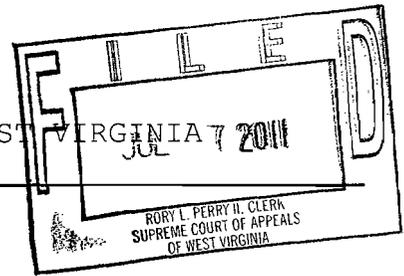


NO. _____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



CHARLESTON

ROGER W. GOFF,

Plaintiff,

v.

Civil Action No.: 09-C-345-3
James A. Matish, Judge

PENN MUTUAL LIFE INSURANCE
COMPANY, a life insurance
company, JENNIFER L. TOLER
OOTEN, and JEREMY TOLER,

Defendants.

FROM THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA
HONORABLE JAMES A MATISH, JUDGE

PETITION FOR APPEAL ON BEHALF OF PLAINTIFF, ROGER W. GOFF

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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PETITION FOR APPEAL ON BEHALF OF PLAINTIFF, ROGER W. GOFF

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST
VIRGINIA

**STATEMENT OF THE KIND OF
PROCEEDING AND NATURE OF THE RULING BELOW**

This action was instituted in the Circuit Court of Harrison County, West Virginia on August 4, 2009 by the plaintiff, Roger W. Goff. (hereinafter identified as "petitioner"). Penn Mutual Life Insurance Company sold a policy of life insurance to Betty J.

Toler. Ms. Toler specifically designated the petitioner as the primary beneficiary of this policy and that her children, Jennifer Toler Ooten and Jeremy Toler, were contingent beneficiaries.¹

Betty J. Toler died on August 25, 2008, however the respondent, Penn Mutual Life Insurance Company, did not pay the life insurance proceeds until December 4, 2009. The complaint asserts that Penn Mutual Insurance Company breached its duty of good faith and fair dealing by depriving the petitioner of the benefits due pursuant to terms of insurance policy sold as well as provision of West Virginia Code § 33-11-4(9) regarding the handling of claims by insurance companies.

Betty J. Toler died on August 25, 2008. The petitioner filed this civil action on August 4, 2009 as Penn Mutual Life Insurance Company had not by that time paid the contracted for life insurance policy benefits.² The complaint initiating this civil action contains four (4) counts of which three (3) are directed to Penn Mutual Life Insurance Company.

¹ The petitioner also obtained a life insurance policy in the same amount at the same time from Penn Mutual Life Insurance Company naming the decedent, Betty J. Toler, as his primary beneficiary with his children as contingent beneficiaries.

² Penn Mutual Life Insurance Company finally paid the life insurance policy proceeds to the Clerk of the Circuit Court of Harrison County, West Virginia pursuant to the Order of the Circuit Court on December 4, 2009.

Count II alleges that Penn Mutual Life Insurance Company caused injury and damage to the petitioner by its failure to pay the life insurance proceeds to the petitioner as the primary beneficiary. Count III asserts that Penn Mutual Life Insurance Company breached its duty of good faith and fair dealing to the petitioner as beneficiary of the life insurance contract vesting the petitioner as beneficiary at the time of the decedent's death.

Count IV of the complaint asserts that Penn Mutual Life Insurance Company violated the provisions of West Virginia Code § 33-11-4(9) in various ways including, but not limited to, misrepresentation of pertinent insurance policy provisions relating to coverage; failing to acknowledge and act reasonably promptly upon communications; and failing to adopt and implement reasonable standards for the prompt investigation of claims. The complaint seeks damages from Penn Mutual Life Insurance Company to include punitive damages.

On May 25, 2010 the circuit court granted the motion of Penn Mutual Life Insurance Company pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure determining that the claims asserted by the petitioner did not state a claim upon which relief may be granted. The circuit court specifically addressed Count III and IV of the complaint and dismissed Penn Mutual Life Insurance Company from the entirety of the case but did not address Count II

of the complaint asserting that Penn Mutual Life Insurance Company breached its contract with the petitioner as the policy beneficiary.

The circuit court concluded that the petitioner was neither a "first-party or third-party bad faith claimant", therefore, had no cause of action. Accordingly, the circuit court's erroneous ruling permits life insurance companies such as Penn Mutual to stall, delay and refuse to honor contractual relationships with beneficiaries thereby forcing a beneficiary to obtain counsel; file a lawsuit to force the company to pay; and, then when the insurance company pays the policy proceeds the circuit court ruling tells the beneficiary that no other claims against the life insurance company may be pursued. This ruling, as a matter of law, is incorrect and should be addressed by this court.

On October 15, 2010, the petitioner, Roger W. Goff, presented to this Court his petition for appeal from the May 25, 2010 Order granting the motion to dismiss the respondent, Penn Mutual Life Insurance Company, from the above-styled action. This Court, on February 24, 2011, dismissed the petition for appeal as interlocutory, with leave to file an appeal once the lower court action is final.

On May 4, 2011, the Circuit Court of Harrison County, West Virginia, granted a judgment as a matter of law in favor of the petitioner, Roger W. Goff, with respect to all claims against and

asserted by the defendant, Jeremy Toler. The respondent, Penn Mutual Life Insurance Company, did not participate as they were completely dismissed from this action by the Order of May 25, 2010.³

This petition for appeal is presented pursuant to Rule 3 of the West Virginia Rules of Appellate Procedure were effective until December 1, 2010. Pursuant to Rule 1(d) of the West Virginia Rules of Appellate Procedure effective December 1, 2010 the prior rules apply to all Orders entered prior to December 1, 2010.

STATEMENT OF FACTS

1. On or about March 18, 2007, Penn Mutual Life Insurance Company sold a policy of life insurance to Betty J. Toler.

2. The application which became part of the policy and contract of insurance specifically provides that the primary beneficiary under the policy is the petitioner, Roger W. Goff. The policy also identifies Ms. Toler's children, Jennifer Toler and Jeremy Toler, as contingent beneficiaries.

3. The policy purchased by the insured, Betty J. Toler, specifically provides that the death benefit will be paid as follows:

The Death Benefit will be paid to the Beneficiary in one sum, or if elected, under an income payment option. Settlement shall be made

³ The defendant, Jeremy Toler, has filed a Notice of Intent to Appeal.

within 60 days after receipt of due proof of death. The Company will require surrender of the policy and proof of the interest of the claimant. The Company will pay interest from the date of death to the date of payment. The interest rate will be determined each year by the Company, but will not be less than the rate of 3% per year compounded annually, or such higher rate as may be required by law.

4. There is no question that the policy expressly provides that the petitioner, Roger W. Goff, is the primary beneficiary of the life insurance proceeds.⁴

5. On August 25, 2008, the insured, Betty J. Toler, died as a result of Stage III Endometrial Carcinoma with the approximate interval between onset and death being determined by medical examiner as three (3) months.

6. In accordance with the life insurance policy issued by the respondent, Penn Mutual Life Insurance Company, the petitioner provided all information necessary for the processing of the payment of the death benefit to the petitioner, Roger W. Goff, as primary beneficiary.

7. On or about March 3, 2009, with no discernable activity for approximately seven (7) months, the petitioner retained counsel to pursue payment of the death benefit pursuant to the insurance policy.

⁴ The Circuit Court confirmed the entitlement of the plaintiff to the insurance policy proceeds in its order of May 4, 2011 which granted judgment as a matter of law in favor of the plaintiff.

8. On March 3, 2009, counsel for the petitioner sent a notice of representation to Penn Mutual Life Insurance Company.

9. On or about March 12, 2009, Penn Mutual Insurance Company advised counsel for the petitioner that the company had been unsuccessful in completing its investigation as Penn Mutual Life Insurance Company had not received a signed authorization from the executrix of the estate of the decedent, Betty J. Toler. The executrix of the estate is Jennifer Ooten, a contingent beneficiary pursuant to the Penn Mutual Life Insurance Company policy.

10. Even considering the apparent lack of cooperation by the executrix of the estate, Penn Mutual Life Insurance Company took no action to complete any investigation and to insure that its obligation to pay the death benefit to the primary beneficiary, the petitioner, Roger W. Goff, was completed in a timely and appropriate manner.⁵

11. On or about March 23, 2009, Jennifer Toler, executrix of the estate of Betty J. Toler, provided Penn Mutual Life Insurance Company various authorizations for release of medical information.

⁵ One available recourse to Penn Mutual Life Insurance Company was to initiate an interpleader action pursuant to Rule 22 of the West Virginia Rules of Civil Procedure. Upon filing the interpleader action, Penn Mutual Life Insurance Company could have subpoenaed any medical or other records of the decedent it deemed necessary to complete its investigation pursuant to the contestability provision of its policy. However, Penn Mutual chose simply to close its file and keep the money rightfully belonging to the petitioner as primary beneficiary.

12. On or about March 31, 2009, Penn Mutual Life Insurance Company advised counsel for the petitioner, Roger W. Goff, that Penn Mutual Life Insurance Company, would be "reopening the investigation and retrieving the medical records from known sources".

13. The March 31, 2009 correspondence also states that Penn Mutual Life Insurance Company was "aware of the beneficiary dispute and that no proceeds will be paid until the dispute is resolved, conditioned upon, the results of our contestable investigation".

14. On or about April 27, 2009, Penn Mutual Life Insurance Company advised counsel for the petitioner that Penn Mutual Life Insurance Company had "started the contestable investigation process".

15. On or about May 1, 2009, counsel for the petitioner responded to the April 27, 2009, correspondence and requested to be provided with a full and complete copy of any and all records received regarding the deceased, Betty J. Toler. Further, counsel for the petitioner requested any information regarding the claims of any persons other than the petitioner, Roger W. Goff, to the policy proceeds.

16. On or about June 1, 2009, Penn Mutual Life Insurance Company advised counsel for the petitioner that records had been obtained from various medical providers with respect to the decedent, Betty J. Toler, and that an examination of the records

was necessary "to determine whether a final claims decision can be made". However, the June 1, 2009, correspondence did not reference nor respond to the information sought by counsel for the petitioner in the May 1, 2009, letter.

17. On or about June 11, 2009, counsel for the petitioner advised Penn Mutual Life Insurance Company of its failure to provide a full and complete copy of all medical records obtained with respect to the decedent, Betty J. Toler. Further, counsel for the petitioner again requested information regarding any evidence that any beneficiary was entitled to the policy proceeds other than the petitioner, Roger W. Goff.

18. On or about July 15, 2009, counsel for the petitioner again requested the status of the contestability investigation and the payment of the policy proceeds to the petitioner, Roger W. Goff. The July 15, 2009, correspondence was necessary as there had been no response to the June 11, 2009, correspondence.

19. Penn Mutual Life Insurance Company never advised the petitioner, Roger W. Goff, or his counsel, that a decision had been made with respect to the payment of the policy proceeds.

20. Further, as of September 25, 2009, thirteen (13) months since the decedent's death there remained no payment of the policy proceeds to the primary beneficiary, Roger W. Goff, or payment of the policy proceeds into Court pursuant to Rule 22 of the West Virginia Rules of Civil Procedure.

STANDARD OF REVIEW

As the Circuit Court granted the motion of Penn Mutual Life Insurance Company to dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure review by this Court is *de novo*. Longwell v. Board of Education of the County of Marshall, 213 W. Va. 486, 583 S.E.2d 109 (2003); Holbrook v. Holbrook, 196 W. Va. 720, 474 S.E.2d 900 (1996); State ex rel. McGraw v. Scott Runyan Pontiac-Buick, 194 W. Va. 770, 461 S.E.2d 516 (1995).

POINTS AND AUTHORITIES

Federal Cases

Bryant v. Country Life Insurance Company, 414 F.Supp. 2d 981 (W.D. Wash. 2006); and,

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Gould v. Mutual Life Insurance Company of New York, 37 Wash.App. 756, 683 P.2d 207 (1984) [overruled on other grounds];

Hamilton v. McClain, 83 W. Va. 433, 98 S.E. 445 (1919);

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Jarvis v. Modern Woodmen of America, 185 W. Va. 305, 406 S.E.2d 736 (1991);

Jenkins v. JC Penney Casualty Insurance Company, 167 W. Va. 597, 280 S.E.2d 252 (1981);

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Plautz v. Time Insurance Company, 189 Wis.2d 136, 525 N.W.2d 342 (1994);

Roach v. Atlas Life Insurance Company, 769 P.2d 158 (Ok. 1989);

Romano v. New England Mutual Life Insurance Company, 178 W. Va. 523, 362 S.E.2d 334 (1987); and,

State ex rel. McGraw v. Scott Runyan Pontiac-Buick, 194 W. Va. 770, 461 S.E.2d 516 (1995).

State Statutes and Regulations

West Virginia Code § 33-11-4a;

West Virginia Code § 33-11-4a(j)(1);

West Virginia Code § 33-11-4(9); and

West Virginia Code § 55-8-12.

Rules of Civil Procedure

Rule 12(b)(6) of the West Virginia Rules of Civil Procedure; and,

Rule 22 of the West Virginia Rules of Civil Procedure.

DISCUSSION

- I. **The Circuit Court Erred in Determining That the Allegations of the Petitioner's Complaint Did Not State a Claim upon Which Relief May Be Granted Based upon the Contractual Relationship Between a Beneficiary of a Life Insurance Policy and the Life Insurance Company after the Death of the Insured for Breach of the Common Law Duty of Good Faith and Fair Dealing.**

A motion to dismiss should be granted only where it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations of the complaint.

Forshey v. Jackson, 222 W. Va. 743, 671 S.E.2d 748 (2008). Motions to dismiss are viewed with such disfavor that this Court has counseled lower courts to rarely grant such motions. Id. S.E.2d at 754.

In considering a motion to dismiss, the circuit court must view all facts in a light most favorable to the non-moving party and may grant a motion to dismiss only if it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to the relief sought. Id. S.E.2d at 754; Chapman v. Kane Transfer Company, Inc., 160 W. Va. 530, 236 S.E.2d 270 (1977). Further, in considering a complaint for the purposes of a motion to dismiss all facts are to be read liberally as required by the notice pleading theory underlying the West Virginia Rules of Civil Procedure. Forshey v. Jackson, 222 W. Va. 743, 671 S.E.2d 748 (2008).

Based upon the foregoing facts it is apparent that the complaint states a cause of action against Penn Mutual Life Insurance Company for breach of contract and breach of its duty of good faith and fair dealing to the petitioner, Roger W. Goff. The petitioner is the beneficiary of the life insurance policy purchased by the decedent, Betty J. Toler, and upon the death of Ms. Toler had a contractual relationship with Penn Mutual which Penn Mutual breached.

The decedent, Betty J. Toler, died on August 25, 2008. Penn Mutual Life Insurance Company was provided with proof of Ms. Toler's death and communicated with the executrix and the petitioner, Roger W. Goff, as the primary beneficiary.

Penn Mutual Life Insurance Company took no action to complete any investigation it desired and to pay the appropriate death benefits in a prompt and reasonable time period. Penn Mutual Life Insurance Company did not apprise the primary beneficiary, Roger W. Goff, of the status of its investigation nor communicate with the petitioner in any way prior to receiving notice of representation from counsel for the petitioner.

By its own admission of Penn Mutual Life Insurance Company closed the life insurance claim presented by the petitioner, Roger W. Goff, as primary beneficiary of the life insurance policy keeping the policy proceeds. It is inconceivable that Penn Mutual Life Insurance Company took no action and closed its file without paying the contracted for benefit to the primary beneficiary, Roger W. Goff. It is clear that Count III of the complaint states a claim against the defendant, Penn Mutual Life Insurance Company, upon which relief may be granted to the petitioner.

This Court has not directly addressed the existence of a cause of action by the beneficiary of a life insurance policy for the violation of the duty of good faith and fair dealing and the various sections of West Virginia Code § 33-11-4(9) following the

death of the insured. However, this Court has inferentially recognized and approved such causes of action by the beneficiary of a life insurance policy.

In Romano v. New England Mutual Life Insurance Company, 178 W. Va. 523, 362 S.E.2d 334 (1987), this Court held that:

While group insureds are not policyholders and usually do not enjoy privity of contract with the insurer, it is recognized that they are beneficiaries of the insurance contract and may sue directly to enforce its provisions.

In Romano, the decedent's estate brought an action against a group life insurance carrier asserting breach of contract and the violation of the Unfair Claims Settlement Practices Act contained in West Virginia Code § 33-11-4(9).⁶ This Court determined that despite the fact that the decedent was not a policyholder, the beneficiary of the insurance contract was authorized to assert claims directly against the life insurer to enforce the contract provisions and for the failings of the insurance company in the investigation process.

⁶ The Circuit Court attempted to distinguish this Court's decision in Romano v. New England Life, by asserting that the plaintiff in the Romano action was not the beneficiary of the life insurance policy, however, based upon a careful review of the facts in Romano it is apparent that no beneficiary was named by the decedent in Romano, therefore, the default beneficiary would have been the decedent's estate.

In Jarvis v. Modern Woodmen of America, 185 W. Va. 305, 406 S.E.2d 736 (1991), this Court affirmed a jury verdict determining that an insurance agent was responsible for misrepresentations in a life insurance application; that economic damages based upon the cancellation of an incontestable life insurance policy based upon the agent advice was appropriate; and, that a punitive damage award against the life insurance company and its agent was justified. In Jarvis, the beneficiary of the replacement life insurance policy brought an action against the agent and the life insurer seeking damages arising from the insurance companies refusal to pay the death benefits because of an alleged misrepresentation in the policy application. Although not directly addressing the beneficiary's standing, this Court implicitly recognized that the beneficiary of a life insurance policy has the right to sue the life insurance carrier.

This Court has ruled that the right of a beneficiary pursuant to a life insurance policy is inchoate prior to the death of the insured but becomes consummate on the death of the insured and cannot thereafter be waived or abrogated by the insurer or otherwise changed unless absolved by some positive rule of law. Peoples Security Life Insurance Company v. Currence, 187 W. Va. 561, 420 S.E.2d 552 (1992); Hamilton v. McClain, 83 W. Va. 433, 98 S.E. 445 (1919). As articulated by the United States District

Court for the Eastern District of Virginia in Lincoln National Life Insurance Company v. Johnson, 38 F.Supp. 2d 440 (E.D. Va. 1999):

During the life of the insured the beneficiary has no vested in the life insurance policy ... but rather has a mere expectancy similar to that of a legatee during the life of a testator; however, if no change was made in the policy, upon the death of the insured, the rights of the beneficiary become fixed and vested.

Accordingly, as the decedent, Betty J. Toler, died on August 25, 2008, the rights of the primary beneficiary, Roger W. Goff, became fixed and vested to the insurance policy at that time. These rights include not only the right to receive the policy proceeds but also the right to enforce obligations under the insurance policy contract including, but not limited to, the obligation of good faith and fair dealing on the part of the insurance carrier.

Other courts addressing the issue of whether a beneficiary has the right to proceed against a life insurance carrier for bad faith, have clearly recognized standing of a beneficiary against a life insurance carrier to enforce the insurance contract and for bad faith. Roach v. Atlas Life Insurance Company, 769 P.2d 158 (Ok. 1989); Plautz v. Time Insurance Company, 189 Wis.2d 136, 525 N.W.2d 342 (1994); Gould v. Mutual Life Insurance Company of New York, 37 Wash.App. 756, 683 P.2d 207 (1984) [overruled on other grounds]; Bryant v. Country Life Insurance Company, 414 F.Supp. 2d 981 (W.D. Wash. 2006).

In Roach v. Atlas Life Insurance Company, 769 P.2d 158 (Ok. 1989), the Supreme Court of Oklahoma determined that while the insurer's duty to deal fairly and act in good faith is limited and does not extend to every party entitled to payment from insurance proceeds, a beneficiary of a life insurance policy meets the criteria for assertion of a cause of action for bad faith against the life insurance carrier. The Oklahoma Court stated that there must be a contractual or statutory relationship between the insurer and the party asserting the bad faith claim before the duty on the part of the insurance carrier arises.

The Oklahoma Court found a statutory relationship in its state statute that provides that "a contract made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." As provided more fully herein West Virginia has a similar statute.

The Oklahoma Court went on to state that:

The failure to afford a cause of action for bad faith to the beneficiary of a life insurance policy would negate a substantial reason for the insureds purchase of the policy - - the peace of mind and security which it provides in the event of loss. An action for breach of the duty of good faith and fair dealing lies in favor of a policy beneficiary against a life insurance company.

Accordingly, the Oklahoma Court determined that the policy beneficiary, after death, stands in the shoes of the life insurance policy insured for the purposes of enforcing the insurance contract and in a cause of action for bad faith.

The Court of Appeals of Wisconsin addressed beneficiary standing in Plautz v. Time Insurance Company, 189 Wis.2d 136, 525 N.W.2d 342 (1994). The Wisconsin Court of Appeals concluded that a life insurance beneficiary of a deceased insured may bring a bad faith cause of action against a life insurance company for unreasonable actions in the investigation and handling of a claim. The court stated that although generally a contract cannot be enforced by a person not a party to the contract an exception exists where the contract was specifically made for the benefit of a third-party.

The Wisconsin Court further stated that:

The right of a beneficiary of a life policy to sue in his own name may be predicated on the real party in interest concept, for when the interest of the contingent beneficiary vests upon the death of the insured, the beneficiary is the real party in interest.

The Wisconsin Court stated at footnote six (6) of its opinion, that its recognition of a beneficiary's bad faith cause of action was consistent with authorities from other jurisdiction and with various insurance treatises that have specifically addressed this issue.

The Court of Appeals in Washington in Gould v. Mutual Life Insurance Company of New York, 37 Wash.App. 756, 683 P.2d 207 (1984)⁷ opined that:

Because there is no logical basis upon which to distinguish Gould [beneficiary] from the insured under the circumstances of this case, we decline to hold that a beneficiary of a life insurance company does not have a cause of action against the insurer under the consumer protection act for bad faith in settling her claim.

The weight of authority supports the standing of a life insurance beneficiary to stand in the shoes of the insured decedent after death and be able to enforce the insurance contract and sue for the insurance carriers bad faith. Accordingly, the circuit court erred in granting the motion to dismiss the petitioner's cause of action.

II. The Beneficiary of a Life Insurance Policy Following the Death of the Decedent Has Standing to Enforce the Provisions of West Virginia Code § 33-11-4(9) and Stands in the Shoes of the Insured for That Purpose.

The Circuit Court in its Order granting its motion to dismiss spends significant time debating the status of the petitioner as either a first or third-party claimant, however, West Virginia Code § 33-11-4(9) makes no such distinction. The focus of that statutory section entitled Unfair Claims Settlement Practices is

⁷ This decision was overruled on other grounds not relevant to this action, however, the holding as to beneficiary standing was reaffirmed in Bryant v. Country Life Insurance Company, 414 F.Supp. 2d 981 (W.D. Wash. 2006).

upon the acts and conduct of the insurance carrier not the status of the entity seeking to compel the insurance company to follow the law.

Count IV of the plaintiff's complaint articulates a cause of action for the violation of West Virginia Code § 33-11-4(9) which includes the assertion that Penn Mutual Life Insurance Company misrepresents pertinent provisions of the life insurance policy relating to its coverage; that Penn Mutual Life Insurance Company failed to acknowledge and act reasonably promptly upon communications with respect to the petitioner; and failed to adopt and implement reasonable standards for the prompt investigation of claims which would include the closure of Penn Mutual Life Insurance Company's file without interpleading the policy proceeds pursuant to Rule 22 of the West Virginia Rules of Civil Procedure.

A private cause of action based upon West Virginia Code § 33-11-4(9) was recognized by this Court in Jenkins v. JC Penney Casualty Insurance Company, 167 W. Va. 597, 280 S.E.2d 252 (1981). Although the West Virginia Legislature limited the effect of Jenkins by the adoption of West Virginia Code § 33-11-4a, that statutory limitation does not apply to the petitioner in this case as the petitioner is clearly not a third-party claimant as defined by West Virginia Code § 33-11-4a(j)(1).⁸

⁸ Third-party claimant means any individual, corporation, association, partnership or any other legal entity asserting a claim against an individual, corporation, association, partnership or other legal entity insured under an insurance policy or

As provided hereinabove the petitioner, Roger W. Goff, as the primary beneficiary of the life insurance policy sold by Penn Mutual Life Insurance Company is entitled to the proceeds of the life insurance policy and his contractual rights vested upon the insured's death, therefore, the petitioner, stands in the shoes of the decedent as an insured. As the petitioner has a cause of action for the breach of the duty of good faith and fair dealing against Penn Mutual Life Insurance Company it is clear that he is not a third-party claimant as third-party claimants do not have such a cause of action. Elmore v. State Farm Mutual Automobile Insurance Company, 202 W. Va. 430, 504 S.E.2d 893 (1998).

The life insurance carrier in Plautz v. Time Insurance Company, 189 Wis.2d 136, 525 N.W.2d 342 (1994), also attempted to rely upon various court decisions determining that a third-party claimant could not maintain a bad faith action against the tortfeasor's insurance company. The Wisconsin Court specifically distinguished a liability insurance claim from the claim of a beneficiary of a life insurance policy as follows:

With life insurance, a named insured intentionally contracts for death benefits to be paid to a designated beneficiaries upon the named insureds death. Therefore, quite obviously, the failure to afford a

insurance contract for the claim in question. West Virginia Code § 33-11-4a(j)(1). The petitioner herein is the beneficiary of a life insurance policy, he has not asserted a liability claim against anyone.

cause of action for bad faith to the beneficiary of a life insurance policy would negate a substantial reason for the insureds purchase of the policy - the peace of mind and security which it provides in the event of loss

The right of a beneficiary of a life policy to sue in his own name may be predicated on the real party and interest concept, for when the interest of the contingent beneficiary rests upon the death of the insured, the beneficiary is the real party in interest.

The beneficiary of a policy for the benefit of whom it may concern extra, is usually held to be the real party in interest for the purpose of bringing an action against the insurer.

Accordingly, it is clear that the petitioner is entitled to assert a cause of action against Penn Mutual Life Insurance Company for violation of the duty of good faith and fair dealing as well as for violations of the West Virginia Unfair Claims Settlement Practices Act. The petitioner is not a third-party claimant precluded from asserting such a cause of action by West Virginia Code § 33-11-4a.

Additionally, West Virginia Code § 55-8-12 provides as follows:

If a covenant or promise be made for the sole benefit of a person with whom it is not made, or with whom it is made jointly with others, such

person may maintain, in his own name, any action thereon which he may maintain in case it had been made with him only, and the consideration had moved from him to the party making such covenant or promise.

This Court has not had the occasion to address this statute in the context of a life insurance policy, however, the Supreme Court of Oklahoma in Roach v. Atlas Life Insurance Company, 769 P.2d 158 (Ok. 1989), addressed a similar Oklahoma statute which provided as follows:

A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it.

This statute was the partial basis for the conclusion of the Oklahoma Supreme Court that a beneficiary of a life insurance policy is entitled to enforce the life insurance contract including, but not limited to, the duty of good faith and fair dealing owed by the insurance carrier.

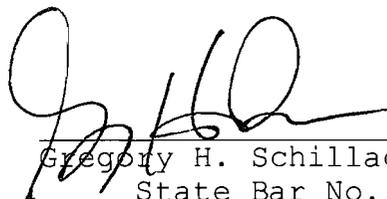
A life insurance policy is by its express nature a contract executed for the sole benefit of the beneficiary. The existence of one (1) or more beneficiaries does not defeat the fact that the purpose of the policy is to benefit a sole beneficiary. Accordingly, the petitioner respectfully submits that the phrase contained in West Virginia Code § 55-8-12 stating "for the sole benefit of a person" would include the class of any individuals who were identified as the beneficiaries of a life insurance policy.

Mr. Goff is the primary beneficiary of a life insurance policy purchased from Penn Mutual Life Insurance Company. Upon the decedent's death all contractual rights owed to the beneficiary vested in the petitioner, Roger W. Goff, therefore, there should be no dispute that Mr. Goff is fully able to pursue the causes of action alleged in the complaint.

CONCLUSION

Based upon the foregoing, the petitioner, Roger W. Goff, respectfully request that the Circuit Court's May 25, 2010 "Order Granting Without Prejudice Motion to Dismiss of the Defendant, Penn Mutual Life Insurance Company" be reversed.

Dated this 14th day of June, 2011.



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NO. _____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

ROGER W. GOFF,

Plaintiff,

v.

Civil Action No.: 09-C-345-3
James A. Matish, Judge

PENN MUTUAL LIFE INSURANCE
COMPANY, a life insurance
company, JENNIFER L. TOLER
OOTEN, and JEREMY TOLER,

Defendants.

FROM THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA
HONORABLE JAMES A MATISH, JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of July, 2011, I served the foregoing **DOCKETING STATEMENT** and **DESIGNATION OF RECORD WITH RESPECT TO PETITION FOR APPEAL OF ROGER W. GOFF REGARDING THE MAY 25, 2010 ORDER** upon all opposing parties by depositing a true copy thereof in the United States mail, postage prepaid, in envelopes addressed as follows:

Robert J. Ridge, Esquire
Vincent M. Roskovensky, Esquire
Thorp, Reed & Armstrong, LLP
1233 Main Street, Suite 4000
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