IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2003 Term

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No. 31226

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

HUBERT J. BAREFIELD,
Plaintiff

v.

DPIC COMPANIES, INC.,
Defendant

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF WEST VIRGINIA
Hon. W. Craig Broadwater, Judge
Case No. 3:02-CV-02

CERTIFIED QUESTION ANSWERED

Submitted: September 23, 2003
Filed: June 25, 2004

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JUSTICE STARCHER delivered the Opinion of the Court.

JUSTICE DAVIS concurs and reserves the right to file a concurring opinion.

JUSTICE ALBRIGHT concurs and reserves the right to file a concurring opinion.

JUSTICE MAYNARD concurs in part and dissents in part, and reserves the right to file a separate opinion.

SYLLABUS BY THE COURT

1. "A de novo standard is applied by this Court in addressing the legal issues presented by a certified question from a federal district or appellate court." Syllabus Point 1, *Light v. Allstate Ins. Co.*, 203 W.Va. 27, 506 S.E.2d 64 (1998).

2. "The Unfair Trade Practices Act, W.Va.Code §§ 33-11-1 to 10, and the tort of bad faith apply only to those persons or entities and their agents who are engaged in the business of insurance." Syllabus Point 2, *Hawkins v. Ford Motor Co.*, 211 W.Va. 487, 566 S.E.2d 624 (2002).

3. "A defense attorney who is employed by an insurance company to represent an insured in a liability matter is not engaged in the business of insurance. The defense attorney is therefore not directly subject to the provisions of the West Virginia Unfair Trade Practices Act, *W.Va. Code*, 33-11-1 to -10." Syllabus Point 5, *Rose v. St. Paul Fire & Marine Ins. Co.*, ___ W.Va. ___, ___ S.E.2d ___ (No. 31317, June 25, 2004).

4. "A claimant can establish a violation of the West Virginia Unfair Trade Practices Act, *W.Va. Code*, 33-11-1 to -10, by showing that an insurance company, through its own actions, breached its duties under the Act by knowingly encouraging, directing, participating in, relying upon, or ratifying wrongful litigation conduct of a defense attorney hired by the insurance company to represent an insured." Syllabus Point 6, *Rose v. St. Paul Fire & Marine Ins. Co.*, ___ W.Va. ___, ___ S.E.2d ___ (No. 31317, June 25, 2004).

5. "To maintain a private action based upon alleged violations of W.Va. Code § 33-11-4(9) in the settlement of a single insurance claim, the evidence should establish that the conduct in question constitutes more than a single violation of W.Va. Code § 33-11-4(9), that the violations arise from separate, discrete acts or omissions in the claim settlement, and that they arise from a habit, custom, usage, or business policy of the insurer, so that, viewing the conduct as a whole, the finder of fact is able to conclude that the practice or practices are sufficiently pervasive or sufficiently sanctioned by the insurance company that the conduct can be considered a 'general business practice' and can be distinguished by fair minds from an isolated event." Syllabus Point 4, *Dodrill v. Nationwide Mut. Ins. Co.*, 201 W.Va. 1, 491 S.E.2d 1 (1996).

6. "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syllabus Point 2, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968).

7. When an insurance company hires a defense attorney to represent an insured in a liability matter, the attorney's ethical obligations are owed to the insured and not to the insurance company that pays for the attorney's services.

8. Because a defense attorney is ethically obligated to maintain an independence of professional judgment in the defense of a client/insured, an insurance company possesses no right to control the methods or means chosen by the attorney to defend the insured.

9. The conduct of an insurance company or other person in the business of insurance during the pendency of a lawsuit may support a cause of action under the West Virginia Unfair Trade Practices Act, *W.Va. Code*, 33-11-1 to -10.

10. An insurance company cannot be held liable under the West Virginia Unfair Trade Practices Act, *W.Va. Code*, 33-11-1 to -10, for the actions of a defense attorney retained to defend an insured, when the defense attorney's strategy and tactics are a result of the attorney's independent, professional discretion with regard to the representation of the client-insured, and are not otherwise relied upon or ratified by the insurance company in a manner contrary to the Act.

Starcher, Justice:

This case is before this Court upon a certified question from the United States District Court for the Northern District of West Virginia at Martinsburg. The plaintiff in the federal court lawsuit, Hubert J. Barefield, alleges that an insurance company, defendant DPIC Companies, Inc., violated the West Virginia Unfair Trade Practices Act in the litigation and settlement of a legal malpractice action filed by Mr. Barefield. The plaintiff contends that the defendant hired a defense attorney to represent its insured in the underlying legal malpractice action, and permitted or required the attorney to violate the Act.

The question from the district court concerns whether an insurance company may be held liable under the Act for the conduct of a defense attorney hired to represent the interests of an insured in a liability action, and whether an insurance company can be held liable for violations of the Act that occur after a lawsuit is filed against an insured. We answer the first portion of the district court's question in the negative, but answer the second portion in the affirmative.

I.
Facts & Background

In 1992, plaintiff Hubert J. Barefield was injured in Virginia. Mr. Barefield sought medical treatment from a doctor in Virginia, and continued to receive treatment through June 1994.

On October 17, 1994, Mr. Barefield met with a West Virginia attorney, "Attorney A," to investigate the possibility of filing a medical malpractice action in Virginia against the Virginia doctor. Mr. Barefield signed a contract with Attorney A on February 21, 1995, and Attorney A later videotaped a sworn statement with Mr. Barefield, in which she questioned him at length and established the factual predicates for filing a medical malpractice lawsuit.

Attorney A never filed a medical malpractice lawsuit on Mr. Barefield's behalf, thereby missing the Virginia statute of limitation. Mr. Barefield then retained another law firm to represent him in a legal malpractice claim against Attorney A, and in April 1999 Mr. Barefield's new attorneys informed Attorney A's malpractice insurer, defendant DPIC Companies, Inc. ("DPIC"), of the legal malpractice claim. DPIC then retained a defense attorney, "Attorney S," to represent Attorney A. All subsequent discussions and negotiations with the plaintiff on behalf of DPIC were apparently conducted solely by Attorney S.

Mr. Barefield filed his legal malpractice claim against Attorney A in October 1999, and trial was scheduled for February 12, 2001. Before and after filing the legal malpractice lawsuit, Mr. Barefield's attorneys submitted various settlement demands to Attorney S – demands starting as high as $2,000,000.00 – and included reports indicating that actionable medical malpractice had been committed under Virginia law against Mr. Barefield by his Virginia doctor, and that Attorney A had committed legal malpractice by failing to timely file the medical malpractice lawsuit. At the same time, Attorney S was repeatedly told

that Mr. Barefield was in financial straits and in poor physical health.[1] Attorney S, on behalf of DPIC, rejected the plaintiff's settlement demands.[2]

In February 2000, DPIC authorized Attorney S to make its first offer to settle the case in a "high-low" arrangement, such that DPIC would make an interim payment to the plaintiff of $25,000.00 in exchange for a cap on DPIC's liability at $250,000.00. The plaintiff rejected the offer,[3] but DPIC eventually made an interim payment to Mr. Barefield

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[1]For instance, on June 25, 1999 – nearly four months before the legal malpractice action was filed – one of Mr. Barefield's attorneys stated in a letter to Attorney S:

> As you know, I have been working to assemble a complete Demand Package and List of Damages on behalf of Mr. Barefield. As you have probably anticipated, his clear totals are rapidly approaching a multi-million dollar level. I would request that you notify me of Ms. [A.]'s policy limits as expediently as possible as we will likely be making a policy limits demand.
>
> I remind you that Mr. Barefield . . . [has] been living at the poverty line for a number of years now. Accordingly, an immense amount of appreciation would be felt if we both could assign this case a priority status and avoid long delays between communications and exchanges of information.

[2]DPIC asserts that Attorney S initially rejected the settlement demands, and made no counter-offers, on the belief that the two-year Virginia medical malpractice statute of limitation had already expired when Mr. Barefield first spoke with Attorney A in October 1994. Mr. Barefield's attorneys subsequently gave Attorney S a report showing that under Virginia law, medical malpractice is a "continuing tort" that occurs so long as the plaintiff/patient is being treated by the allegedly-negligent doctor. Mr. Barefield was last treated by his Virginia doctor in June 1994, five months before he visited Attorney A.

[3]In a February 28, 2000 letter to Attorney S, counsel for Mr. Barefield rejected the settlement offer as "a woefully inadequate offer under the circumstances."

> As we all know, liability is reasonably clear. It appears that we are only arguing as to the amount of damages. . . . Please help us and Mr. Barefield understand that this is not just an effort by

(continued...)

of $5,000.00 in April 2000 (and the parties agreed this amount would be credited against any final settlement).

On November 29, 2000, after further settlement negotiations that included discussions about Mr. Barefield's financial and medical situation, Mr. Barefield agreed to settle his claim for $250,000.00, the highest amount Attorney S had proposed in February 2000. Mr. Barefield now contends he believed his case was worth more, but that he accepted this settlement primarily because of his poor financial and medical condition at the time.

One year later, on November 29, 2001, Mr. Barefield filed the instant action in the Circuit Court of Berkeley County against DPIC alleging that DPIC violated the West Virginia Unfair Trade Practices Act ("UTPA"), *W.Va. Code*, 33-11-1 to -10, in its defense and settlement of the legal malpractice action. Mr. Barefield alleged that DPIC, through the actions of its defense attorney, Attorney S, delayed acting on Mr. Barefield's claim even though Attorney A's liability was reasonably clear, and thereby took advantage of Mr. Barefield's physical and financial difficulties to negotiate a settlement far lower than what his claim was worth, in violation of the Act. Mr. Barefield took the position that on behalf

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[3](...continued)

> DPIC to get out of the case for less money than the case deserves, knowing Mr. Barefield's desperate financial situation. . . . I would be interested to learn why DPIC feels the damages should be capped at $250,000.00 when past medical bills alone total at least $196,848.59. Mr. Barefield will continue to require medication throughout his life which will total at least $12,000.00 per year. If you or DPIC have anything to indicate that our damages are not what we say they are, please advise us immediately.

of DPIC, Attorney S had breached several duties owed to him under the Act, including a duty to promptly conduct a reasonable investigation of his claim, and a duty to in good faith attempt to effect a prompt, fair and equitable settlement of his claim once Attorney A's liability became reasonably clear. *See W.Va. Code*, 33-11-4(9) [2002]. The plaintiff alleged that DPIC's acts, or its failures to act, were not isolated but resulted from DPIC's general business practices in violation of the Act.

DPIC removed the action from state court to the United States District Court for the Northern District of West Virginia. DPIC subsequently moved for summary judgment to dismiss Mr. Barefield's action, contending that an insurance company cannot be held liable under the UTPA for the actions of a defense attorney hired to represent an insured in a liability insurance matter. Furthermore, DPIC contended that the UTPA does not apply to claims that are in litigation, and therefore did not apply to the protracted settlement negotiations that occurred after Mr. Barefield filed his legal malpractice suit.

II.
Certified Question

The district court did not rule upon DPIC's motion for summary judgment to dismiss the plaintiff's action. Instead, the district court certified the following question to this Court:

> Under the West Virginia Unfair Trade Practices Act, specifically W.Va. Code § 33-11-4(9), is an insurer liable to a third party for the conduct of an attorney hired by the insurer, when that attorney is hired by the insurer to represent the

> insurer's insured, and when the attorney's conduct took place during and after the initiation of a civil action against the insurer's insured for legal malpractice?

The district court did not directly answer that part of the question relating to whether an insurance company could be held liable for the actions of an attorney hired to defend an insured in a liability matter. However, the district court did conclude that "because the attorney's actions in this case took place *after* litigation was initiated, the West Virginia Unfair Trade Practices Act does not apply."

III.
Discussion

Before answering the questions certified by the district court, it is important to point out that we are not sitting as an appellate court; rather, pursuant to the Uniform Certification of Questions of Law Act, *W.Va. Code*, 51-1A-1 to -13 [1996], we are simply asked to answer questions of law. Accordingly, the factual record regarding the legal issue in dispute must be sufficiently precise and undisputed, and this Court will assume that the findings of fact by the certifying court are correct. Further, the legal issue must substantially control the case. *See* Syllabus Point 5, *Bass v. Coltelli*, 192 W.Va. 516 453 S.E.2d 350 (1994); *Mutafis v. Erie Ins. Exchange*, 174 W.Va. 660, 663, 328 S.E.2d 675, 678 (1985).

This Court employs a plenary standard of review when we answer certified questions from a federal district court. In Syllabus Point 1 of *Light v. Allstate Ins. Co.*, 203 W.Va. 27, 506 S.E.2d 64 (1998), we held that "[a] de novo standard is applied by this Court

in addressing the legal issues presented by a certified question from a federal district or appellate court." *Accord*, Syllabus Point 1, *Bower v. Westinghouse Elec. Corp.*, 206 W.Va. 133, 522 S.E.2d 424 (1999) ("This Court undertakes plenary review of legal issues presented by certified question from a federal district or appellate court."). However, when a certified question is framed so that this Court is not able to fully address the law which is involved in the question, then this Court retains the power to reformulate the questions certified to it. Syllabus Point 3, *Kincaid v. Mangum*, 189 W.Va. 404, 432 S.E.2d 74 (1993).

We discern that there are two separate issues under the Unfair Trade Practices Act contained within the district court's certified question, namely:

(1) Can an insurance company be liable under the Act for the conduct of a defense attorney hired by the insurance company to represent the insurance company's insured in a liability matter; and

(2) Can an insurance company under any circumstances be held liable for its violations of the Act that occur after the filing of a civil action against an insured?

We reformulate the district court's question to consider these two issues separately. As we discuss in detail below, we answer the first question "no,"[4] and the second question "yes."

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[4]However, as we discuss in more detail in both Sections III.A. and III.B., *infra*, an insurance company can be held liable for its own actions that violate the UTPA, when the insurance company knowingly encourages, directs, participates in, relies upon, or ratifies wrongful conduct by a defense attorney hired by the insurance company to represent an insured in a liability matter. *See* Syllabus Point 6, *Rose v. St. Paul Fire & Marine Ins. Co.*, ___ W.Va. ___, ___ S.E.2d ___ (No. 31317, June 25, 2004).

A.

Liability of an insurance company under the UTPA for the actions of a defense attorney

The plaintiff in the instant action, Mr. Barefield, contends that an insurance company has a duty under the UTPA to avoid, among other things, engaging in unfair or abusive settlement practices. The plaintiff further contends that this duty cannot be delegated to any other person, including a defense attorney hired by the insurance company to defend the interests of an insured in a liability matter. In other words, the plaintiff argues that because the insurance company could not, under the UTPA, legally refuse to settle the plaintiff's claim once liability became reasonably clear, the insurance company could not then legally instruct Attorney S, as an agent of the insurance company, to refuse to settle the plaintiff's claim as a way of avoiding responsibility under the UTPA.

The defendant insurance company, DPIC, argues that an attorney retained by an insurance company to defend an insured must, under the *Rules of Professional Conduct*, defend the case in the best interests of the insured – not the insurance company – and the insurance company cannot infringe on the attorney's duties to the insured.[5] The defendant therefore contends that the defense attorney is not an agent of the insurance company, and that any allegations of unfair conduct against the attorney for aggressive or wrongful litigation actions cannot constitute a violation of the UTPA.

[5]We address this argument in Section III.B., *infra*.

We recently addressed this precise issue in *Rose v. St. Paul Fire & Marine Ins. Co.*, ___ W.Va. ___, ___ S.E.2d ___ (No. 31317, June 25, 2004). As we noted in *Rose*, the purpose of the UTPA "is to regulate trade practices *in the business of insurance*[.]" ___ W.Va. at ___, ___ S.E.2d at ___ (Slip Op. at 9), *quoting W.Va. Code*, 33-11-1 [1974] (emphasis added). This is because "[t]he Unfair Trade Practices Act, W.Va. Code §§ 33-11-1 to -10, and the tort of bad faith apply only to those persons or entities and their agents who are engaged in the business of insurance." Syllabus Point 2, *Hawkins v. Ford Motor Co.*, 211 W.Va. 487, 566 S.E.2d 624 (2002).

Examining the phrase "business of insurance" as used in the UTPA, we stated in *Rose* that:

> . . . we do not perceive a defense attorney, employed by an insurance company to represent an insured in a liability matter, to be a person who is "in the business of insurance." There is nothing to suggest that the defense attorneys in this case had any contractual obligations to pay the appellee's claim . . . nor anything to suggest the defense attorneys made, solicited, negotiated, or otherwise directly acted in any manner pursuant to the terms of an insurance contract. The defense attorneys were employed by the insurance company to defend the interests of the insured; the insurance contract at issue bound only the insurance company and the insured. . . . [T]he defense attorneys' ethical attorney-client obligations were to the insured. . . . Any obligations imposed by an insurance contract were between [the insured] and [the insurance company], and the defense attorneys were neither parties to nor bound by that contract.

___ W.Va. at ___, ___ S.E.2d at ___ (Slip Op. at 13).

We concluded in Syllabus Point 5 of *Rose* that:

> A defense attorney who is employed by an insurance company to represent an insured in a liability matter is not engaged in the business of insurance. The defense attorney is therefore not directly subject to the provisions of the West Virginia Unfair Trade Practices Act, *W.Va. Code*, 33-11-1 to -10.

We see no difference between the facts of the instant case and those in *Rose*.[6] The defense attorney, Attorney S, was employed by the insurance company, DPIC, to represent the interests of an insured, Attorney A, against a lawsuit seeking to impose civil liability for legal malpractice. We see nothing in the record presented to suggest that Attorney S was in any way engaged in the business of insurance. Accordingly, the defense attorney was not subject to the provisions of the UTPA, and his actions, standing alone, cannot form the basis of an action against the insurance company.

This does not mean, however, that the defendant is fully absolved from any potential responsibility by our holding. We made clear in *Rose* that an insurance company in the business of insurance must continue to comply with the UTPA, and can be held liable for its *own* actions that violate the UTPA – regardless of the actions of a defense attorney it might employ to defend an insured. As we said in Syllabus Point 6 of *Rose*:

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[6]We made clear that our holding in *Rose* was limited solely to "an independent attorney, hired by an insurance company to defend the interests of a defendant-insured under a liability insurance policy against a claim made by a plaintiff[.]" ___ W.Va. at ___ n. 7, ___ S.E.2d at ___ n. 7 (Slip Op. at 14, n. 7). We did not consider "the case of an attorney who is hired by an insurance company in other circumstances – such as to investigate or give advice upon the validity of a claim in the same fashion as a company claims representative; to defend the interests of the insurance company; or an attorney who works 'in house' for the company or in a 'captive' law firm that is employed exclusively by the insurance company to represent only the company's insureds." *Id*.

> A claimant can establish a violation of the West Virginia Unfair Trade Practices Act, *W.Va. Code*, 33-11-1 to -10, by showing that an insurance company, through its own actions, breached its duties under the Act by knowingly encouraging, directing, participating in, relying upon, or ratifying wrongful litigation conduct of a defense attorney hired by the insurance company to represent an insured.

It is well established, of course, that if a plaintiff is alleging that an insurance company violated the UTPA by committing an unfair claim settlement practice, as set forth in *W.Va. Code*, 33-11-4(9) [2002], the plaintiff must establish that the insurance company had a "general business practice" of committing unfair claim settlement practices and that the breach of the law was not an isolated event. *See* Syllabus Point 3, *Jenkins v. J.C. Penney Cas. Ins. Co.*, 167 W.Va. 597, 280 S.E.2d 252 (1981), *overruled on other grounds by State ex rel. State Farm Fire & Cas. Co. v. Madden*, 192 W.Va. 155, 451 S.E.2d 721 (1994). "It is possible that multiple violations of W.Va. Code, 33-11-4(9), occurring in the same claim would be sufficient [to establish a 'general business practice.']" *Jenkins*, 167 W.Va. at 610, 280 S.E.2d at 259-60. As we stated, in Syllabus Point 4 of *Dodrill v. Nationwide Mut. Ins. Co.*, 201 W.Va. 1, 491 S.E.2d 1 (1996):

> To maintain a private action based upon alleged violations of W.Va. Code § 33-11-4(9) in the settlement of a single insurance claim, the evidence should establish that the conduct in question constitutes more than a single violation of W.Va. Code § 33-11-4(9), that the violations arise from separate, discrete acts or omissions in the claim settlement, and that they arise from a habit, custom, usage, or business policy of the insurer, so that, viewing the conduct as a whole, the finder of fact is able to conclude that the practice or practices are sufficiently pervasive or sufficiently sanctioned by the insurance company that the

> conduct can be considered a 'general business practice' and can be distinguished by fair minds from an isolated event.

The district court's certified question asked, in part, whether under the UTPA "an insurer [is] liable to a third party for the conduct of an attorney hired by the insurer, when that attorney is hired by the insurer to represent the insurer's insured[.]" We answer this portion of the district court's question "no," because defense attorneys are not engaged in the business of insurance, and the insurance company cannot be held liable for merely hiring the attorney to represent an insured. The insurance company may, however, be liable for its *own* conduct if it is shown that the company breached the Act by knowingly encouraging, directing, participating in, relying upon or ratifying the wrongful conduct of an attorney hired by the insurance company.

B.

Duties under the UTPA after the initiation of a civil action

The district court concluded in its answer to the certified question – as it had concluded in an earlier opinion, *McDaniel v. Travelers Property Cas. Ins. Co.*, 121 F.Supp.2d 508 (N.D.W.Va. 2000) – that all conduct by an insurance company which takes place after the filing of a civil action against the insurance company's insured, regardless of the nature of that conduct, cannot under any circumstances support a cause of action against the insurance company under the UTPA. As the district court stated in its certification order, quoting its earlier opinion in *McDaniel*, "an insurance company's actions after litigation is instituted cannot be properly introduced as bad faith." *See McDaniel*, 121 F.Supp.2d at 512.

In other words, the district court ruled that an insurance company has absolutely no duty whatsoever to comply with the requirements of the UTPA once a claimant files a lawsuit against an insurance company's insured.

The defendant insurance company argues that the district court's interpretation of the UTPA is correct, and argues that the UTPA is designed to regulate conduct relating to "claims," not conduct relating to "litigation."

The plaintiff counters that the UTPA does not distinguish between unfair trade practices committed before or after litigation has commenced, and argues that the UTPA does not state that the provisions of the law become inoperative when a civil action is filed. As the plaintiff's attorney summarized at oral argument, "if it's an unfair trade practice the day before suit is filed, it's an unfair trade practice the day after suit is filed."

The arguments of the parties illustrate differing views of public policy, views that we believe can be reconciled. On the one hand, the plaintiff argues that the defendant insurance company is claiming complete immunity for its post-litigation conduct that violates the UTPA. The plaintiff suggests that adopting the defendant's arguments would permit an insurance company to abuse the legal system and delay the resolution of valid claims. The public policy encompassed by the plaintiff's arguments is that the UTPA was enacted so that insurance companies would be required to act fairly, promptly resolve valid claims where the issues are not legitimately in dispute, and not use protracted, expensive legal proceedings to exhaust an injured party into accepting a low settlement.

On the other hand, the defendant insurance company argues that both defendants *and* insurance companies are entitled to a zealous defense by an attorney once a lawsuit is filed against an insured, and that it should be permitted to employ defense attorneys to (indirectly) defend their assets by any means once a lawsuit has been filed, regardless of the merits of the defense that is interposed, and to delay the resolution of a case until a settlement favorable to the insurance company can be reached.

We believe that the language of the UTPA somewhat reconciles the positions of both the plaintiff and defendant. The UTPA is intended to require insurance companies to deal fairly with individuals seeking to recover under an insurance policy, and to promptly resolve valid claims that are not reasonably in dispute – regardless of whether or not a lawsuit has been filed.

However, as we discuss in more detail below, the UTPA is decidedly not intended to interfere with the exercise of an attorney's zealous, independent, professional judgment in the defense of a client, and should never be read as doing so. We believe that an attorney retained by an insurance company to defend an insured is ethically required to independently and vigorously defend the interests of the insured.

We begin our analysis by looking to the language of the UTPA. "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syllabus Point 2, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968). *In accord*, Syllabus Point 2, *State v. Epperly*, 135 W.Va. 877, 65 S.E.2d 488 (1951) ("A statutory provision which is clear and unambiguous and plainly

expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.").

The UTPA prohibits individuals in the business of insurance from engaging in certain unfair acts and practices, including a host of unfair claim settlement practices that are set forth in *W.Va. Code*, 33-11-4(9) [2002]. That section states, in part:

> No person shall commit or perform with such frequency as to indicate a general business practice any of the following: . . .
>
> (d) Refusing to pay claims without conducting a reasonable investigation based upon all available information; . . .
>
> (f) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear; . . .
>
> (n) Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement[.]

The defendant asserts that the Legislature's choice of the word "claim" in the UTPA indicates an intent to exclude from regulation by the UTPA insurance company conduct relating to "litigation." However, the definition of the word "claim" includes meanings such as "a demand for something as due; an assertion of a right to something;"[7] "a

[7]II *Oxford English Dictionary* 451 (1970).

demand for something due or believed to be due;"[8] and "a demand for compensation, benefits, or payment (as . . . one made under an insurance policy upon the happening of the contingency against which it is issued)."[9] In other words, the Legislature's repeated use of the word "claim" in the UTPA indicates an intent to impose duties upon those in the business of insurance to fairly deal with persons asserting a right or demanding something that is believed to be rightfully due under an insurance policy. A lawsuit or litigation is simply a means of asserting a right or demanding something by using the judicial process.[10]

Furthermore, the purpose of the UTPA, which is plainly stated in *W.Va. Code*, 33-11-1 [1974], is to:

> . . . regulate trade practices in the business of insurance . . . by defining, or providing for the determination of, all such practices in this State which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.

At its heart, the UTPA establishes a "legislative policy encouraging prompt settlement of meritorious claims [that] parallels our longstanding judicial policy that encourages compromise and settlement of disputed claims[.]" *Jenkins*, 167 W.Va. at 607, 280 S.E.2d at 258.

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[8]*Merriam-Webster's Collegiate Dictionary* 210 (10th Ed., 2001).

[9]*Webster's Third New International Dictionary* 414 (1970).

[10]*Blacks's Law Dictionary* 841 (5th Ed. 1979) defines "litigation" as a "[c]ontest in a court of law for the purpose of enforcing a right[.]" A "lawsuit" is "a process in law instituted by one party to compel another to do him justice." *Id.* at 799.

We find no caveat in the UTPA, and the defendant directs us to no such language, which states that an insurance company or other person in the business of insurance only has a duty to refrain from "unfair methods of competition or unfair or deceptive acts or practices" prior to the filing of a lawsuit by a party, but has no such duty thereafter. We find nothing to show that the public policy established in *W.Va. Code,* 33-11-1 is obviated once litigation ensues. We therefore must conclude that the language of the UTPA does not restrict the scope of the conduct that is proscribed by the Act to that which occurred prior to the filing of a lawsuit. *In accord, O'Donnell ex rel. Mitro v. Allstate Ins. Co.,* 734 A.2d 901 (Pa.Super. 1999) (bad faith suits may extend to the misconduct of an insurer during the pendency of litigation); *Federated Mut. Ins. Co. v. Anderson,* 297 Mont. 33, 991 P.2d 915 (1999) (insurance company's prosecution of a "meritless appeal" could be used to support a claim for unfair trade practices); *Gooch v. State Farm Mut. Automobile Ins. Co.,* 712 N.E.2d 38 (Ind.App. 1999) (insurance company's litigation conduct admissible in determining whether company made a bad-faith attempt to force insured to settle uninsured motorist claim); *Tucson Airport Authority v. Certain Underwriters at Lloyd's, London*, 186 Ariz. 45, 918 P.2d 1063 (Ariz.App. 1996) (wrongful litigation conduct of insurance company toward insured during coverage lawsuit was not rendered inadmissible due to "litigation privilege"); *Palmer by Diacon v. Farmers Ins. Exchange*, 261 Mont. 91, 121, 861 P.2d 895, 913 (1993) ("[A]n insurer's duty to deal fairly and not to withhold payment of valid claims does not end when an insured files a complaint against the insurer.").

Our conclusion that the Legislature intended to regulate the actions of companies and individuals in the business of insurance, before and after the initiation of a lawsuit, is also compelled by the manner in which the Legislature regulates the premiums insurance companies may charge, and the profits companies may earn. "The insurance business is quasi-public in its character, and the state may, under its police power, . . . prescribe the terms and conditions on which it may be conducted and generally to regulate it and all persons engaged in it." *Swearingen v. Bond*, 96 W.Va. 193, 197, 122 S.E. 539, 540 (1924). The Legislature regulates the premiums insurance companies may charge so as "to promote the public welfare by regulating insurance rates to the end that they shall not be excessive, inadequate or unfairly discriminatory[.]" *W.Va. Code*, 33-20-1 [1957]. To achieve this goal, *W.Va. Code*, 33-20-3(a) [1976] states that when an insurance company sets the premium rates that it will charge customers, the company must give due consideration "to past and prospective loss experience" and "to a reasonable margin for underwriting profit."[11] The insurance company's proposed premium rates are reviewed and approved by the insurance commissioner.

So, while there might be some theoretical appeal in the notion that a liability insurer has a right to maximize its financial well-being by aggressively litigating and refusing to pay valid claims, such a notion ignores the fact that, under the law, the premiums the

[11]*W.Va. Code*, 33-20B-2(a) and (b) [2003] similarly requires companies providing medical malpractice insurance to give "[d]ue consideration" to "past and prospective loss experience within and outside this state" and "to a reasonable margin for underwriting profit" when determining premium rates.

liability insurer charges *already account for the financial well-being of the insurance company*. An insurance company is not like the average citizen or business defending their assets against a lawsuit; an insurance company exists to pay valid claims, and charges premiums that provide sufficient resources to pay those claims. The regulated premiums charged by an insurance company and paid by the insurance consumer have been approved by the State at a level that ensures a fair profit after the insurance company has paid all past and prospective valid claims. To then allow an insurance company to increase its underwriting profit by unreasonably defending claims, while still charging the same premiums, violates the public policy underlying the premium-rate statutes. Allowing an insurance company to employ unfair practices "create[s] market disadvantages for other honest insurance companies" because these illicit practices unfairly increase its profits, thereby placing pressure on other insurance companies to also adopt equally reprehensible tactics. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 65 P.3d 1134, 1150 (Utah 2001) (*reversed on other grounds by State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003)).

Our conclusion is also compelled by the disparity in economic bargaining power between insurance companies and the average litigant. As we discussed in *Poling v. Motorists Mutual Ins. Co.*, 192 W.Va. 46, 48, 450 S.E.2d 635, 637 (1994):

> Often in lawsuits, there is a disparity of bargaining power between the plaintiff and defendant. In most cases, the defendant has a resource advantage over the plaintiff and is able to draw out a trial into a prolonged blizzard of mindless motions, countless continuances, and dreadful delay.

> The mere fact that after months of delay and hassle the insurance company deigns to speak to the injured party and settles the case for the policy limits after realizing that the plaintiff is not going to accept some outlandish low-ball offer, does not automatically preclude the plaintiff from later bringing a bad faith action. . . .

Put simply, the goal of the UTPA is to make bad-faith behavior by those in the business of insurance – whether or not a lawsuit has been filed by the claimant – economically unattractive.

Were we to adopt the defendant's argument, and hold that the UTPA did not apply to insurance company conduct occurring after litigation ensues, would be to suggest that the Legislature intended to reward obstinacy by insurance companies in the compromise and settlement of claims. Such an interpretation of the UTPA would provide a disturbing incentive for insurance companies to push meritorious claims into litigation, thereby consuming limited judicial resources, further crowding congested dockets, and burying claimants in a "prolonged blizzard of mindless motions, countless continuances, and dreadful delay." *Poling*, 192 W.Va. at 48, 450 S.E.2d at 637. The prompt resolution of meritorious claims would be delayed by insurance companies, even where liability was reasonably clear, simply to "starve out" claimants to obtain a settlement more favorable to the owners or shareholders of the insurance company. We reject such an interpretation of the UTPA.

The UTPA, however, was not intended to restrict a defense attorney's representation of a client or deter the attorney's vigorous protection of the client's interests. The fact that the defense attorney is being paid by an insurance company should not alter the

attorney's actions, and the UTPA should never be read to infringe upon an attorney's legitimate actions taken in the course of a lawsuit.

Attorneys have long struggled with the contractual and ethical quandaries presented by the "tripartite" relationship between defense attorney, insurance company, and insured. The Supreme Court of Mississippi once observed that the "ethical dilemma thus imposed upon the carrier-employed defense attorney" by the relationship between insurer, client-insured, and insurance-company-paid defense attorney is one that "would tax Socrates." *Hartford Accident & Indemnity Co. v. Foster*, 528 So.2d 255, 273 (Miss. 1988).

However, as our holding in *Rose v. St. Paul Fire & Marine Ins. Co.*, ___ W.Va. ___, ___ S.E.2d ___ (No. 31317, June 25, 2004) supports, the Legislature did not intend to impose an additional ethical dilemma upon insurance-company-paid defense attorneys by requiring them to measure their actions in defense of a client under the UTPA, because attorneys are not in the business of insurance. We therefore agree with the defendant's argument in the instant case that a defense attorney, employed to represent an insured in a liability matter, is not bound by the UTPA and is not an agent of the insurance company, because the attorney is professionally obligated to represent only the interests of the client/insured, not the interests of the insurance company.

In *State ex rel. Allstate Ins. Co. v. Gaughan*, 203 W.Va. 358, 508 S.E.2d 75 (1998), we concluded that a defense attorney represents only the insured, and not the insurer that is paying the defense attorney's fee. While it has been argued that the attorney

represents both the insurer and insured, we acknowledged that "[i]n reality, the insurer actually hires the attorney to represent the insured." 203 W.Va. at 372, 508 S.E.2d at 89.

Our examination of the *Rules of Professional Conduct* supports our statement in *Gaughan*. We find that there are at least three applicable provisions in the *Rules* which preclude an attorney paid by an insurance company from jointly representing both the insurance company and the insured in a liability matter: Rules 1.7, 1.8(f), and 5.4(c).[12]

[12]The requirement that a lawyer maintain the confidentiality of client information, as specified in Rule 1.6 [1989] of the *Rules of Professional Conduct*, can also be implicated when an insurance company retains a lawyer to represent an insured. The confidentiality requirement is most likely to be infringed by "insurers' requests to defense counsel to submit bills directly to outside auditors." Amy S. Moats, Student Work, "A Bermuda Triangle in the Tripartite Relationship: Ethical Dilemmas Raised by Insurers' Billing and Litigation Management Guidelines," 105 W.Va. L.Rev. 525, 529-530 (2003). The West Virginia Lawyer Disciplinary Board, in response to a legal ethics inquiry, is of the opinion that "pursuant to Rule 1.6 a lawyer may only submit legal bills to outside auditors, reviewers, or similar entities if the insured consents to this release." *See* LEI 99-02, "Submitting Insurance Defense Legal Bills to Outside Auditors or Reviewers."

Rule 1.7[13] is the first rule that weighs against an attorney's joint representation of both the insurance company and the insured. Rule 1.7 was adopted to ensure an attorney's loyalty to a client and preclude the attorney from undertaking the simultaneous representation of another client with interests that are actually or potentially adverse to the existing client without both clients' knowledgeable consent. The rule does not require a current conflict of interest or current material limitation on the attorney's behavior before the attorney may be precluded from jointly representing two clients. Rather, all that is required by Rule 1.7 is that there "may be" such a conflict or limitation in the future.

A conflict of interest between an insurance company and an insured "occurs whenever their common lawyer's representation of the one is rendered less effective by reason of [the lawyer's] representation of the other." *Spindle v. Chubb/Pacific Indemnity Group*, 89 Cal.App.3d 706, 713, 152 Cal. Rptr. 776, 780-81 (Ct. App. 1979). "Even the most

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[13]Rule 1.7 of the *Rules of Professional Conduct* states:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

optimistic view of human nature requires us to realize that an attorney employed by an insurance company will slant his efforts, perhaps unconsciously, in the interests of his real client – the one who is paying his fee and from whom he hopes to receive future business – the insurance company." *U.S. Fidelity and Guaranty Co. v. Louis A. Roser Co.*, 585 F.2d 932, 938 n.5 (8th Cir. 1978). An attorney should "not be permitted to put himself in a position where, even unconsciously, he will be tempted to 'soft pedal' his zeal in furthering the interests of one client in order to avoid an obvious clash with those of another." *Committee on Legal Ethics v. Frame*, 189 W.Va. 641, 645, 433 S.E.2d 579, 583 (1992) (citation omitted).

In insurance defense, if an attorney simultaneously represents the interests of both the insured and the insurance company, there is a substantial likelihood that the attorney's representation of either party may in the future be materially limited. *See* Robert E. Keeton and Alan I. Widiss, *Insurance Law* 809 [1988] ("There is a very substantial prospect that actual or potentially conflicting interests between an insurer and an insured will exist in regard to almost any tort claim that may be covered by liability insurance.").[14]

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[14]For example,

> [t]he client may at a later date reveal to the lawyer that someone else – not the insured – was actually driving the car; or that the insured's conduct was intentional rather than negligent. . . . An offer of settlement may come which the insurer believes is too high, but the insured may have a strong preference for avoiding the time, irritations, and anxieties of trial preparation. Or, as the case proceeds it may become apparent that there is exposure for punitive damages, or damages beyond the limits of the liability

(continued...)

Accordingly, because of that likelihood, Rule 1.7 generally precludes a defense attorney from jointly representing both the insurance company and the insured in a liability matter.

Rules 1.8(f)[15] and 5.4(c)[16] of the *Rules of Professional Conduct* also weigh against an attorney's joint representation of both an insurance company and the client/insured in the liability insurance context. These two *Rules of Professional Conduct* discuss the limitations upon an attorney when the attorney is hired and paid by a third party to represent a client. These two rules do not prohibit an attorney from being paid by an individual other than the client, such as an insurance company. Rather, the *Rules* impose a duty upon the

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[14](...continued)

> [insurance], thus creating a conflict situation if an offer to settle within the policy limits is made. Or the insured may have a simple and understandably humane preference that the plaintiff he has injured be paid compensation by the insurer, whether or not plaintiff and insured are related family members, friends, or strangers.

Stephen L. Pepper, "Applying the Fundamentals of Lawyers' Ethics to Insurance Defense Practice, 4 Conn.Ins.L.J. 27, 31 (1997).

[15]Rule 1.8(f) of the *Rules of Professional Conduct* states:

> (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
> (1) The client consents after consultation;
> (2) There is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
> (3) Information relating to representation of a client is protected as required by Rule 1.6 [relating to confidentiality].

[16]Rule 5.4(c) of the *Rules of Professional Conduct* states:

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

attorney to represent the sole interests of the client and to fully inform the client of the individual's payment arrangement, and prohibits the individual who is paying the attorney from interfering with the attorney's zealous, independent representation of the client.[17]

Arguably, the language of both Rules 1.7 and 1.8(f) might allow an attorney hired and paid by an insurance company to protect the insurance company's interests, and comply with the insurance company's directives and restrictions, in the representation of an insured if the insured "consents after consultation." However, the *Rules* also require that there must also be "no interference with the lawyer's independence of professional judgment," Rule 1.8(f)(2), and the attorney must reasonably believe that "the representation will not be adversely affected" by the joint representation. Rule 1.7(b)(1). More specifically, Rule 5.4(c) prohibits a third-party who pays for an attorney's services from "direct[ing] or regulat[ing] the lawyer's professional judgment in rendering such legal services."

In sum, our *Rules of Professional Conduct* compel us to the conclusion that when an insurance company hires a defense attorney to represent an insured in a liability matter, the attorney's ethical obligations are owed to the insured and not to the insurance

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[17]The Comment to Rule 5.4 supports this conclusion:

> When someone other than a client pays the lawyer's fee or salary, . . . that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangement should not interfere with the lawyer's professional judgment.

The Comment to Rule 1.5, which relates to attorneys' fees, states similarly:

> An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest.

company that pays for the attorney's services. *In accord, In re Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures*, 299 Mont. 321, 333, 2 P.3d 806, 814 (2000); *Higgins v. Karp*, 239 Conn. 802, 810, 687 A.2d 539, 543 (1997); *Petition of Youngblood*, 895 S.W.2d 322, 328 (Tenn. 1995); *Atlanta Intern. Ins. Co. v. Bell*, 438 Mich. 512, 520, 475 N.W.2d 294, 297 (1991); *First American Carriers, Inc. v. Kroger Co.*, 302 Ark. 86, 89-91, 787 S.W.2d 669, 671 (1990).

Because a defense attorney is ethically obligated to maintain an independence of professional judgment in the defense of a client/insured, an insurance company possesses no right to control the methods or means chosen by the attorney to defend the insured. As one court stated, an insurance company "cannot control the details of the attorney's performance, dictate the strategy or tactics employed, or limit the attorney's professional discretion with regard to the representation [of the insured]." *Petition of Youngblood*, 895 S.W.2d at 328. Accordingly, "an attorney hired by an insurer to defend an insured must be considered, at least initially, to enjoy the status of an independent contractor." *Givens v. Mullikin ex rel. Estate of McElwaney*, 75 S.W.3d 383, 394 (Tenn. 2002).[18]

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[18]The general rule is that the employer of an independent contractor is not liable for harm caused to another by an act or omission of the independent contractor. *Pasquale v. Ohio Power Co.*, 187 W.Va. 292, 302, 418 S.E.2d 738, 748 (1992), *quoting Peneschi v. National Steel Corp.*, 170 W.Va. 511, 521, 295 S.E.2d 1, 11 (1982) (*quoting Restatement (Second) of Torts* § 409 (1976)). "However, over the years, the defense has proved to be a slender reed and one which the courts have found difficult to apply." *Sanders v. Georgia-Pacific Corp.*, 159 W.Va. 621, 625, 225 S.E.2d 218, 221 (1976). This is because, as "we have [previously] acknowledged[,] ... the independent contractor defense is riddled with numerous exceptions that limit its applicability." *Pasquale*, 187 W.Va. at 303, 418 (continued...)

It therefore appears clear that an insurance company cannot be held liable under the UTPA for the actions of an attorney hired to defend the interests of an insured, when the defense attorney's strategy and tactics are a result of the attorney's independent, professional discretion with regard to the representation of the client-insured. *See O'Donnell v. Allstate Ins. Co.*, 734 A.2d 901 (Pa.Super. 1999) (insurance company's statutory duty to act in good faith did not end upon initiation of lawsuit; however, "the statute clearly does not contemplate actions for bad faith based upon allegation of discovery violations.").[19]

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[18](...continued)
S.E.2d at 749. *See also West v. National Mines Corp.*, 168 W.Va. 578, 588, 285 S.E.2d 670, 677 (1981) ("The general rule that an employer is not liable for the torts of an independent contractor is subject to numerous exceptions").

One of the many exceptions to the independent contractor defense is contained in *Restatement (Second) of Torts*, § 410, which provides that when an independent contractor acts pursuant to the orders or directions of the employer, then the employer "is subject to the same liability . . . as though the act or omission were that of the employer himself." "Consequently, although an insurer clearly lacks the *right* to control an attorney retained to defend an insured, we simply cannot ignore the practical reality that the insurer may seek to exercise *actual* control over its retained attorneys in this context." *Givens*, 75 S.W.3d at 395. When an insurance company seeks, either directly or indirectly, to affect the defense attorney's independent professional judgment or interfere with the attorney's duty of loyalty to the client/insured, "it would be imprudent for this Court to hold that attorneys are independent contractors vis-á-vis insurers, but then to ignore the practical realities of that relationship when it causes injury." *Id.* Accordingly, "an insurer can be held vicariously liable for the acts or omissions of an attorney hired to represent an insured when those acts or omissions were directed, commanded, or knowingly authorized by the insurer." *Id.*

[19]Another question arises, however, when the insurance company seeks to exercise control over the defense attorney's strategy and tactics. *See, e.g., Givens v. Mullikin ex rel. Estate of McElwaney*, 75 S.W.3d 383 (Tenn. 2002) (plaintiff, alleging tort of abuse of process, stated claim upon which relief could be granted in alleging insurance company directed defense attorneys to engage in excessive discovery for purpose of inducing plaintiff to dismiss tort claim against insured); *Campbell v. State Farm Mut. Auto. Ins. Co.*, 65 P.3d
(continued...)

In summary, we hold that the conduct of an insurance company or other person in the business of insurance during the pendency of a lawsuit may support a cause of action under the West Virginia Unfair Trade Practices Act, *W.Va. Code*, 33-11-1 to -10. In so holding, we reject the district court's conclusion in *McDaniel*, *supra*, that the word "claim" in the UTPA precludes the application of the UTPA to "litigation" conduct by an insurance company or other person in the business of insurance.

However, we also hold that an insurance company cannot be held liable under the West Virginia Unfair Trade Practices Act, *W.Va. Code*, 33-11-1 to -10, for the actions of a defense attorney retained to defend an insured, when the defense attorney's strategy and tactics are a result of the attorney's independent, professional discretion with regard to the representation of the client-insured, and are not otherwise relied upon or ratified by the insurance company in a manner contrary to the Act.

The district court's certified question asked, in part, whether under the UTPA an insurance company could be liable for "conduct [that] took place during and after the initiation of a civil action against the insurer's insured[.]" We answer this portion of the district court's certified question "yes."

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[19](...continued)
at 1148 (punitive damages award against insurance company supported by evidence company published instruction manual for defense attorneys mandating that they harass and intimidate claimants and witnesses to deter litigation, and that they "employ 'mad dog defense tactics' – using the company's large resources to 'wear out' opposing attorneys by prolonging litigation, making meritless objections, claiming false privileges, destroying documents, and abusing the law and motion process."). It is not clear whether the record in the instant case involves such a situation.

IV.
Conclusion

In answer to the question certified by the district court, we conclude that an insurance company cannot be held directly liable under the UTPA for the misconduct of a defense attorney hired by the insurance company to represent the interests of an insured in a liability matter, particularly when the defense attorney's conduct results from the attorney's independent, professional judgment, but may be held liable for its own acts by knowingly encouraging, directing, participating, relying upon or ratifying that behavior. We also conclude that an insurance company has a duty to comply with the UTPA after the filing of a civil action against an insured, and can be held liable for violations of the UTPA that occur after litigation commences.

Having answered the certified question from the district court, this case is dismissed from the docket of this Court.

Certified Question Answered.