No. 31226 – Hubert J. Barefield v. DPIC Companies, Inc.

No. 31317 – Linn Rose and Adam Rose, by and through his mother and legal guardian, Linn Rose v. St. Paul Fire and Marine Insurance Company, and Stephen Brown v. Joseph Katarincic, Esq., Carl DePasquale, Esq., and Chad A. Ciccone, Esq.

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Chief Justice Maynard, concurring, in part, and dissenting, in part:

In *Barefield*, I concur with the majority's holding that an insurer cannot be held liable under the West Virginia Unfair Trade Practices Act for the actions of a defense attorney when the attorney's strategy and tactics are a result of his or her independent, professional discretion. However, I dissent to the holding that the conduct of an insurer during the pendency of a lawsuit may support a cause of action under the Act.

Similarly, in *Rose*, I concur with reversing the circuit court's order to the extent that it ruled that a defense attorney, hired by an insurance company to defend the interests of an insured in a liability matter, is subject to the provisions of the Unfair Trade Practices Act. However, I dissent to affirming the circuit court's ruling that an insurance company can be held liable, under certain circumstances, for violations of the Act by a defense attorney employed by the insurance company to defend an insured.

Both *Barefield* and *Rose* are third-party statutory bad faith cases. As I

previously made clear, I do not believe that a private cause of action, and especially a third-party cause of action, should exist under the Unfair Trade Practices Act. The Act itself does not expressly indicate that it supports a private cause of action. Rather, this Court, many years before any of its present members arrived, in a perfect example of judicial legislation, created such a cause of action from whole cloth. *See 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). As I stated in footnote 10 of *State ex rel. Medical Assurance v. Recht*, 213 W.Va. 457, 469, 583 S.E.2d 80, 92 (2003), among the small minority of states that recognize a private cause of action arising from their unfair claim settlement statutes,

> only a handful recognize *third-party* bad faith claims[.] According to [*State ex rel. Allstate Ins. Co. v.] Gaughan*, 203 W.Va. [358], 369, n. 15, 508 S.E.2d [75], 86 [1998], "[m]ost courts which have considered a third-party bad faith action have not allowed such a third-party claim against a tortfeasor's insurer." (Citation omitted). This is in accord with Paul R. Rice, *A Quasi-Attorney-Client Privilege? West Virginia's Mislabeled Fiduciary Duty Exception*, 101 W.Va. L.Rev. 311, 314 (1998) which says, "[b]ecause the third-party action involves a plaintiff to whom the insurance company did not owe a contractual duty under the insurance policy, most state jurisdictions that have addressed the issue have refused to find an implied statutory duty under legislative schemes similar to those in West Virginia." (Footnote omitted).

Because I do not believe that this Court should have created third-party statutory bad faith

claims, I disagree with the expansion of such a cause of action by the majority in the instant cases.

The fact is that third-party bad faith claims, besides being wholly unsupported in statutory law, simply are a bad idea. First, they are unnecessary. Insurers already have a contractual and implied duty of good faith and fair dealing to their insureds to settle claims against the insureds. In Syllabus Point 2 of *Shamblin v. Nationwide Mut. Ins. Co.*, 183 W.Va. 585, 396 S.E.2d 766 (1990), this Court held:

> Wherever there is a failure on the part of an insurer to settle within policy limits where there exists the opportunity to settle and where such settlement within policy limits would release the insured from any and all personal liability, the insurer has prima facie failed to act in its insured's best interest and such failure to so settle prima facie constitutes bad faith toward its insured.

Thus, when an insurer refuses to settle with a third-party claimant and, as a result, the claimant is awarded a verdict in a personal injury trial against the insured in excess of the insured's policy limits, the insurer is prima facie guilty of bad faith toward its insured. At that point,

> It will be the insurer's burden to prove by clear and convincing evidence that it attempted in good faith to negotiate a settlement, that any failure to enter into a settlement where the opportunity to do so existed was based on reasonable and substantial grounds, and that it accorded the interests and rights of the insured at

least as great a respect as its own.

Syllabus Point 3, *Shamblin*, *supra*. Accordingly, insurers have a powerful incentive to settle claims of third-party claimants absent the bringing of third-party bad faith actions.

Second, third-party bad faith claims create potentially conflicting duties of insurers toward both third-party claimants and their own insureds, to the detriment of those insureds. As noted above, insurers have both a contractual duty and an implied duty of good faith and fair dealing to their insureds. In contrast, the relationship between an insurer and a third-party claimant is adversarial. "[T]hat the insurer is the representative of the insured logically imports that the third party tort claimant's status as the adversary of the insured renders him, ipso facto, the adversary of the insured's agent." *Linscott v. State Farm Mutual Auto Ins. Co.*, 368 A.2d 1161, 1163-64 (Me. 1977). "[T]he insurer stands in the shoes of the insured in dealing with the victim." *Long v. McAllister*, 319 N.W.2d 256, 262 (Iowa 1982). Nevertheless, in recognizing third-party bad faith claims, this Court illogically mandates that an insurer owes competing duties to both insureds and third-party claimants. However, "[n]o servant can serve two masters."[1]

The problem of competing duties is greatly exacerbated by the majority's decisions in the instant cases. If an insurer, as we have seen, is an adversary of a third-party

[1]Luke 16:13.

claimant in the settlement process, it is even more of an adversary once litigation is instituted against its insured. Yet, the majority says that insurers now are potentially liable to third-party claimants for every decision they make in the course of defending their insureds, and they may be liable for the actions of the attorneys they hired to represent the insureds. While the majority attempts to distinguish the actions of insurers from the actions of defense attorneys, acting independently, such a distinction in practice is a chimera - a vain and idle fancy. Now third-party claimants simply will allege in their complaints wrongful failure to settle both pre - and post-litigation. Claimants will further aver that the insured's defense attorney was not acting independently of the insurer, but that the insurer "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*. Consequently, all litigation decisions made by the insurer and the insured's defense attorney will be open to the scrutiny of the courts. Such a result is appalling in a justice system such as ours where every party is due zealous representation. Our system is an adversary system. Such systems, when they are allowed to work properly, are great mechanisms to find the truth and ensure fair trials. But when one adversary party is punished simply for being adversarial, the system breaks down and degenerates into an unfair and biased exercise in bullying. It is about as fair as a boxing match where one boxer has a hand tied behind his back.

Other courts have recognized the problems that arise when post-litigation

conduct is made the subject of bad faith claims against insurers.

> Allowing litigation conduct to serve as evidence of bad faith would undermine an insurer's right to contest questionable claims and to defend itself against such claims. As a district court in this Circuit aptly noted, permitting allegations of litigation misconduct would have a "chilling effect on insurers, which could unfairly penalize them by inhibiting their attorneys from zealously and effectively representing their clients within the bounds permitted by law." *International Surplus Lines Ins. Co. v. University of Wyoming Research Corp.*, 850 F.Supp. 1509, 1529 (D.Wyo.1994), *aff'd*, 52 F.3d 901 (10th Cir. 1995). Insurers' counsel would be placed in an untenable position if legitimate litigation conduct could be used as evidence of bad faith. Where improper litigation conduct is at issue, generally the Federal Rules of Civil Procedure provide adequate means of redress, such as motions to strike, compel discovery, secure protective orders, or impose sanctions. *See id.* at 1528-29.

Timberlake Const. Co. v. U.S. Fidelity and Guar. Co., 71 F.3d 335, 341 (10th Cir. 1995). *See also Federated Mut. Ins. Co. v. Anderson*, 297 Mont. 33, 42, 991 P.2d 915, 922 (1999) ("Public policy favors the exclusion of [an insurer's postfiling conduct] under normal circumstances because it can hinder the right to defend and can impair access to the courts; therefore, courts must use extreme caution in deciding to admit such evidence even if relevant."(Citation omitted.)); *Howard v. State Farm Mut. Auto. Ins. Co.*, 316 S.C. 445, 448, 450 S.E.2d 582, 584 (1994) ("Evidence that arises after the denial of the claim is not relevant to the propriety of the conduct of the insurer at the time of its refusal." (Citation omitted.)).

In sum, the majority's holdings that post-litigation conduct of an insurer may support a cause of action under the Unfair Trade Practices Act and that an insurer is potentially liable for the actions of a defense attorney it hired to represent the insured are devoid of common sense. They infringe on the constitutional right of access to the courts of insurers and insureds by seriously compromising their ability to defend themselves in actions brought by third-party claimants. Actually, I believe we have so crippled and hobbled insureds in these cases that their constitutional right of access to the courts has been denied. In effect, the de facto rule now is that parties in litigation, *with the exception of insurers and insureds*, have a right to zealous representation.

Also, the majority opinions are blatantly anti-consumer (insurance consumer) in that they decrease the value of insurance policies by reducing the contractual duty of insurers to defend their insureds in litigation. Any challenge by an insured to the representation of his insurer-provided lawyer can now be answered with the claim that the insurer had an equal duty to the insured's adversary, the third-party claimant. Finally, by increasing frivolous third-party bad faith litigation and concomitantly the cost of litigation to insurance companies, the majority opinion will have the effect of increasing the cost of purchasing insurance for all West Virginia consumers. That means premiums will increase, and premiums are paid *only* by consumers.

For all of these reasons, I respectfully dissent to the majority's holdings that

post-litigation conduct of an insurer may support a statutory bad faith action, and that an insurer may be liable for the actions of a defense attorney hired by the insurance company to represent its insured.