

Benjamin, Justice, dissenting:

Effective July 8, 2005, the West Virginia Legislature mandated that no further third-party settlement bad faith actions could be brought in the courts of this State. W. Va. Code § 33-11-4a(a) (2005). This included claims based upon allegations of bad conduct after this date. *Id.* In clear, direct and precise terms, the Legislature directed that claims not filed before July 8, 2005 and claims related to activities after July 8, 2005 must be brought only in an administrative action before the Insurance Commissioner of West Virginia. *Id.* On this clear command of the Legislature, it was thought there could be no serious disagreement – until today’s majority opinion.

In refusing to grant the requested writs, the majority judicially rewrites the statutory law to circumvent the plain intention of the Legislature and, in so doing, creates a jurisdiction for courts to entertain complaints about alleged improper conduct occurring after July 8, 2005 -- despite the Legislature having already legislated that the proper jurisdiction to deal with such complaints is with the Insurance Commissioner. I not only am troubled by the majority’s legally inaccurate result, but also by the appropriation by this Court of legislative power to reach this result.

The Unfair Trade Practices Act (“UTPA”) was enacted “to regulate trade practices in the business of insurance . . . by defining . . . unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or

determined.” W. Va. Code § 33-11-1 (1974). The UTPA prohibits unfair claim settlement practices, which are described in W. Va. Code § 33-11-4(9) (2002):

No person shall commit or perform *with such frequency* as to indicate a *general business practice* any of the following:

....
(c) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;

....
(f) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear

(In relevant part) (emphasis added). Under the plain language of W. Va. Code § 33-11-4(9), to maintain a suit under the statute, a plaintiff must refer to more than one act in order to show a general business practice. In other words, a general business practice is proven through a pattern of behavior. Here, the respondents (“Georges”) complained of *past* behavior only by petitioner, AIG Domestic Claims Inc. (“AIG”).

Third-party bad faith claims had been a source of political controversy for some time in West Virginia prior to 2005. Whether good or bad, the Legislature ultimately resolved the controversy by barring such claims as of July 8, 2005. W. Va. Code § 33-11-4a(a) extends this bar to the filing of claims and to allegations related to bad faith conduct after this date. Specifically, W. Va. Code § 33-11-4a(a) states, in pertinent part:

A third-party claimant may not bring a private cause of action or any other action against any person for an unfair claims settlement practice. A third-party claimant’s sole

remedy against a person for an unfair claims settlement practice or the bad faith settlement of a claim is the filing of an administrative complaint with the [Insurance Commissioner of West Virginia] A third-party claimant may not include allegations of unfair claims settlement practices in any underlying litigation against an insured.

Where, as here, the law and the legislative intent are so straightforward and clear, there should be no serious question but that the court below legally erred and that both writs should issue.

The issuance of both writs is also compelled factually. In their June 30, 2005 filing, the Georges asserted the following allegation of bad faith conduct by AIG in the settlement of their claims:

(34) Defendant AIG *violated* the [UTPA] and/or West Virginia insurance regulations with such frequency as to indicate a general business practice, specifically including, but not limited to, not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability had become reasonably clear and other violations of the Unfair Claims Settlement Practices Act.

(35) Defendant AIG in the handling of plaintiffs' claims *has violated* the [UTPA], West Virginia Code § 33-11-4(9), as well as the insurance regulations promulgated thereunder, including, but not limited to the following:

- a. Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;
and
- b. Failing to attempt in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear.

(Emphasis added). Although timely filed on June 30, 2005, to “beat” the upcoming July 8, 2005, deadline for the raising of a civil claim of third-party bad faith against AIG, the Georges chose to narrowly plead their allegations: they only alleged *past* conduct (conduct by AIG prior to June 30, 2005). Absent from their asserted claims was *any* allegation of ongoing bad faith conduct by AIG related to them such as might give rise to a legitimate discovery attempt to seek evidence *after* June 30, 2005. Nevertheless, the Georges thereafter sought not only to discover post-June 30, 2005, AIG conduct, they also now intend to rely on such conduct at the trial of this matter based upon the candid representation of their counsel during the oral argument of this case.

AIG sought a writ from this Court to compel the circuit court to rule on whether the Georges could rely on AIG’s activity after July 8, 2005, to support their unfair claims settlement practices allegations. AIG also sought a writ to prohibit the circuit court from enforcing its order allowing the Georges to seek discovery of events that occurred after the abolition of third-party UTPA actions.

The majority’s memorandum decision denies both writs. With regard to the writ to compel, the majority reasoned:

To establish their claim that AIG committed unfair claims settlement practices in the resolution of their lawsuit in violation of the UTPA, *W.Va. Code* § 33-11-4(9) requires more than simply showing one isolated violation. . . . To establish a “general business practice,” the plaintiffs should be permitted discovery of AIG’s actions that violated the

UTPA, whether or not those actions pre- or post-dated when *W.Va. Code* § 33-11-4a went into operation.

The majority's decision does not clearly recognize that for the Georges to have asserted a valid claim, enough acts establishing a general business practice must have occurred prior to filing the claim; *i.e.*, a cause of action cannot be maintained on speculation of future bad acts. Furthermore, the Georges' complaint clarifies that, through its use of only the past tense, the Georges relied only on events occurring prior to the filing of their complaint. Had the Georges intended to include future events to further reinforce their allegation of a general business practice, they needed simply to include such language in their complaint.

Had the Georges alleged in their complaint that AIG "continues to violate" the UTPA, events occurring after the filing of the complaint and the effective date of *W. Va. Code* § 33-11-4a would be usable and discoverable to show a general business practice without violating *W. Va. Code* § 33-11-4a. Without that allegation in the complaint, subsequent bad acts must constitute a separate cause of action now barred by statute. *W. Va. Code* § 33-11-4a. With regard to the writ to compel, the majority erred by failing to give effect to the language of the complaint.

The majority compounds its error by denying the writ to prohibit the discovery of events following the effective date of *W. Va. Code* § 33-11-4a. The majority

supports this decision, stating that “our rules permit ‘discovery regarding any matter, not privileged, *which is relevant* to the subject matter involved in the pending action[.]’ *W.Va.R.Civ.Pro. 26(b)(1).*” (Emphasis added). Evidence of AIG’s activity after the Georges filed their complaint is wholly irrelevant as a matter of law because the Georges’ complaint specifically confines its allegations to events occurring prior to the date the complaint was filed. The subject discovery has the potential to result in a great and unjustified financial burden upon AIG. I would grant both the writ to prohibit and the writ to compel.