been clear about this, this Court's holdings are routinely ignored by the courts below. If the insurer had a reasonable basis for contesting coverage, then any other violations cannot, by definition, be the cause of "delay". While it is true that properly disputing coverage does not relieve an insurer of the obligation to comply with the KUCSPA, to be actionable a violation must cause its own damage. In this case, Demetre has made no such showing.

III. THE CONSUMER PROTECTION ACT OBVIOUSLY REQUIRES DAMAGE OTHER THAN ATTORNEY FEES.

If it were true that attorney fees constituted an "ascertainable loss of money or property" within the meaning of KRS 367.220, then the provision providing for recovery of attorney fees would be superfluous. Clearly, the legislature did not intend attorney fees to qualify as a trigger for the CPA.

IV. THE COURT DOES NEED TO ESTABLISH A THRESHOLD OF PROOF NECESSARY TO MAINTAIN A CLAIM FOR EMOTIONAL DISTRESS.

This Court has previously made it clear that a Plaintiff in a KUCSPA case may recover emotional distress only if there is "direct or circumstantial evidence from which the jury could infer that anxiety or mental anguish in fact occurred" and that "proof must be clear and satisfactory; and evidence based on conjecture will not support a recovery for such damages." *Motorists Mut. Ins. Co. v. Glass,* 996 S.W.2d 437, 454 (Ky. 1997). But the Court has never explained what types of proof would be clear and satisfactory. If mere self-serving declarations by the Plaintiff were sufficient, then there would have been no reason to even bring up the subject since there is no weaker basis for awarding damages imaginable. Indiana suggests that an appropriate standard would be that established in *Osborne v. Keeney*, 399 S.W.3d 1 (Ky. 2012). Whether the Court favors this standard, or desires to establish a slightly different one for this type of case, there are some particular areas of concern that should be explored and examined in the Court's consideration of this difficult issue.

This type of case, assuming emotional distress at all, almost always has a claimant with the potential for both compensable and non-compensable emotional distress. For example if an insured loses his house to fire, the loss itself may cause emotional distress. Even if the conduct of the insurer is deemed to cause additional emotional distress, any standard of proof should insure that compensation is limited to that which was caused by the wrongful conduct. By the same token, a tort claimant may sustain emotional distress relating to the injuries, and in fact may have already been compensated for those damages. Any standard adopted by the Court should be careful to restrict the claimant to any emotional distress caused by the KUCSPA violation. The same is true in the case before the Court. Indiana did not cause Demetre to be sued, and emotional distress

relating to being sued and exposed to litigation should not be compensable. The reality is that the claimant themselves cannot likely distinguish between causes (at least not without a script supplied by counsel) which is one reason there should be required some direct or circumstantial proof beyond self-serving statements by the Plaintiff. The standard should not only require proof to suggest actual emotional distress, but also a direct causal relation to the alleged violation.

CONCLUSION

The Amicus Curiae and the industry it represents are fully supportive of the goals of excellence in the handling of claims, but decisions like the one at issue herein are in this regard counterproductive. If the Court desires to regulate the handling of claims through the imposition of this type of liability, it is critical that the industry know in advance what is expected. The tort was originally intended to be a limited remedy for particularly egregious behavior, but has become the basis for extortionist threats and *ex post facto* setting of rules. This and other cases presently before the Court provide an opportunity to return the rule of law to the regulation of insurance, and it is respectfully submitted that the Court should take this opportunity to do so.

Respectfully submitted,

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