Insurance Law

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*West Virginia Supreme Court of Appeals*

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**Recommended Citation**
Available at: https://researchrepository.wvu.edu/wvlr/vol102/iss5/21
agency or remand the case for further proceedings. The circuit court shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decisions or order are: “(1) In violation of constitutional or statutory provisions; or (2) In excess of the statutory authority or jurisdiction of the agency; or (3) Made upon unlawful procedures; or (4) Affected by other error of law; or (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.”

XVII. INSURANCE LAW

A. Interpreting Policy Language

In Helfeldt v. Robinson, Justice McHugh was forced to determine the effect of an exception to exclusion in a liability policy that was voided by other exclusions in the policy. The court held:

Although an exclusion in a comprehensive general automobile and property liability insurance contract contained an exception for “warranty of fitness or quality of the named insured’s products or a warranty that work performed by or on behalf of the named insured will be done in a workmanlike manner,” that exception to the contract’s exclusion provision did not extend insurance coverage to a contractor for the defective construction of a home where the insurance contract contained other exclusions precluding insurance coverage and the insurance contract in question was a liability insurance policy and not a builder’s risk policy.

In Shamblin v. Nationwide Mutual Insurance Co., the court held that “[t]he term ‘occurrence’ in a limitation of liability clause within an automobile liability insurance policy refers unmistakably to the resulting event for which the insured becomes liable and not to some antecedent cause(s) of the injury.”

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1149 Id. at Syl. Pt. 2.
1151 Id. at Syl.
1152 332 S.E.2d 639 (W. Va. 1985).
1153 Id. at Syl. Pt. 3.
In *Transamerica Occidental Life Insurance Co. v. Burke*,¹¹⁵⁴ Justice McHugh determined the meaning of language in a life insurance, as it related to beneficiaries of the policy. Justice McHugh stated that “[w]ith reference to the beneficiary(ies), it has frequently been said that a policy of life insurance is testamentary in nature, and the rules for interpreting a will may guide the courts in ascertaining the legal effect of a clause in a life insurance policy designating the beneficiary(ies).”¹¹⁵⁵ The court held that “[t]he term ‘children’ ordinarily does not include stepchildren, but it may include stepchildren when a contrary intent is found from additional language or circumstances.”¹¹⁵⁶ Justice McHugh determined that “[a] class description such as ‘children’ ordinarily raises a latent ambiguity if there are, for example, stepchildren, so that evidence of the testator’s or insured’s relations with and attitude toward them is admissible to determine whether it was the testator’s or insured’s intent to include them in the gift.”¹¹⁵⁷ He concluded:

> If a will was drafted by one who is not a lawyer, a court will be more inclined to assume that the will was written in the language of the lay person and will be more inclined to give effect to the language of the will in accordance with the subjective sense employed by the testator or testatrix, and not according to the technical meaning of the language. The same principle applies to other documents which contain dispositions of property which are testamentary in nature, such as the beneficiary designation clause of an insurance policy providing death benefits.¹¹⁵⁸

In *Marshall v. Fair*,¹¹⁵⁹ Justice McHugh ruled that “[b]odily injury and property damage ‘arising out of’ uninsured premises, as that phrase is used in an uninsured premises exclusion provision, refers to the condition of the uninsured premises and does not exclude coverage for the allegedly tortious acts of the insured committed on either such uninsured premises or on premises closely related to the uninsured premises.”¹¹⁶⁰

### B. Renewal of Policy

In *Horace Mann Insurance Co. v. Shaw*,¹¹⁶¹ Justice McHugh examined the statutory basis for renewal of specific types of insurance policies. The court held:

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¹¹⁵⁴ 368 S.E.2d 301 (W. Va. 1988).
¹¹⁵⁵ *Id.* at Syl. Pt. 1.
¹¹⁵⁶ *Id.* at Syl. Pt. 2.
¹¹⁵⁷ *Id.* at Syl. Pt. 3.
¹¹⁵⁸ *Id.* at Syl. Pt. 4.
¹¹⁶⁰ *Id.* at Syl. Pt. 2.
Where an insurer has issued to its insured an automobile liability or physical damage insurance policy, which policy has been in existence for two consecutive years or longer, the insured is entitled to the renewal protection of W.Va. Code, 33-6A-4 [1980], i.e., that an insurer “may not fail to renew an outstanding automobile liability or physical damage insurance policy which has been in existence for two consecutive years or longer” except for the reasons enumerated in that statute; furthermore, an insured’s existing renewal protection under W.Va. Code, 33-6A-4 [1980], applies with regard to additional policies issued by the insurer for additional or replacement automobiles acquired by the insured, and for such renewal protection the additional policies need not have been in existence for “two consecutive years or longer.”

C. Employee Fidelity Insurance Policy

Justice McHugh explained in Commercial Bank of Bluefield v. St. Paul Fire & Marine Insurance Co. that

[e]mployee fidelity insurance (sometimes called fidelity guaranty insurance) is a contract whereby one for consideration agrees to indemnify the insured against loss arising from want of integrity, fidelity or honesty of employees or other persons holding positions of trust. The insurer is liable to the insured only in the event of a loss sustained by the insured.

D. West Virginia Guaranty Association Act

Justice McHugh made several observations regarding the Guaranty Association Act in Cannelton Industries, Inc. v. Aetna Casualty & Surety Co. of America. He said that “[t]he West Virginia Guaranty Association is not required to notify insureds of the insolvent insurer unless the West Virginia Insurance Commissioner requires that such notice be given pursuant to W.Va. Code,§ 33-26-10(2)(a) [1970] of the West Virginia Guaranty Association Act.” The court subsequently held:

Pursuant to the West Virginia Guaranty Association Act,

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1162 Id. at Syl. Pt. 4.
1164 Id. at Syl. Pt. 2.
1165 460 S.E.2d 18 (W. Va. 1994).
1166 Id. at Syl. Pt. 4.
specifically, *W.Va. Code, 33-26-8(1)(a) [1985]*, the West Virginia Guaranty Association is "obligated to the extent of covered claims existing prior to the determination of insolvency, and for such claims arising within thirty days after the determination of insolvency. . . . [However,] notwithstanding any other provision of this article, a covered claim shall not include any claim filed with the guaranty fund after the final date set by the court for the filing of claims against the liquidator or receiver of an insolvent insurer[.]" 1167

E. Anti-Stacking Provision

Justice McHugh addressed anti-stacking language in an insurance policy in the case of *Shamblin v. Nationwide Mutual Insurance Co.* 1168 In *Shamblin*, the court held:

> When an automobile liability insurance policy contains language limiting the insurer’s liability as the result of any one occurrence, "[r]egardless of the number of . . . automobiles to which this policy applies,” the insured is not entitled to “stack” liability coverages for each vehicle for which the insured has paid a separate premium. In light of the explicit “anti-stacking” language, the payment of a separate premium for each vehicle does not create an ambiguity in the insurance policy which should be resolved against the insurer. 1169

Justice McHugh also clarified the legal legitimacy of anti-stacking provisions in *Shamblin*. He held:

> A limitation of liability clause within an automobile liability insurance policy which limits coverage for any one occurrence, regardless of the number of covered vehicles, does not violate any applicable insurance statute or regulation, and there is no judicial policy that prevents an insurer from so limiting its liability and yet collecting a premium for each covered vehicle because each premium is for the increased risk of an “occurrence.” 1170

Justice McHugh addressed the impact of anti-stacking language on uninsured and underinsured motorist coverage in the case of *State Automobile

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1167 *Id.* at Syl. Pt. 5 (alterations in original).


1169 *Id.* at Syl. Pt. 4 (alteration in original).

1170 *Id.* at Syl. Pt. 5.
Mutual Insurance Co. v. Youler.\textsuperscript{1171} The court held that

[s]o-called “antistacking” language in automobile insurance policies is void under \textit{W.Va. Code}, 33-6-31(b), as amended, to the extent that such language is purportedly applicable to uninsured or underinsured motorist coverage, and an insured covered simultaneously by two or more uninsured or underinsured motorist policy endorsements may recover under all of such endorsements up to the aggregated or stacked limits of the same, or up to the amount of the judgment obtained against the uninsured or underinsured motorist, whichever is less, as a result of one accident and injury.\textsuperscript{1172}

Justice McHugh held in \textit{Miller v. Lemon}\textsuperscript{1173} that

[a]nti-stacking language in an automobile insurance policy is valid and enforceable as to uninsured and underinsured motorist coverage where the insured purchases a single insurance policy to cover two or more vehicles and receives a multi-car discount on the total policy premium. If no multi-car discount for uninsured or underinsured motorist coverage is apparent on the declarations page of the policy, the parties must either agree or the court must find that such a discount was given. In such event, the insured is not entitled to stack the coverages of the multiple vehicles and may only recover up to the policy limits set forth in the single policy endorsement.\textsuperscript{1174}

\textbf{F. Bad Faith Settlement}

In \textit{Berry v. Nationwide Mutual Fire Insurance Co.},\textsuperscript{1175} Justice McHugh stated that "[p]unitive damages may be awarded to an insured if the insurer actually knew that the claim was proper and the insured can prove that it was willfully, maliciously and intentionally denied. Therefore, in such a case, it is not error for a trial court to give an instruction stating that punitive damages may be awarded."\textsuperscript{1176}

\begin{thebibliography}{9}
\bibitem{1171} 396 S.E.2d 737 (W. Va. 1990).
\bibitem{1172} \textit{Id.} at Syl. Pt. 3.
\bibitem{1173} 459 S.E.2d 406 (W. Va. 1995).
\bibitem{1174} \textit{Id.} at Syl. Pt. 4.
\bibitem{1175} 381 S.E.2d 387 (W. Va. 1989).
\bibitem{1176} \textit{Id.} at Syl. Pt. 5.
\end{thebibliography}
G. Payment of Proceeds

The case of Arcuri v. Great American Insurance Co.1177 presented the issue of payment of proceeds from a policy by an insurer, when a person is wrongfully added to the policy as a beneficiary. Justice McHugh ruled:

W.Va. Code, 33-17-12 [1965], by providing that payment of the proceeds under a fire insurance policy to the person or persons designated in the policy fully discharges the insurer from all claims under the policy, makes it inappropriate for an insurer, which has wrongfully added an insured person to a fire insurance policy, to merely tender the proceeds to the clerk of the court in a pending action in which the parties are the joint payees of the proceeds, namely, the only person properly designated in the policy as an insured and another person, not properly designated in the policy as an insured but who claims an interest in the proceeds. The delay in payment to the person properly designated as an insured would, in such a case, be attributable to the insurer’s wrongful designation of the additional insured person and the insurer’s failure to follow the statute on payment to the person designated in the policy as the insured.1178

In Jones v. Wesbanco Bank Parkersburg,1179 Justice McHugh explained when a mortgagee on a deed of trust would be entitled to proceeds from a fire insurance policy. The court held:

Where the lender under a deed of trust executed by a property owner to secure a debt owing on the property is named as mortgagee in a standard mortgage clause in a fire insurance contract between an insurer and a property owner, it has an independent and distinct contract with the insurer and is deemed to be an insured to the extent of the balance due it from the property owner. Thus, the right of the lender under a deed of trust named as mortgagor to the insurance proceeds is determined at the time of the fire loss to the extent of the balance due it from the property owner.1180

H. Family Use Policy Exclusion

Justice McHugh addressed the validity of family use policy exclusions in

1177 342 S.E.2d 177 (W. Va. 1986).
1178 ld. at Syl. Pt. 3.
1179 460 S.E.2d 627 (W. Va. 1995).
1180 ld. at Syl. Pt. 4.
automobile coverage in the case of *Thomas v. Nationwide Mutual Insurance Co.* He stated the following:

When an insurer issues an automobile insurance policy which provides both liability and underinsured motorists coverage, but which policy contains what is commonly referred to as a “family use exclusion” for the underinsured motorist coverage, and when, in a single car accident, the passenger/wife receives payments under the liability coverage for the negligence of the driver/husband, such exclusion is valid and not against the public policy of this state. That exclusion, which excludes from the definition of “underinsured motor vehicle” any automobile owned by or furnished for the regular use of the insured or a relative, has the purpose of preventing underinsured coverage from being converted into additional liability coverage.

**I. Intentional Injury Policy Exclusion**

Justice McHugh stated in *Horace Mann Insurance Co. v. Leeper* that

> there is neither a duty to defend an insured in an action for, nor a duty to pay for, damages allegedly caused by the sexual misconduct of an insured, when the liability insurance policy contains a so-called “intentional injury” exclusion. In such a case the intent of an insured to cause some injury will be inferred as a matter of law.

**J. Insured Person Policy Exclusion**

Justice McHugh addressed the issue of the validity of a clause excluding an insured person in a homeowner’s policy in *Rich v. Allstate Insurance Co.* He stated that

> when a homeowner’s insurance policy excludes coverage to an “insured person” and defines an “insured person” as a resident of the named insured’s household and a dependent person in the named insured’s care, a minor child who sustains bodily injury as a result of the negligence of the named insured on the named insured’s premises, such minor child also being a resident of the

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1182 *Id.* at Syl. Pt. 2.
1184 *Id.* at Syl.
named insured's household and who is a dependent person in the named insured's care, is not covered under the homeowner's insurance policy. Such exclusionary language within the homeowner's insurance policy is not violative of the public policy of this state.\(^{1186}\)

**K. Fire Insurance Mortgage Clause**

Justice McHugh determined the status of a lender named as a mortgagee in a fire insurance policy in the case of *Firstbank Shinnston v. West Virginia Insurance Co.*\(^{1187}\) The court held:

If a fire insurance contract between an insurer and a property owner includes a standard mortgage clause naming as mortgagee the lender under a deed of trust executed by the property owner to secure a debt owing on the property, the lender under the deed of trust pursuant to that clause has an independent and distinct contract with the insurer, as if the lender under the deed of trust had taken out a separate policy with the insurer, and is deemed to be an insured to the extent of the balance due it from the property owner.\(^{1188}\)

**L. Per Person Liability Limit**

Justice McHugh expounded upon the reach of a per person liability limit provision in an automobile policy on a claim for loss of consortium in *Federal Kemper Insurance Co. v. Karlet.*\(^{1189}\) He held:

When a person is bodily injured in an automobile accident, an individual other than the bodily-injured person may also suffer damages as a result of such accident through loss of consortium. The claim for loss of consortium by an individual other than the one suffering bodily injury as a result of an automobile accident is generally recognized as arising out of the claim for damages of the bodily-injured person. As a result, the claim of the bodily-injured person and the claim for loss of consortium are covered within the same per person limit of liability provisions under the automobile insurance policy. More specifically, when the per person limit of liability in a policy provides coverage for "all damages arising out of bodily injury sustained by one person as a result of one

\(^{1186}\) *Id.* at Syl. Pt. 3.

\(^{1187}\) 408 S.E.2d 777 (W. Va. 1991).

\(^{1188}\) *Id.* at Syl. Pt. 1.

\(^{1189}\) 428 S.E.2d 60 (W. Va. 1993).
accident," both the claim of the bodily injured person and the claim for loss of consortium are covered within the same per person limit of liability, and recovery for both claims may not exceed the fixed amount of the maximum limit of damages under the per person limit of liability. If, however, there is language in the policy which includes loss of consortium as a separate bodily injury, such loss of consortium claim is entitled to a separate per person limit of liability.\textsuperscript{1190}

In \textit{Davis v. Foley},\textsuperscript{1191} Justice McHugh distinguished per person limit from per occurrence limit within the context of a wrongful death action. The court held:

The damages in a wrongful death action arise out of the death of the decedent thereby making a wrongful death action a derivative claim. As a result, when language in an insurance policy clearly limits recovery of derivative claims to the per person limit, the per occurrence limit does not apply even though "the surviving spouse and children, including adopted children and stepchildren, brothers, sisters, parents and any persons who were financially dependent upon the decedent at the time of his or her death . . ." are entitled to share in the recovery in a wrongful death action pursuant to \textit{W.Va. Code, 55-7-6} [1992]. However, if there is language in the insurance policy which includes damages from a wrongful death as a separate bodily injury, then each person recovering for the wrongful death is entitled to a separate per person limit.\textsuperscript{1192}

\textbf{M. Subrogation}

In \textit{Berry v. Nationwide Mutual Fire Insurance Co.},\textsuperscript{1193} Justice McHugh stated that "[w]here an insurer decides, after complete investigation, not to approve payment to its insured based upon the allegedly tortious conduct of another party, the insurer's claim that a subsequent settlement by the insured with the other party violates the subrogation clause of the insurance contract by prejudicing the insurer's subrogation rights is invalid."\textsuperscript{1194}

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at Syl.
\item 457 S.E.2d 532 (W. Va. 1995).
\item \textit{Id.} at Syl. Pt. 4 (alteration in original).
\item 381 S.E.2d 367 (W. Va. 1989).
\item \textit{Id.} at Syl. Pt. 1.
\end{enumerate}
\end{footnotesize}
N. Uninsured/Underinsured Coverage

In State Automobile Mutual Insurance Co. v. Youler, Justice McHugh addressed several issues concerning uninsured and underinsured motorist coverage. The court initially that "[t]he notice provisions of an automobile insurance policy ordinarily are activated in a case of uninsured or underinsured motorist coverage, not when there has been an accident, but when the insured, with reasonable diligence, ascertains that the alleged tortfeasor is uninsured or underinsured." The court next held:

In an uninsured or underinsured motorist case, prejudice to the investigative interests of the insurer is a factor to be considered, along with the reasons for delay and the length of delay, in determining the overall reasonableness in giving notice of an accident. In the typical case, the insured must put on evidence showing the reason for the delay in giving notice. Once this prerequisite is satisfied, the insurer must then demonstrate that it was prejudiced by the insured's failure to give notice sooner. If the insurer fails to present evidence as to prejudice, then the insured's failure to give notice sooner will not be a bar to the insured's recovery. If the insurer puts on evidence of prejudice, however, the reasonableness of the notice ordinarily becomes a question of fact for the fact finder to decide.

Justice McHugh concluded in Youler that

W.Va. Code, 33-6-31(b), as amended, on uninsured and underinsured motorist coverage, contemplates recovery, up to coverage limits, from one's own insurer, of full compensation for damages not compensated by a negligent tortfeasor who at the time of the accident was an owner or operator of an uninsured or underinsured motor vehicle. Accordingly, the amount of such tortfeasor's motor vehicle liability insurance coverage actually available to the injured person in question is to be deducted from the total amount of damages sustained by the injured person, and the insurer providing underinsured motorist coverage is liable for the remainder of the damages, but not to exceed the coverage limits.

1196 Id. at Syl. Pt. 1.
1197 Id. at Syl. Pt. 2.
1198 Id. at Syl. Pt. 4.
In *Pristavec v. Westfield Insurance Co.*, Justice McHugh clarified when underinsured motorist coverage is actually triggered. He held that

[i]n light of the preeminent public policy of the underinsured motorist statute, which is to provide full compensation, not exceeding coverage limits, to an injured person for his or her damages not compensated by a negligent tortfeasor, this Court holds that underinsured motorist coverage is activated under W.Va. Code, 33-6-31(b), as amended, when the amount of such tortfeasor’s motor vehicle liability insurance actually available to the injured person in question is less than the total amount of damages sustained by the injured person, regardless of the comparison between such liability insurance limits actually available and the underinsured motorist coverage limits.

Justice McHugh held in *Johnson by Johnson v. General Motors Corp.* that “[t]he collateral source rule operates to preclude the offsetting of uninsured or underinsured benefits since the benefits are the result of a contractual arrangement which is independent of the tortfeasor; therefore, we overrule syllabus point 1 of Cox v. Turner, 157 W.Va. 802, 207 S.E.2d 152 (1974) which held that uninsured motorist benefits were not a collateral source under the then existing statutory scheme.”

Justice McHugh addressed several issues involving uninsured motorist coverage in *Cox v. Amick*. He stated that

[u]nder W.Va. Code, 33-6-31d [1993] a knowing and intelligent rejection of optional uninsured and underinsured motorists coverages by any named insured under an insurance policy creates a presumption that all named insureds under the policy received an effective offer of the optional coverages and that such person exercised a knowing and intelligent rejection of such offer. The named insured’s rejection is binding on all persons insured under the policy.

In *Cox*, the court also held:

When an insurance policy clearly and unambiguously provides
uninsured motorists coverage for damages suffered by the insured or a relative from the “owner or driver of an uninsured motor vehicle” if such damages have resulted from an accident arising out of the ownership, maintenance or use of the uninsured motor vehicle, the insured or relative may not recover damages pursuant to his or her uninsured motorists coverage from a person who was not occupying an uninsured motor vehicle involved in the accident when it occurred and who was not the owner or driver of the uninsured motor vehicle involved in the accident even though such person may be liable to the insured or relative under other appropriate causes of action.\textsuperscript{1205}

\section*{O. Commercial Liability Policy}

Justice McHugh addressed issues involving a commercial liability policy in \textit{Bruceton Bank v. U.S. Fidelity and Guaranty Insurance Co.}\textsuperscript{1206} The court held that

[w]here, under a commercial general liability policy and a related commercial umbrella liability policy issued to a bank, insurance coverage is provided for certain injuries and damages caused by an “occurrence” or an “incident,” and the policies expressly equate the terms “occurrence” and “incident” with an “accident,” no such insurance coverage, or duty to defend or investigate by the insurer, arises, where the underlying case against the bank, concerning the denial of a loan, is grounded upon breach of contract and is in the nature of a lender liability action. Although a case in the nature of a lender liability action would, ordinarily, be foreign to the risk insured against as reflected by such insurance policies, included in the consideration of whether the insurer has a duty to defend is whether the allegations in the complaint against the bank are reasonably susceptible of an interpretation that the claim may be covered by the terms of the insurance policies. To the extent that the syllabus point in \textit{Farmers & Mechanics Mutual Fire Insurance Company v. Hutzler}, 191 W.Va. 559, 447 S.E.2d 22 (1994), differs from these principles, it is hereby clarified.\textsuperscript{1207}

\footnotesize{\textsuperscript{1205} \textit{Id.} at Syl. Pt. 14.  
\textsuperscript{1206} 486 S.E.2d 19 (W. Va. 1997).  
\textsuperscript{1207} \textit{Id.} at Syl. Pt. 3.}