

Miller, Justice, concurring:

I agree with the majority that the due process rights of the appellant in this case have been violated, and thus the order of the trial court must be reversed. However, because I disagree with the procedure utilized by the majority to protect the due process rights of the appellant, I respectfully concur.

The facts of this case make clear that the appellant paid premiums to his insurance company, State Farm Fire & Casualty Company (State Farm), to cover damage to his house caused by mine subsidence.

Mine subsidence insurance coverage was issued to the appellant under the mandate of W. Va. Code, 33-30-1, et seq., which dictates that all insurance policies issued or renewed in this State which insure a structure must include mine subsidence insurance coverage at a separate premium from the direct insurance.¹ An insured may then waive such coverage, and thus not be liable for the separate mine subsidence coverage premiums, at his discretion.² The appellant in

¹Other states have also set up mine subsidence insurance funds. See, e.g., Ohio Rev. Code Ann. § 3929.50, et seq. (Anderson 1985); Pa. Stat. Ann. tit. 52, § 3201, et seq. (1972).

²W. Va. Code, 33-30-6 (1985), provides, inter alia, that mine subsidence insurance provided for structures in certain counties named therein need only be provided if requested by the insured. Most counties, however, are covered by the formula stated in the text.

this case did not waive mine subsidence coverage, and his premiums for that coverage were paid to and collected by State Farm.

Under W. Va. Code, 33-30-1, et seq., a rather complex bureaucratic system exists to ensure that eligible insureds receive mine subsidence coverage.³ The system works as follows: (1) the statute mandates that mine subsidence coverage be granted to all eligible insureds unless they affirmatively waive such coverage; (2) the insured pays a mine subsidence coverage premium to the insurer; (3) the insurer then forwards the premium, minus a "ceding commission," to the state board of risk and insurance management⁴ (Board); (4) the

³ The legislature outlined its purpose in mandating mine subsidence coverage availability in this State in W. Va. Code, 33-30-1 and -2 (1982):

33-30-1: "Mine subsidence in this State has resulted in great loss of home, shelter and property to the citizens of this State to the detriment of the health, safety and welfare of such citizens and programs for the alleviation of such problems constitute the carrying out a public purpose. . . ."

"33-30-2: The purpose of this article is to make mine subsidence insurance available in a reasonable and equitable manner to all residents of this State through the office of the state board of risk and insurance management."

⁴W. Va. Code, 33-30-8 (1985) and -9 (1982), allow the insurer to retain a "ceding commission" in return for the insurer "agree[ing] to absorb all [its] expenses . . . necessary for the sale of policies and any administration duties of the mine subsidence insurance program imposed upon it pursuant to the terms of the reinsurance agreement," entered into by the insurer with the Board. The Board has the power to fix the proportion of the premium retained by the insurer as a ceding commission. That proportion is fixed by virtue of 8 W. Va. C.S.R. § 115-1-3.8, whereby the insurer retains 30 percent of the gross

Board "is authorized to undertake adjustment of losses and administer the fund" under W. Va. Code, 33-30-8; and (5) whenever a mine subsidence claim is submitted to an insurer, it must "be reported to the Board for assignment to qualified independent adjusting firms. . . . The selected adjusting firm will send all reports simultaneously to the insurer and the Board with all settlement authority, coverage questions and related matters being resolved by the Board." 8 W. Va. C.S.R. § 115-1-4.1.⁵ (Emphasis added).

Neither the statute (W. Va. Code, 33-30-1, et seq.) nor the applicable provisions in the West Virginia Code of State Rules (8 W.Va. C.S.R. 115-1-1, et seq.) delineate any procedure whereby an insured may present evidence supporting a claim brought pursuant to mine subsidence insurance coverage. Although the Board is the governmental entity charged with adjusting the mine subsidence claims of an insured, the insured, under the statute and the Code of State Rules, is not granted direct contact with the Board. As the majority correctly points out, "[f]undamental principles of due process require

(..continued)
premium collected for mine subsidence coverage from each insured as the ceding commission.

⁵8 W. Va. C.S.R. § 115-1-1 et seq., was promulgated by the Board pursuant to its authority under W. Va. Code, 33-30-15 (1982), which provides: "The board is authorized to promulgate and adopt such rules and regulations relating to mine subsidence insurance as are necessary to effectuate the provisions of this article. Such rules and regulations shall be promulgated and adopted pursuant to the provisions of chapter twenty-nine-a [§ 29A-1-1 et seq.] of this Code."

that the Board . . . set forth procedures whereby insureds may present evidence and establish a record upon which the Board can base any decision regarding a claim." ___ W. Va. ___, ___, ___ S.E.2d ___, ___ (Slip op. at 14), citing North v. W. Va. Bd. of Regents, 160 W. Va. 248, 256, 233 S.E.2d 411, 416 (1977).⁶

There is ample authority to support the proposition that a valid insurance policy is a property interest which cannot be taken without some procedural due process. See, e.g., North v. West Virginia Bd. of Regents, supra; Campbell v. Kelly, 157 W. Va. 453, 461-62, 202 S.E.2d 369, 375 (1974) ("For the average working person, the most valuable property rights . . . consist of social security benefits, insurance contracts, union welfare fund benefits and private and governmental pensions." (Emphasis added).). See also Lynch v.

⁶In Syllabus Point 2 of North, we stated:

"Applicable standards for procedural due process, outside the criminal area, may depend upon the particular circumstances of a given case. However, there are certain fundamental principles in regard to procedural due process embodied in Article III, Section 10 of the West Virginia Constitution, which are; First, the more valuable the right sought to be deprived, the more safeguards will be interposed. Second, due process must generally be given before the deprivation occurs unless a compelling public policy dictates otherwise. Third, a temporary deprivation of rights may not require as large a measure of procedural due process protection as a permanent deprivation."

See also Matthews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

United States, 292 U.S. 571, 577, 54 S. Ct. 840, 842, 78 L. Ed. 1434, 1439 (1934) ("[W]ar risk [insurance] policies, being contracts, are property and create vested rights."); United States v. Bess, 357 U.S. 51, 56, 78 S. Ct. 1054, 1058, 2 L. Ed. 2d 1135, 1141 (1958) (the cash remainder value of a life insurance policy is a property interest); Sims v. Order of United Commercial Travelers of Am., 343 F. Supp. 112, 115 (D. Mass. 1972) ("[T]he purchaser of a life insurance policy makes an investment decision whereby he purchases a promise to pay. . . . That promise to pay is 'property' of substantial value to the purchaser[.]" (Emphasis added).). Indeed, in most instances, the insured vindicates the property interest by suing the insurer in court to obtain coverage and damages for the denial of coverage. See Smithson v. United States Fidelity & Guaranty Co., 186 W. Va. 195, 411 S.E.2d 850 (1991); Thomas v. State Farm Mut. Auto. Ins. Co., 181 W. Va. 604, 383 S.E.2d 786 (1989); Hayseeds, Inc. v. State Farm Fire & Casualty Co., 177 W. Va. 323, 352 S.E.2d 73 (1986).

The majority, following its due process concept, orders that "procedures should be implemented to afford an insured the opportunity to present the Board with any evidence he may have in support of his claim[.]" ____ W. Va. at ____, ____ S.E.2d at ____ (Slip op. at 15). Unfortunately, the majority goes on to require that the appellee, the State Insurance Commissioner, and not the Board, should hold the hearing in this case to resolve the disputed issue. I believe

that the majority's premise in ordering the Insurance Commissioner to hold hearings on this matter is erroneous.

It is clear to me that this is not a dispute over coverage under W. Va. Code, 33-30-7 (1985), which gives the Insurance Commissioner the right to hold a hearing. That section concerns only the initial procurement of the subsidence coverage. It allows an insurer to decline this coverage if "a structure evidenc[es] unrepaired subsidence damage, until necessary repairs are made" or where the "structure . . . evidences a loss or damage in progress."⁷

The second basis for a hearing in front of the Insurance Commissioner under W. Va. Code, 33-30-7, is "where the insurer has declined, nonrenewed or canceled all coverage under a policy for underwriting reasons unrelated to mine subsidence[.]" (Emphasis added).

It is obvious that neither of the conditions outlined in W. Va. Code, 33-30-7, occurred in this case. The policy was issued with subsidence coverage. The appellant faithfully paid premiums

⁷W. Va. Code, 33-30-7, states:

"An insurer may refuse to provide subsidence coverage (1) on a structure evidencing unrepaired subsidence damage, until necessary repairs are made; or (2) where the insurer has declined, nonrenewed or canceled all coverage under a policy for underwriting reasons unrelated to mine subsidence: Provided, That an insurer shall refuse to provide subsidence coverage on a structure which evidences a loss or damage in progress."

for five years to cover potential damage to his home from mine subsidence and these premiums were accepted by the insurer. There was no cancellation of all coverage for underwriting reasons by the insurer. Thus, none of the conditions described in W. Va. Code, 33-30-7, that could trigger a hearing with the Insurance Commissioner existed.

Because coverage was granted and the premium paid and accepted and no underwriting reasons canceling the entire policy exist, W. Va. Code, 33-30-7, is not applicable. The Insurance Commissioner is out of the picture because only by virtue of the reasons set out in W. Va. Code, 33-30-7, may the Insurance Commissioner hold a hearing. Where a subsidence loss is claimed to have occurred after the policy is issued, as was the case here, the Board is required to act under W. Va. Code, 33-30-8. This section requires the Board to undertake the adjustment of the loss or, through its agreement with the insurer, direct the insurer to do so.⁸ Although the Board undertook to adjust the appellant's claim in this case, it failed to provide him with his due process right to appear and offer evidence on his behalf.

⁸W. Va. Code, 33-30-8, in relevant part, states:

"The Board is authorized to undertake adjustment of losses and administer the fund, or it may provide in a reinsurance agreement that the insurer do so. The board shall agree to reimburse the insurer from the fund for all amounts paid policyholders for claims resulting from mine subsidence and shall pay from the fund all costs of administration incurred by the board[.]"

I agree with the majority that the appellant's constitutional right to due process has not been met in this case and a remand is therefore necessary. However, for the reasons stated above, I believe that the Board, and not the Insurance Commissioner, should provide that due process to the appellant.