

No. 33091 *Daniel R. Strahin v. Earl Sullivan and Farmers & Mechanics Mutual Insurance Company*

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Starcher, J., dissenting:

The majority opinion in this case marks a new low in bad public policymaking by this Court. Without a doubt, the opinion will go down in history as one of the most anti-consumer, anti-contract, pro-insurance company cases ever issued by this Court. The majority opinion invents an interpretation of the common law that is pointless and cruel. Because an insurance company refused to settle a claim that probably could and should have been settled within policy limits, defendants are now forced to go through a painful trial, and to gamble upon losing all of their worldly possessions. And the majority opinion forces plaintiffs to expend precious resources litigating trials to conclusion, not because the insurance company can't or shouldn't settle within policy limits, but because the insurance industry wants to grind plaintiffs down and force them to settle their claims for pennies on the dollar.

When I was elected in 1996, I was proud of the Court's reputation – built by earlier justices – of issuing decisions that forced insurance companies to behave reasonably.¹

¹*See, e.g., Jenkins v. J.C. Penney Cas. Ins. Co.*, 167 W.Va. 597, 280 S.E.2d 252 (1981) (court ruled an insurance claimant could bring an individual lawsuit against insurer that violates the Uniform Unfair Trade Practices Act, even though a majority of jurisdictions had ruled only a state agency could bring such a suit); *Hayseeds, Inc. v. State Farm Fire & Cas.*, 177 W.Va. 323, 352 S.E.2d 73, (1986) (when an insurer breaches an insurance contract, the insured may recover reasonable attorneys' fees in vindicating the claim; damages for net
(continued...)

These bold decisions leveled the playing field, and encouraged behemoth insurance companies to deal fairly with individual West Virginia citizens. And for asking insurance companies to behave reasonably, West Virginia is now routinely called a “judicial hellhole” with the “worst legal system in America” by various anti-consumer lobbying organizations. The majority opinion suggests that this Court is now bowing to those lobbying efforts.

The majority opinion might leave the reader with the notion that Mr. Strahin’s counsel relied primarily upon one case – *Red Giant Oil Company v. Lawlor*, 528 N.W.2d 524 (Iowa, 1995) – as support for their argument that bad faith claims may be assigned. The majority opinion then says that the appellant’s reliance upon this one case is “misplaced” because it is “easily distinguishable” since “unlike the insurer in *Red Giant*, Farmers & Mechanics never refused to defend Mr. Sullivan.” ___ W.Va. at ___, ___ S.E.2d at ___ (Slip Op. at 10-11).

What really happened, however, is that the appellant cited to dozens of cases that have different fact patterns than *Red Giant*, but which reach the same holding. What the majority opinion dismissively overlooks in the above-quoted statement is that there is more than one case in America holding that a bad faith claim may be assigned from the insured to a plaintiff, when the assignment is coupled with a covenant not to execute. In fact, the

¹(...continued)
economic loss caused by the delay in settlement; damages for aggravation and inconvenience; and punitive damages); or *Shamblin v. Nationwide Mut. Ins. Co.*, 183 W.Va. 585, 396 S.E.2d 766 (1990).

overwhelming majority of courts in America accept such assignments coupled with covenants not to execute.

The above-quoted statement by the majority is also ill-informed, and fails to recognize – like the insurance industry recognizes – that assignments of rights in tort actions are a daily occurrence and happen for all sorts of reasons. Insurance companies often find that “the insured and the tort claimant have joined forces to fight the insurer,” and it is

... normally the case where the insured is potentially faced with a verdict that may expose its personal assets. More precisely, this situation typically arises where the insurer decides not to defend the insured at all or where it provides a defense under a reservation of rights. Even when the insurer decides to defend the suit unconditionally, there may come a time when the insurer does not want to settle the suit for the policy limits. At that point, the insured may believe that its personal assets may be exposed if the lawsuit proceeds to trial.

Jude Francois, “The Assignment of the Insured’s Rights,” *For the Defense* at 46 (February 2007). But no matter what the defendant-insured’s motivation was for entering into an agreement with a plaintiff, a majority of courts nationwide support such assignment of rights or consent agreements.²

²Consent judgments are sometimes referred to as stipulated judgments, “*Damron*” agreements, “*Miller/Shugart*” agreements, or “*Mary Carter*” agreements. See *Damron v. Sledge*, 460 P.2d 997 (Ariz. 1969) (landmark case from the Supreme Court of Arizona); *Miller v. Shugart*, 316 N.W.2d 729 (Minn. 1982) (landmark case from the Supreme Court of Minnesota). Consent judgments are largely recognized as an appropriate and reasonable procedural remedy available to an insured following the refusal by an insurer to indemnify an insured against a liability claim and/or under circumstances wherein an insurer defends under a reservation of rights. See *Restatement (Second) of Judgments*, §57-58 (1982); Justin A. Harris, *Judicial Approaches to Stipulated Judgments, Assignments of Rights, and* (continued...)

Let me say it again: An overwhelming majority of jurisdictions permit the assignment of a bad faith claim when coupled with a covenant not to execute.³

²(...continued)

Covenants Not to Execute in Insurance Litigation, 47 Drake L. Rev. 853 (1999); Steven Plitt, *The Evolving Boundaries of Damron/Morris Agreements: A Search for the Missing Link, A Judicial Determination of the Length of a Reasonable Person's Arm, and Other Progressive Issues*, 35 Ariz. St. L.J. 1331 (2003); Steven L. Pain, et al., *California Practicum: Recent Developments in California Insurance Law: Enforceability of Stipulated Judgments Against Insurance Carriers*, 22 Pepp. L. Rev. 1017 (1995); Chris Wood, *Note: Assignments of Rights and Covenants Not to Execute in Insurance Litigation*, 75 Tex. L. Rev. 1373 (1997); Douglas R. Richmond, *Rights and Responsibilities of Excess Insurers*, 78 Den. U. L. Rev. 29 (2000); Timothy D. Howell, *So Long "Sweetheart" - State Farm & Casualty Co. v. Gandy Swings the Pendulum Further to the Right as the Latest in a Line of Setbacks for Texas Plaintiffs*, 29 St. Mary's L. J. 47 (1997); Michael J. Brady et al., *Demise of the Stipulated Judgment as a Basis for Bad Faith Actions*, 60 Def. Couns. J. 59 (1993); 1 R. Long, *The Law of Liability Insurance* § 5.14 (1983); Sheldon R. Shapiro, *Modern Views of State Courts as to Whether Consent Judgment is Entitled to Res Judicata or Collateral Estoppel Effect*, 91 A.L.R.3d 1170, (1979); E. H. Schopler, *Right to Appellate Review of Consent Judgment*, 69 A.L.R.2d 755, (1960); E. H. Schopler, *Conclusiveness and Effect, Upon Surety, of Default or Consent Judgment against Principal*, 59 A.L.R.2d 752, (1958); Richard D. English, *Alternative Dispute Resolution: Sanctions for Failure to Participate in Good Faith In, or Comply with Agreement made in Mediation*, 43 A.L.R.5th 545, (1996); 1-3 *Insurance Bad Faith Litigation* § 3.08: "Recoverable Damages for Breach of Duty to Settle" (2004); 1-3 *Insurance Bad Faith Litigation* § 3.14: "Insurer's Procedural Options When Questions of Coverage Arise" (2004); Stuart N. Rappaport, *Collateral Estoppel Effects of Judgments Vacated Pursuant to Settlement*, 1987 U. Ill. L. Rev. 731 (1987); Ellen S. Pryor, *The Tort Liability Regime and the Duty to Defend*, 58 Md. L. Rev. 1 (1999); J. Michael Phillips, *Looking Out for Mary Carter: Collusive Settlement Agreements in Washington Tort Litigation*, 69 Wash. L. Rev. 255 (1994).

³*Red Giant Oil Co. v. Lawlor*, 528 N.W.2d 524 (Iowa 1995) (landmark case); *Gray v. Grain Dealers Mut. Ins. Co.*, 871 F.2d 1128 (D.C. Cir. 1989) (landmark case); *J & J Farmer Leasing, Inc. v. Citizens Ins. Co. of America*, 696 N.W.2d 681 (Mich. 2005); *Wangler v. Lerol*, 670 N.W.2d 830 (N.D. 2003); *Guillen ex rel. Guillen v. Potomac Ins. Co.*, 785 N.E.2d 1 (Ill. 2003); *Stateline Steel Erectors, Inc. v. Shields*, 837 A.2d 285 (N.H. 2003); *Pinto v. Allstate Ins. Co.*, 221 F. 3d 394 (2nd Cir. 2000); *Kobbeman v. Oleson*, 574 N.W.2d 633 (S.D. 1998); *Ayers v. C & D General Contractors*, 269 F. Supp. 2d 911 (W.D. Ct. Ky. (continued...))

The rule followed by most courts is to consider a covenant not to execute “merely a contract and not a release.” *Red Giant Oil Co. v. Lawlor*, 528 N.W.2d at 534. Covenants not to execute are different from releases, as the legal liability remains in force against those who have covenants, whereas a release represents “total freedom from liability.” *Gray v. Grain Dealers Mut. Ins. Co.*, 871 F.2d 1133. *See also Kobbeman v. Oleson*, 574 N.W.2d at 636 (A covenant not to execute is “merely a contract, and not a release, such that the underlying tort liability remains and a breach of contract action lies in favor of the insured if the injured party seeks to collect his judgment.”); *J & J Farmer Leasing, Inc. v. Citizens Ins. Co. of America*, 696 N.W.2d at 684 (“A release immediately discharges an existing claim or right. In contrast, a covenant not to sue is merely an agreement not to sue on an existing claim. It does not extinguish a claim or cause of action. The difference primarily affects third parties, rather than the parties to the agreement.”); *Stateline Steel Erectors, Inc. v. Shields*, 837 A.2d 285 at 290 (“Unlike a release, a covenant not to sue does not relinquish a right of claim, or extinguish a cause of action. A covenant not to sue recognizes the continuation of the obligation or liability; the party making the covenant not to sue agrees only not to assert any right or claim based upon the obligation”).

³(...continued)

2003); *Glenn v. Fleming*, 799 P.2d 79 (Kan. 1990); *Franco v. Selective Ins. Co.*, 184 F.3d 4 (1st Cir. 1999) (applying Maine law); *Gainsco Ins. Co. v. Amoco Prod. Co.*, 53 P.3d 1051 (Wyo. 2002); *Tip’s Package Store, Inc. v. Commercial Ins. Managers, Inc.*, 86 S.W.3d 543 (Tenn. Ct. App. 2001); *Campione v. Wilson*, 661 N.E.2d 658 (Mass. 1996); *McLellan v. Atchison Ins. Agency Inc.*, 912 P.2d 559 (Haw. Ct. App. 1996).

The majority opinion totally rejects the rule followed by the overwhelming majority of jurisdictions, and instead aligns West Virginia's common law with . . . the U.S. Virgin Islands. The *only case* that the majority opinion and the appellee insurance company could find to support their position was from the U.S. Virgin Islands. *In re Tutu Water Wells Contamination*, 78 F.Supp.2d 423 (D.Virgin Islands, 1999).

Based upon this one case from the U.S. Virgin Islands, the majority opinion concludes, as a matter of law, that a *Shamblin* claim cannot be assigned prior to a jury verdict. In so ruling, the Court accepted the invitation of Farmers & Mechanics to add a new twist to our common law. Essentially, our law now holds that a *Shamblin* claim cannot attach unless and until there is an excess verdict that puts the insured's personal assets at stake.

I believe it should make no difference whether an assignment of a *Shamblin* claim precedes or follows an excess verdict. The risk to the insured arises when a settlement offer within policy limits is rejected. The insured must spend days, weeks, or months of trial fearing the loss of everything. The risk becomes reality after an adverse verdict in the absence of an assignment which protects the rights of an insured.

A classic example of this can be found in the recent U.S. Supreme Court case of *State Farm Mutual Insurance v. Campbell*, 538 U.S. 408 (2003). State Farm determined its insured was at fault in a collision that resulted in the death of one man and the permanent disability of another. Still, State Farm repeatedly refused to settle within the policy limits. When the jury returned a verdict in excess of policy limits, the lawyer hired by State Farm

told the insureds that State Farm wouldn't pay the verdict, and said "You may want to put for sale signs on your property to get things moving." *Id.* at 413.

Thanks to the majority opinion, I believe this is what the citizens of West Virginia should start getting used to. People better get used to the old days, and should expect their liability insurance company to be allowed to gamble with their assets at trial. And when a jury comes back with a verdict that exceeds the policy limits, the people of West Virginia might want to think about putting a "for sale" sign on their property to get things moving along. Because the people of West Virginia sure won't get any help from this Court.

I therefore respectfully dissent.