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Insurance

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INSURANCE

AETNA CASUALTY & SUR. CO. v. PITROLO, 342 S.E.2d 156 (W. Va. 1986).

Refusal to Defend Insured—Reimbursement of Attorney's Fees—Trial Court Procedures

A declaratory judgment action was filed to determine if Aetna had to defend the insured in three separate civil suits stemming from an auto accident. When Aetna refused to defend him, the insured hired a private attorney. Following a hearing, the circuit court found Aetna had a duty to defend the insured and ordered Aetna to reimburse the insured for the costs of his defense to date. The attorney estimated his fee to be approximately $114,000; however, the court awarded only $18,083, but held no separate hearing on the matter and provided no basis for how the award was derived.

The main issue presented was whether the trial court followed the appropriate procedures in awarding attorney's fees to the insured.

The West Virginia Supreme Court of Appeals held that while the trial court was correct in finding Aetna liable to the insured for the costs of litigation incurred in defending himself in the three civil actions and the declaratory judgment action, the trial court's failure to make any findings of fact or conclusions of law regarding the calculation of attorney's fees as required by Rule 52(a) of the West Virginia Rules of Civil Procedure points to the need for a hearing on the issue of the reasonableness of the attorney's fees and the need for subsequent findings of fact and conclusions of law.

COMMERCIAL BANK OF BLUEFIELD v. ST. PAUL FIRE AND MARINE INS. CO., 336 S.E.2d 552 (W. Va. 1985).

Defenses Assertable by Insurer—Employee Fidelity Insurance—Standing of Judgment Creditor as Third-Party Beneficiary—Susceptibility to Garnishment

An employee of a company misappropriated funds in two banks, resulting in losses to the plaintiff bank and forcing the company to close. The bank sued the company and obtained a default judgment for its damages, and then brought suit against the company's insurer, which indemnified the company against loss from employee infidelity, on theories of third-party beneficiary and garnishment-in-aid-of-execution.

The three certified questions were: (1) Whether a judgment creditor (here, the bank) may maintain a garnishment proceeding in aid of execution to reach the proceeds of a judgment debtor's (the insured's) employee fidelity insurance policy when the judgment debtor has sustained a loss within the meaning of the policy; (2) whether the bank as a judgment creditor of an indemnitee (the insured) may maintain, as a third-party beneficiary, a direct action against the indemnitor (the

insurer) when the indemnity is against loss by the indemnitee; (3) whether an indemnitor in either a garnishment-in-aid-of-execution proceeding or third-party beneficiary proceeding may assert defenses against the judgment creditor which the indemnitee/judgment debtor failed to assert (primarily because the latter was defunct at the time of the underlying action).

The court held that: (1) A judgment creditor may maintain a garnishment proceeding in aid of execution to reach the proceeds of a judgment debtor's employee fidelity insurance policy when the judgment debtor has sustained a loss within the meaning of that policy, even though a formal notice and proof of loss has not been furnished to the insurer and even though the amount of the loss has not been determined at the time the garnishment proceeding is brought; (2) a judgment creditor of an indemnitee may not maintain, as a third-party beneficiary, a direct action against the indemnitor when the indemnity is against loss by the indemnitee; and (3) an indemnitor against loss ordinarily may not, in a garnishment-in-aid-of-execution proceeding, assert defenses against the judgment creditor which the indemnitee/judgment debtor failed to assert, such as the comparative negligence of the judgment creditor.

HORACE MANN INS. CO. v. SHAW, 337 S.E.2d 908 (W. Va. 1985).

Additional and Replacement Autos—Auto Insurance—Renewal Protection

The insurance company appealed a decision that the insurer's practice of issuing separate policies for each auto of the insured does not constitute a separate policy under the statute, so the insurer cannot subject each policy to a separate two-year requirement before affording renewal protection.

The issue in this case was whether an insured's existing renewal protection under the statute applies with regard to additional or replacement autos acquired by the insured, even though the additional policies have not been in existence for two consecutive years or longer.

The court held that where an insurer has issued to its insured an auto 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 West Virginia Code section 33-6A-4; an insured's existing renewal protection under the statute applies with regard to additional policies issued by the insurer for additional or replacement autos acquired by the insured, and for such renewal protection the policies need not have been in existence for two consecutive years or longer.

HUGGINS v. TRI-COUNTY BONDING CO., 337 S.E.2d 12 (W. Va. 1985).

Coverage and Exclusions—Negligent Entrustment

In this case, the defendant's son was involved in a car accident which injured the plaintiff's daughter, and plaintiff alleged that the defendant negligently entrusted the car to his son. The car was owned by the defendant's company, and the son

was using it to drive to a school dance and also deliver a corporate contribution to the school. The defendant asked his homeowner's insurance company to defend him in the negligent entrustment action and the insurer refused on the grounds that their policy covered only negligent "personal acts," not corporate acts, and that the policy excludes motor vehicle claims arising out of business pursuits.

The circuit court certified the following questions for the West Virginia Supreme Court of Appeals to resolve: (1) Whether Nationwide's homeowner's liability policy generally affords coverage for a claim of negligent entrustment, and (2) if so, whether any of the policy exclusions apply so as to except the claim in this case.

The court held: (1) Because Nationwide's homeowner's insurance policy covers negligent personal acts and there is no language in the liability coverage section which confines liability to acts arising on the premises covered by the policy, it does cover losses due to negligent entrustment; (2) where a home owner negligently entrusts a nonowned vehicle to his son who injures a third party, exclusionary language in the homeowner's liability policy in relation to "the ownership, maintenance, operation or use...of a land motor vehicle" does not exclude coverage for suits for negligent entrustment where the initial liability coverage is for "loss from damages for negligent personal acts." Since the circuit court found that neither the defendant nor his son were engaged in business activity at the time of the entrustment or the accident, none of the policy exclusions apply.

LUSK v. DOE, 338 S.E.2d 375 (W. Va. 1985).

Requirements for Bringing "John Doe" Actions—Uninsured Motorist Coverage

The appellant was involved in a car accident in which she alleges she was sideswiped by a hit-and-run coal truck and forced off the road. She was subsequently hospitalized with injuries for eight days. She instituted a "John Doe" action pursuant to West Virginia Code section 33-6-31 against her insurance carrier, and the insurer filed a motion to dismiss, asserting that the appellant failed to comply with the notice provisions of the statute which require the insured, being physically able, or someone in his behalf, to report the accident to either the police or the Department of Motor Vehicles (DMV) within twenty-four hours and notify the insurer within sixty days of such accident. While appellant's sister-in-law testified that she reported the accident to their insurance agent the day after the accident and appellant's brother, a co-insured under the policy, testified that he filled out an accident report form and had appellant sign it, the insurer denied getting any notice of the accident within sixty days, and the DMV had no accident report on file. The circuit court dismissed the action based on the failure of the appellant to report the accident to the appropriate authorities within the twenty-four hour notice period.

This appeal presented questions involving (1) the construction and application of certain provisions of West Virginia Code section 33-6-31 which, in substantial part, concerns uninsured motorist coverage and the procedures to be followed when

an injury to person or property is precipitated by an uninsured driver, and (2) the proper disposition of this case as one for summary judgment and not dismissal because the court considered testimony and other evidence outside of the pleadings.

The court held that: (1) Under West Virginia Code section 33-6-31(e)(i), those injured in person or property are separate "insureds" for the purposes of the notice requirement. By the clear language of this provision, the twenty-four hour notice period is tolled as to insureds "physically unable to report the occurrence of such accident...." Although another person, whether it be another named or additional insured, or a friend, relative, or witness to the accident, may report the accident on behalf of an injured insured, their failure to do so cannot prejudice those unable to make such report within the initial twenty-four hour period immediately following such accident; and (2) summary judgment was precluded by disputed issues of material fact pertaining to whether notice was actually sent to DMV and whether appellant was physically able to give notice earlier.

SOLIVA v. SHAND, MORAHAN & CO., 345 S.E.2d 33 (W. Va. 1986).

Certified Question—Contracts—Insurance—Insurance Policy Language—Torts

The Circuit Court of Mingo County, in this case, asked the West Virginia Supreme Court of Appeals whether a medical malpractice insurance company is required to defend and pay a judgment on a claims-made policy where a claim was made against the insured more than a year after the policy had expired. The circuit court had answered this question affirmatively. Dr. Soliva was sued for malpractice on June 12, 1982 for occurrences whch arose between August and November, 1980. His one-year insurance policy with Evanston Insurance Company expired on May 25, 1981, and he chose not to renew or extend it. The plaintiff then contracted with Aetna Life and Casualty for a policy to begin on June 1, 1981, and brought suit against both companies when they denied coverage for his malpractice suit. The circuit court sustained Aetna's motion for summary judgment, but denied it in Evanston's case.

The issues, in addition to the certified questions, were: (1) Whether the claims-made language of the Evanston policy was ambiguous; (2) whether the failure to fulfill plaintiff's "reasonable expectations" was sufficient to enforce the payment by Evanston; (3) when West Virginia law prohibits a claims-made insurance policy which does not include a tail provision of at least two years, whether the denial of summary judgment to Evanston is a correct interpretation of the contract of insurance.

The court held that the policy, when read as a whole, clearly stated that coverage was limited to claims made during the policy period. This was stated in several places, including a page to itself in bold type. No reasonable man could have honestly believed that the policy would cover a claim made a year after it expired. No ambiguity existed, and the plain language of the contract controlled. Plaintiff's "reasonable expectations" rule is a minority view. A party to a contract has a

duty to read the instrument. As to the West Virginia tail provision, appellant equated a claim made with an action brought. The policy did not limit the time for bringing an action under the contract, but the time for bringing a claim. The answer to the certified question was in the negative, and Evanston was not required to defend and pay this case against appellant Soliva.

WARDEN v. BANK OF MINGO, 341 S.E.2d 679 (W. Va. 1985).

Credit Insurance—Parties Bound—Unilateral Mistake

A debtor requested credit life and disability insurance sufficient to meet loan payments, which the bank provided. The bank later discovered that the terms given exceeded the maximum amount of coverage authorized by the insurer; it then modified the certificate to reflect lower benefits. Debtor became disabled and collected benefits at the lower allowance, and then sued for the balance.

The issues in this case were: (1) Whether the bank and insurer were bound to the original insurance contract where the bank made a mistake in issuing an insurance certificate in excess of the insurer's allowable limits, and whether the modification made by the bank without the debtor's acceptance effective and binding; (2) whether the bank was the agent of the insurer or the debtor in issuing credit insurance certificates; (3) whether an award of punitive damages against the bank was appropriate.

The court held that: (1) The bank's attempt to void the first certificate and replace it with a second without any acceptance of the modification by the debtor was ineffective; when the bank exceeded the authority given to it by the insurer, the bank itself became bound; since the bank had actual authority from the insurer to fill in and issue certificates and did so within its apparent authority, the fact that it exceeded its actual authority is unimportant—the contract is binding on the insurer; (2) where a creditor under a group credit policy was furnished blank forms and the forms were completed by the creditor's employees and delivered to the debtor advising him of the policy coverage, the creditor was the agent of the insurer in issuing certificates; (3) punitive damages are not appropriate here because there is no evidence of malice, fraud, oppression, or gross negligence.

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See also,

CIVIL PROCEDURE:

Arcuri v. Great Am. Ins. Co., 342 S.E.2d 177 (W. Va. 1986).

Capital Fuels, Inc. v. Clark Equip. Co., 342 S.E.2d 245 (W. Va. 1986).

TORTS:

Chamberlaine & Flowers, Inc. v. Smith Contracting, Inc., 341 S.E.2d 414 (W. Va. 1986).