No. 30840 – *State of West Virginia ex rel. Medical Assurance of West Virginia, Inc. v. The Honorable Arthur M. Recht, Judge of the Circuit Court of Ohio County; the Estate of Marjorie I. Verba, by Sally Jo Nolan, Executrix*

FILED
June 17, 2003
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Albright, Justice, concurring:

I concur in the judgment rendered and the carefully crafted opinion underlying that judgment. I write briefly to give emphasis to three points.

First, the suit before us involves a claim of alleged bad faith on the part of an insurance company in the handling of an underlying claim or lawsuit. Accordingly, the matters of attorney-client or quasi attorney-client privilege addressed in the opinion should not be at issue before the underlying claim or lawsuit has been resolved. Once that underlying claim or lawsuit has been resolved and attention is turned to allegations of bad faith in the handling of that underlying claim, the attention of the court and parties turns from the merits of the underlying claim to whether the evidence supports the allegations of bad faith on the part of the insurance company in the handling of the underlying claim. At that juncture, the fundamental factual question is *what did the insurance company know about the underlying claim and its liability to pay indemnity, and when did the insurance company know it*. Given that fundamental factual inquiry, the potential exposure to discovery and disclosure of the insurance company's internal work product and internal attorney-client

communications during the company's handling of the underlying claim presents somewhat different issues than those which arise during the pendency of the underlying claim.

Second, I believe that the attorney-client privilege is so central to our system of both civil and criminal justice that it deserves absolute protection during the pendency of the underlying claim and should be breached or circumscribed in the context of a bad faith claim upon the clear showings required by the majority opinion – including those of need, relevancy, and unavailability elsewhere. In specific areas of federal law (e.g., tax law, securities regulation, RICO prosecutions) it has become frequent, if not commonplace, to breach those privileges ever more freely, all in the name of full and fair enforcement of the law. Moreover, sound ethical considerations have motivated the organized bar to carefully craft specific exceptions to and waivers of the privilege. I trust, and have concluded, that the Court's opinion in the instant case is well within the conceptual boundaries of those previously defined exceptions and waivers. In short, it appears to me that today's opinion does not extend the law of exception and waiver as far as have other courts and agencies in similar situations.

Third, all of that being said, the ultimate fairness and practical usefulness of our decision today depends upon the special skill, careful consideration and innate sense of fairness which the trial judges of this state bring to bear on the consideration of requests

made in the future under the authority of this decision. It is dependent as well upon the special skill, careful consideration and innate sense of fairness which those trial judges bring to bear on the arduous task our opinion assigns those judges for the review of documents for which discovery is sought notwithstanding claims of privilege. We have thus placed on the trial judges a very heavy burden to study and classify perhaps hundreds of documents in the more complex cases. We earnestly hope that trial counsel in this and similar cases will assist in keeping that heavy burden at least bearable by not submitting discovery requests or responses other than those counsel clearly finds essential either to the proper prosecution or proper defense of the action being litigated.