IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2003 Term

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No. 31317

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

LINN ROSE and ADAM ROSE, by and through
his mother and legal guardian, Linn Rose,
Plaintiffs Below, Appellees

v.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,
and STEPHEN BROWN,
Defendants Below, Appellants

v.

JOSEPH KATARINCIC, ESQ.,
CARL DePASQUALE, ESQ., and
CHAD A. CICCONE, ESQ.,
Third-Party Defendants Below

Appeal from the Circuit Court of Ohio County
Hon. Arthur M. Recht, Judge
Case No. 01-C-465

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Submitted: October 8, 2003
Filed: June 25, 2004

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JUSTICE STARCHER delivered the Opinion of the Court.

JUSTICE DAVIS concurs and reserves the right to file a concurring opinion.

CHIEF JUSTICE MAYNARD concurs, in part, and dissents, in part, and reserves the right to file a separate opinion.

SYLLABUS BY THE COURT

1. "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syllabus Point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

2. "The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syllabus Point 1, *Smith v. State Workmen's Compensation Com'r*, 159 W.Va. 108, 219 S.E.2d 361 (1975).

3. "A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." Syllabus Point 2, *State v. Epperly*, 135 W.Va. 877, 65 S.E.2d 488 (1951).

4. "The Unfair Trade Practices Act, W.Va. Code §§ 33-11-1 to -10, and the tort of bad faith apply only to those persons or entities and their agents who are engaged in the business of insurance." Syllabus Point 2, *Hawkins v. Ford Motor Co.*, 211 W.Va. 487, 566 S.E.2d 624 (2002).

5. A defense attorney who is employed by an insurance company to represent an insured in a liability matter is not engaged in the business of insurance. The defense attorney is therefore not directly subject to the provisions of the West Virginia Unfair Trade Practices Act, *W.Va. Code*, 33-11-1 to -10.

6. A claimant can establish a violation of the West Virginia Unfair Trade Practices Act, *W.Va. Code*, 33-11-1 to -10, by showing that an insurance company, through its own actions, breached its duties under the Act by knowingly encouraging, directing,

participating in, relying upon, or ratifying wrongful litigation conduct of a defense attorney hired by the insurance company to represent an insured.

Starcher, Justice:

In this appeal of an order from the Circuit Court of Ohio County, an insurance company and an insurance claims representative challenge the circuit court's conclusion that a defense attorney, hired by the insurance company to defend the interests of an insured in a liability matter, was subject to the provisions of the West Virginia Unfair Trade Practices Act, *W.Va. Code*, 33-11-1 to -10. The circuit court ruled that the duties imposed by the Act upon the insurance company are not delegable, and that the insurance company could be held liable for any violations of the Act by a defense attorney employed by the insurance company to defend an insured in an underlying medical malpractice case.

As set forth below, we affirm, in part, and reverse, in part, the circuit court's order. We reverse the circuit court's conclusion regarding the duties of a defense attorney under the Act, and hold that a defense attorney who is employed by an insurance company to represent the interests of an insured in a liability matter is not directly subject to the provisions of the Act. However, we affirm the circuit court's order to the extent that it holds that an insurance company is not relieved of its duty to comply with the Act by employing a defense attorney to represent the interests of an insured, and may be found liable under the Act for its own actions when it knowingly encourages, directs, participates in, relies upon, or ratifies certain wrongful litigation conduct of a defense attorney.

I.

Facts & Background

Appellee Linn Rose brought the instant action against appellant St. Paul Fire and Marine Insurance Company ("St. Paul") and one of its claims handlers, appellant Stephen Brown, for violations of the West Virginia Unfair Trade Practices Act ("UTPA"). Ms. Rose alleges that the appellants violated the Act by directing, ratifying, participating in, or acquiescing to the misconduct of certain defense attorneys who were employed by the appellants to defend a doctor insured by St. Paul against a medical malpractice claim filed by appellee Rose.

Ms. Rose's malpractice claim began on August 21, 1998, when Dr. David Shaffer performed an outpatient surgical procedure and negligently burned through the appellee's spinal accessory nerve. After the surgery, the appellee experienced pain in her shoulder and difficulty moving her right arm. As time passed her trapezius muscle began to wither and her shoulder began to droop. A physician at the Cleveland Clinic diagnosed and repaired the error in March 1999, but the disfigurement to the appellee's shoulder was permanent.

In January 2000, appellee Rose sued Dr. Shaffer for medical malpractice. Dr. Shaffer referred the lawsuit to his malpractice insurance company, appellant St. Paul, and St. Paul retained defense attorney Joseph Katarincic to defend Dr. Shaffer. During the course of litigation, the appellee asserts that Mr. Katarincic and an associate, Carl DePasquale, engaged in numerous improper acts – and that Mr. Brown, who was a St. Paul employee and the claims adjuster assigned to the case, assisted, encouraged, approved, and/or acquiesced

in those improper acts. The appellee asserts that St. Paul can be held liable for the conduct of the defense attorneys, as well as for the conduct of Mr. Brown in tolerating, encouraging or assisting that behavior.

An example of litigation misconduct cited by the appellee is Dr. Shaffer's September 2000 deposition testimony, where he asserted that his hospital privileges had never been revoked or suspended.[1] The appellee has since discovered notes in St. Paul's records, recording a conversation between Mr. Brown and Mr. Katarincic in August 2000, to the effect that Dr. Shaffer's hospital privileges had in fact previously been suspended.[2] In a report later written by Mr. Brown regarding the appellee's case, a report which justified the ultimate settlement of the malpractice case, Mr. Brown again stated that "[i]n the fall and winter of 2000, we learned that Dr. Shaffer had his privileges at both of the hospitals in Wheeling revoked." The appellee argues that Mr. Brown, St. Paul, and Mr. Katarincic knew

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[1]The appellants suggest that information regarding the suspension or revocation of Dr. Shaffer's privileges in 2000, nearly two years after the appellee's surgery, would not necessarily have been admissible at trial under Rules 403 and 404(b) of the *Rules of Evidence*.

[2]The August 21, 2000 note states:

> Steve Brown and I got on the phone today with Katarincic, and he does a nice job distilling the issues to a more compact appreciation of what the case is about. . . . Dr. Shaffer is now in a stew over privileges at two hospitals . . . he is trying to re-locate and start anew. His problems stem from professional care and some concerns regarding his private life. . . . [I]n the last 30 days or so the insured's reputation has become clouded, he would not fess up to us about the reasons, and there is a likely leak at the Wheeling Hospital that will spread the word to the plaintiff bar in the panhandle.

that Dr. Shaffer was being less than truthful in his deposition testimony in September 2000, but made no attempt to correct or amend his statement.[3]

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[3]As additional evidence that the appellants, St. Paul and its employee Mr. Brown, had a general business practice of facilitating misconduct by the defense attorneys, Mr. Katarincic and Mr. DePasquale, including their use of false testimony, the appellee cites to records taken from another malpractice lawsuit that was filed against Dr. Shaffer. In the other lawsuit, the plaintiff's attorney sought to take the deposition of a doctor who had shared a medical practice with Dr. Shaffer.

It appears that this former medical partner had parted ways with Dr. Shaffer in a less-than-amicable way. The appellee suggests that Mr. Brown believed that the former medical partner might give unfavorable testimony about Dr. Shaffer, so Mr. Brown hired a separate lawyer to represent the former medical partner in his deposition. Mr. Brown's notes reflect that he directed the lawyer to work with Dr. Shaffer's defense attorney to coordinate both doctors' testimony:

> The pltfs atty has noticed [the former medical partner]'s deposition and I have hired [a separate lawyer] to represent him at the deposition. . . . I think it is essential that [the former medical partner] and Shaffer are on the same page. I have asked [the separate lawyer] and DePasquale to accomplish this.

Dr. Shaffer's former medical partner then testified in a manner favorable to Dr. Shaffer.

In a subsequent lawsuit between Dr. Shaffer and the former medical partner over money issues, the former medical partner admitted that his favorable deposition testimony was "not correct:"

> Q. Do you remember being asked, quote, "How was it that Dr. Shaffer became unemployed with your corporation?" End quote.
> A. No.
> Q. Do you remember answering, quote, "He just decided to go on his own." End quote.
> A. That was not correct.
> Q. Do you remember being asked the question, quote, "Was there any dissatisfaction on your part with regard to Dr. Shaffer and any of his business practices or the way he practiced medicine?" End quote.
> A. No. I don't remember.
> Q. Do you remember your answer being, "The way he practiced medicine was fine." End quote. Do you

(continued...)

Several weeks before trial, on March 29, 2001, the appellee settled her medical malpractice action against Dr. Shaffer for $800,000.00. After the settlement, and during discovery in the instant case, the appellants produced a confidential, internal "loss report" prepared by Mr. Brown discussing the settlement in which he stated that there was "no chance to successfully defend this case" and estimated the "full value" of the appellee's damages at $1.25 million.

On October 21, 2001, the appellee brought the instant action under the UTPA against appellants St. Paul and Mr. Brown.[4] The appellee's complaint asserted, among other

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[3](...continued)

remember that?

A. Yeah. Probably twisted that a little bit.
Q. Are you saying that you didn't tell the truth?
A. Yeah, probably a little bit shady there.
Q. Why did you do that?
A. Because I was trying to cover his ass. . . .
Q. So what's the truth?
A. The truth is he's a no good surgeon. I didn't want to be associated with him any more, and on October 9th, I kicked him out.

To further bolster their claim that the appellants knowingly encouraged the use of false testimony, the appellee cites to evidence from another medical malpractice lawsuit, against a different doctor, but administered by Mr. Brown and defended by Mr. Katarincic and Mr. DePasquale. In that case, the defense attorneys allegedly induced the defendant doctor to execute two false affidavits in support of a motion for summary judgment – affidavits that later resulted in the doctor being convicted of false swearing. *See State ex rel. Porter v. Recht*, 211 W.Va. 396, 566 S.E.2d 283 (2002) (holding that although both affidavits contained ten statements, prosecutor could charge doctor with only two counts of false swearing, not twenty).

[4]The appellants, St. Paul and Mr. Brown, subsequently brought a third-party action for contribution and indemnification against the attorneys who worked on Dr. Shaffer's case: (continued...)

theories, that the appellants should be held liable for the litigation misconduct of the defense attorneys hired to defend Dr. Shaffer. The complaint alleges, in part:

> [Appellants] have acted wrongfully, and in contravention of the law, in relation to [appellees]' claims of the underlying action. Their wrongful and illegal conduct includes:
> a. directing, acquiescing, participating in, and/or ratifying unlawful and improper behavior committed by counsel retained to defend Dr. Shaffer; . . .
> f. asserting defenses to the claims, which defenses had no basis in law nor fact;
> g. engaging in unreasonable and abusive discovery;
> h. unlawfully communicating with [appellee] Linn Rose's healthcare providers.

The appellants later filed a motion seeking to dismiss those portions of the appellee's case that would hold St. Paul liable under the UTPA for the litigation conduct of defense counsel. The circuit court, in a hearing on the issue, stated that "the conduct of anybody acting on behalf of the insurance company is attributable to the insurance company." The court subsequently entered an order on September 12, 2002, specifically stating that:

> [T]he duties imposed upon defendants [St. Paul and Mr. Brown] under §33-11-4(9) of the West Virginia Unfair Trade Practices Act are not delegable, and that the defendants can be held liable for the conduct of the attorneys employed to defend the underlying action against Dr. Shaffer to the extent that the conduct implicates the various provisions set forth in §33-11-4(9) of the Unfair Trade Practices Act.

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[4](...continued)
Joseph Katarincic, Carl DePasquale, and Chad Ciccone.

The circuit court declared that its order was a final order entered pursuant to Rule 54(b) of the *Rules of Civil Procedure* and, finding that there was "no just reason for delay," directed "the entry of final judgment on the issues addressed herein for purposes of appeal."

St. Paul and Mr. Brown now appeal the circuit court's September 12, 2002 order.

II.
Standard of Review

The issues raised by the parties in the instant appeal require an interpretation of the West Virginia Unfair Trade Practices Act, *W.Va. Code*, 33-11-1 to -10. "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syllabus Point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

III.
Discussion

The appellants' primary contention on appeal is that the provisions of the UTPA apply only to people, entities or their agents who are engaged in the business of insurance. The appellants contend that defense attorneys hired to defend an insured pursuant

to a liability insurance policy are not subject to the provisions of the UTPA because they are not engaged in the business of insurance, but rather are engaged in the practice of law.[5]

The appellee responds that she is not pursuing a case against the defense attorneys, but is only contending that the appellants violated the UTPA by the manner in which they directed, ratified, encouraged, participated in, or acquiesced to the actions of the defense attorneys. The appellee contends that an insurance company should be held liable

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[5]A secondary issue contained within the parties' arguments concerns the application of the *Rules of Civil Procedure*, the *Trial Court Rules*, and the *Rules of Professional Conduct* to litigation misconduct by an insurance defense attorney, and the availability of remedies under those rules for that misconduct. The appellants argue that these rules are more than adequate for protecting litigants against an attorney's misconduct, and argue that the rules do not provide for a "new tort for litigation misconduct in the guise of [a] statutory bad faith claim" under the UTPA.

The appellee counters that these rules certainly provide for sanctions for litigation misconduct, but those sanctions apply only to the attorneys and litigants, and not entities that are not party to the lawsuit. In other words, the appellee argues that because an insurance company that insures a litigant – like St. Paul in the appellee's underlying malpractice lawsuit against Dr. Shaffer – is not a party to a tort action, the insurance company cannot be sanctioned under these rules. The appellee suggests that the insurance company could knowingly direct, command, authorize, rely upon and benefit from a defense attorney's misconduct – but only the defense attorney could be penalized by the trial court. Further, the appellee argues that the appellants actively concealed information regarding much of the defense attorneys' misconduct, preventing its discovery until long after the underlying suit was resolved. Lastly, these rules are largely tools for trial courts to manage their courtrooms, and do not allow a claimant to recover the full panoply of damages – such as compensatory or punitive damages – that are available under the UTPA. The appellee therefore argues that the *Rules of Civil Procedure*, the *Trial Court Rules*, and the *Rules of Professional Conduct* provide an inadequate deterrent and remedy for litigation misconduct by an insurance defense attorney.

Because we conclude that under the language of the UTPA a defense attorney hired by an insurance company to defend an insured is not subject to the provisions of the UTPA, we decline to go further and examine the interplay between the UTPA and the *Rules of Civil Procedure*, the *Trial Court Rules*, and the *Rules of Professional Conduct*.

for the wrongful acts or omissions of an attorney hired to defend an insured, particularly when those acts or omissions were directed, commanded, or knowingly authorized by the insurance company.

The issue raised by the parties requires us to interpret the West Virginia Unfair Trade Practices Act, *W.Va. Code*, 33-11-1 to -10. "The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syllabus Point 1, *Smith v. State Workmen's Compensation Com'r*, 159 W.Va. 108, 219 S.E.2d 361 (1975). "Once the legislative intent underlying a particular statute has been ascertained, we proceed to consider the precise language thereof." *State ex rel. McGraw v. Combs Services*, 206 W.Va. 512, 518, 526 S.E.2d 34, 40 (1999). Moreover, when we interpret a statutory provision, this Court is bound to apply, and not construe, the enactment's plain language. We have held that "[a] statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." Syllabus Point 2, *State v. Epperly*, 135 W.Va. 877, 65 S.E.2d 488 (1951).

The stated purpose of the UTPA "is to regulate trade practices *in the business of insurance* . . . by defining, or providing for the determination of, all such practices in this State which constitute 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] (emphasis added). The Act achieves this purpose by expressly prohibiting any "person" from engaging "in any trade practice which is defined in this article as, or determined pursuant to section seven [*W.Va. Code*, 33-11-7] of this article to be, an unfair

method of competition or an unfair or deceptive act or practice in the business of insurance." *W.Va. Code*, 33-11-3 [1974]. For example, in *Taylor v. Nationwide Mut. Ins. Co.*, 214 W.Va. 324, 589 S.E.2d 55 (2003), we concluded that a claims adjuster employed by an insurance company is a "person" in the business of insurance who is subject to regulation under the UTPA. A claimant may bring an action for damages, including expenses, attorney's fees, and punitive damages, caused when a person in the business of insurance violates the UTPA. *Jenkins v. J.C. Penney Cas. Ins. Co.*, 167 W.Va. 597, 280 S.E.2d 252 (1981), *overruled on other grounds by State ex rel. State Farm Fire & Cas. Co. v. Madden*, 192 W.Va. 155, 451 S.E.2d 721 (1994).[6]

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[6]Virtually all states impose upon insurance companies a duty to settle liability claims where the insured is likely to be exposed to damages in excess of the insurance policy limits. An insurance company's breach of this duty can result in a "bad faith" lawsuit against the company to recover the claimant's full damages, regardless of policy limits. *See* Stephen S. Ashley, *Bad Faith Actions: Liability & Damages*, §§ 2:04-06 (2d. ed. 1997). *See also*, *Shamblin v. Nationwide Mut. Ins. Co.*, 183 W.Va. 585, 599, 396 S.E.2d 766, 780 (1990) (*prima facie* case of "bad faith" is made when insured shows insurance company failed to settle a claim within policy limits and gain insured's release from personal liability, where there was an opportunity to do so).

At least sixteen states, including West Virginia, also use statutes to impose various duties upon insurance companies to use "good faith" toward a claimant throughout the settlement of a claim. These statutes – which, like West Virginia's, are usually patterned after the National Association of Insurance Commissioners' "Model Unfair Trade Practices Act" or "Model Unfair Claims Settlement Practices Act" – have been construed by courts to allow a claimant to bring an action against an insurance company for damages caused by a violation of the statute. *See, e.g.*, *Rankin v. Allstate Ins. Co.*, 336 F.3d 8 (1st Cir. 2003) (interpreting Maine statute requiring "prompt, fair and equitable settlement of claims submitted in which liability has become reasonably clear"); *Gray v. North Carolina Ins. Underwriting Ass'n*, 352 N.C. 61, 529 S.E.2d 676 (2000); *O'Donnell ex rel. Mitro v. Allstate Ins. Co.*, 734 A.2d 901 (Pa.Super. 1999); *Theriot v. Midland Risk Ins. Co.*, 694 So.2d 184 (La. 1997); *Auto-Owners Ins. Co. v. Conquest*, 658 So.2d 928 (Fla. 1995); *Urban v. Mid-*
(continued...)

The Act is specifically designed, by its own terms, to regulate only those entities and individuals who are engaged in the "business of insurance." In *Hawkins v. Ford Motor Co.*, 211 W.Va. 487, 566 S.E.2d 624 (2002), we considered the meaning of the phrase "business of insurance," and whether a self-insured company met that definition. We

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[6](...continued)
Century Ins., 79 Wash.App. 798, 905 P.2d 404 (1995); *New Mexico Life Ins. Guar. Ass'n v. Quinn & Co., Inc.*, 111 N.M. 750, 809 P.2d 1278 (1991); *State Farm Mut. Auto. Ins. Co. v. Reeder*, 763 S.W.2d 116 (Ky. 1989); *Crystal Bay General Imp. Dist. v. Aetna Cas. & Sur. Co.*, 713 F.Supp. 1371 (D.Nev. 1989); *Vail v. Texas Farm Bureau Mut. Ins. Co.*, 754 S.W.2d 129 (Tex. 1988); *Shaheen v. Preferred Mut. Ins. Co.*, 668 F.Supp. 716 (D.N.H. 1987) (consumer may file private action under insurance unfair trade practice statute if insurance commissioner first finds insurance company violated the statute) (*see also, WVG v. Pacific Ins. Co.*, 707 F.Supp. 70 (D.N.H. 1986) (suit allowed against insurance company under consumer protection act)); *Van Dyke v. St. Paul Fire & Marine Ins. Co.*, 388 Mass. 671, 448 N.E.2d 357 (1983); *Klaudt v. Flink*, 202 Mont. 247, 658 P.2d 1065 (Mont. 1983) (*superseded on other grounds by statute, O'Fallon v. Farmers Ins. Exchange*, 260 Mont. 233 , 859 P.2d 1008 (1993)); *Griswold v. Union Labor Life Ins. Co.*, 186 Conn. 507, 442 A.2d 920 (1982); *Sparks v. Republic Nat. Life Ins. Co.*, 132 Ariz. 529, 647 P.2d 1127 (1982). *See also, Heyden v. Safeco Title Ins. Co.*, 175 Wis.2d 508, 498 N.W.2d 905 (Ct.App. 1993) (*overruled on other grounds by Weiss v. United Fire and Cas. Co.*, 197 Wis.2d 365, 541 N.W.2d 753 (1995)) (regulations under unfair claims settlement statute admissible as proof insurance company acted unreasonably under the circumstances and therefore in bad faith); *Walston v. Monumental Life Ins. Co.*, 129 Idaho 211, 216, 923 P.2d 456, 461 (1996) (violation of the unfair claims settlement practices statute constitutes evidence of an extreme deviation from customary practices "relevant to the state of mind that is necessary to establish fraud."); *State Farm Mut. Auto. Ins. Co. v. Weiford*, 831 P.2d 1264 (Alaska 1992) (trial court did not err in basing "bad faith" jury instruction upon state's unfair trade practices statute); *Ford Motor Credit Co. v. Manzo*, 196 Ill.App.3d 874, 554 N.E.2d 480 (1st Dist. 1990) (insurance company's violation of the unfair claims settlement practices statute established that its conduct was vexatious). *Compare Farmers Union Central Exchange, Inc. v. Reliance Ins. Co.*, 626 F.Supp. 583 (D.N.D. 1985) (finding North Dakota would allow third-party claims under the Model Act) with *Farmers Union Central Exchange, Inc. v. Reliance Ins. Co.*, 675 F.Supp. 1534 (D.N.D. 1987) (rejecting argument that North Dakota would allow third-party claims).

focused our analysis on the legislatively-stated definitions of "insurance," "insurer," and "transacting insurance:"

> The West Virginia Code defines insurance as "a contract whereby one undertakes to indemnify another or to pay a specified amount upon determinable contingencies." W.Va. Code § 33-1-1 (1957). An "[i]nsurer is every person engaged in the business of making contracts of insurance." W.Va. Code § 33-1-2 (1957). Specifically, "[t]ransacting insurance includes solicitation and inducement, preliminary negotiations, effecting a contract of insurance and transaction of matters subsequent to effecting the contract and arising out of it." W.Va. Code § 33-1-4 (1957).

211 W.Va. at 491, 566 S.E.2d at 628. Putting these definitions together, we concluded that even though a company may choose to insure its own losses, if the primary purpose of the company is some venture other than dealing in insurance – that is, the company is under no contractual obligation to pay a claim and does not "transact[] insurance" as defined by law – then the company is not in the "business of insurance" and not subject to the regulation of the UTPA. We stated, in Syllabus Point 2 of *Hawkins*, that:

> The Unfair Trade Practices Act, W.Va. Code §§ 33-11-1 to -10, and the tort of bad faith apply only to those persons or entities and their agents who are engaged in the business of insurance.

We held in *Hawkins* that the self-insured company at issue – Ford Motor Company – primarily manufactured and sold cars and did not engage in the business of insurance, and was therefore not subject to the UTPA.

In the instant case, we do not perceive a defense attorney, employed by an insurance company to represent an insured in a liability matter, to be a person who is "in the

business of insurance." There is nothing to suggest that the defense attorneys in this case had any contractual obligations to pay the appellee's claim against Dr. Shaffer, nor anything to suggest the defense attorneys made, solicited, negotiated, or otherwise directly acted in any manner pursuant to the terms of an insurance contract. The defense attorneys were employed by the insurance company to defend the interests of the insured; the insurance contract at issue bound only the insurance company and the insured. The defense attorneys' ethical attorney-client obligations were to the insured, Dr. Shaffer. *State ex rel. Allstate Ins. Co. v. Gaughan*, 203 W.Va. 358, 372, 508 S.E.2d 75, 89 (1998). Any obligations imposed by an insurance contract were between Dr. Shaffer and St. Paul, and the defense attorneys were neither parties to nor bound by that contract. *See* ABA Formal Opinion 01-421, "Ethical Obligations of a Lawyer Working Under Insurance Company Guidelines and Other Restrictions," 30 *Brief* 45, 46 (Summer 2001) ("[T]he rules of professional conduct – and not the liability insurance contract – govern the lawyer's ethical obligations to his client[.]").

We therefore conclude that under these circumstances, a defense attorney who is employed by an insurance company to represent an insured in a liability matter is not engaged in the business of insurance. The defense attorney is therefore not directly subject to the provisions of the West Virginia Unfair Trade Practices Act.[7]

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[7]We emphasize, however, that our analysis in this case is focused upon whether an independent attorney, hired by an insurance company to defend the interests of a defendant-insured under a liability insurance policy against a claim made by a plaintiff, is in the "business of insurance." We do not consider, and make no judgment upon, the case of an attorney who is hired by an insurance company in other circumstances – such as to (continued...)

Our holding does not, however, absolve the appellants from all potential responsibility under the UTPA. While attorneys and other individuals who are not in the business of insurance are not directly bound by the UTPA, an insurance company and its employees who *are* in the business of insurance must continue to comply with the UTPA, even if a defense attorney has been hired by the insurance company to defend a claim against an insured. A claimant can establish a violation of the UTPA by showing that an insurance company, through its own actions, breached its duties under the Act by knowingly encouraging, directing, participating in, relying upon, or ratifying the wrongful litigation conduct of a defense attorney hired by the insurance company to represent an insured. Actionable wrongful litigation conduct by a defense attorney, to be binding on the insurance company, is conduct that, if it were committed by a person or entity in the business of insurance, would constitute a violation of the UTPA.

For example, the UTPA makes clear that an insurance company must fully investigate an insurance claim, and make a reasonable offer to settle the claim if warranted by the evidence. *W.Va. Code*, 33-11-4(9)(c) requires an insurance company to have "reasonable standards for the prompt investigation of claims arising under insurance policies," while *W.Va. Code*, 33-11-4(9)(d) states that the company may not "[r]efus[e] to

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[7](...continued)
investigate or give advice upon the validity of a claim in the same fashion as a company claims representative; to defend the interests of the insurance company; or an attorney who works "in house" for the company or in a "captive" law firm that is employed exclusively by the insurance company to represent only the company's insureds.

pay claims without conducting a reasonable investigation based upon all available information[.]" With the information obtained from the investigation, *W.Va. Code*, 33-11-4(9)(f) requires the insurance company to "attempt[] in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear."

An insurance company can be held liable for its own actions – regardless of the actions of any insurance-company-hired defense attorney – in failing to comply with these statutory requirements in the course of resolving a claim. So, for instance, if a claimant was able to establish that an insurance company knew that a defense attorney was engaging in litigation misconduct (say, offering the perjured testimony of a witness) and the insurance company knowingly encouraged, directed, participated in, relied upon, or ratified that misconduct (say, by not seeking out other known witnesses and knowingly using the perjured testimony as a basis for refusing to settle the claim), then a jury could fairly conclude that the insurance company had failed to conduct a reasonable investigation and failed to make a "good faith" attempt to settle the case as required by the Act. *See, e.g.*, *Federated Mut. Ins. Co. v. Anderson*, 297 Mont. 33, 43, 991 P.2d 915, 922 (1999) (after court made judicial determination insurance coverage existed under policy, insurance company violated unfair trade practices act by continuing to deny coverage and having attorney file a "meritless appeal" that included inconsistent and conflicting positions, inaccurate citations to authority, and lack of support for claims on appeal, because "[m]eritless appeals are not legitimate litigation conduct.")

IV.
Referral to the Office of Disciplinary Counsel

Our review of the record suggests that the attorneys employed by appellant St. Paul to defend Dr. Shaffer may have engaged in numerous violations of the *Rules of Professional Conduct*. For instance, it appears that Mr. DePasquale represented Dr. Shaffer and other West Virginia doctors at the behest of both St. Paul and Mr. Katarincic in several West Virginia courtrooms – yet he was never licensed or admitted *pro hac vice* to practice law in West Virginia. The record is unclear whether any of the possible violations have been considered by the Office of Disciplinary Counsel, or the state bar disciplinary authorities of any other state where Mr. Katarincic or Mr. DePasquale are licensed.

In light of the many potential transgressions in the record, we find it necessary to refer this matter to the Office of Disciplinary Counsel for further review, in accordance with our obligation to do so pursuant to Rule 8.3(a) of the *Rules of Professional Conduct* and Canon 3D(2) of the *Code of Judicial Conduct*. *See* Rule 8.3(a) ("A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."); *W.Va. Code of Jud. Conduct* Canon 3D(2) ("A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct should take appropriate action. A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question

as to the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority."). *See also Covington v. Smith*, 213 W.Va. 309, 582 S.E.2d 756 (2003) (referring a matter to the Office of Disciplinary Counsel for further proceedings); *Gum v. Dudley*, 202 W.Va. 477, 491, 505 S.E.2d 391, 405 (1997) (same). Accordingly, we direct the Clerk of the Supreme Court of Appeals to transmit a certified copy of this Opinion to that tribunal.

V.
Conclusion

The circuit court erred in concluding that the attorneys employed by the appellants in the underlying action to defend Dr. Shaffer were subject to the duties imposed by the UTPA, and that the appellants could be held liable under the UTPA solely on account of the alleged litigation misconduct of those attorneys. On these conclusions the circuit court's order is reversed. We hold that defense attorneys employed by an insurance company to represent the interests of an insured in a liability matter are not directly subject to the provisions of the UTPA.

However, the circuit court correctly determined that an insurance company's duties under the UTPA are not delegable. An insurance company is responsible for its own actions under the UTPA, not those of a defense attorney employed to represent an insured. To the extent that the circuit court's order so holds, it is affirmed.

In sum, the appellants cannot be held directly liable under the UTPA for the litigation misconduct of the defense attorneys, but may be held liable for their own actions in knowingly encouraging, directing, participating, relying upon or ratifying that behavior.

Accordingly, the circuit court's September 12, 2002 order is affirmed, in part, reversed, in part, and the case is remanded for further proceedings not inconsistent with this opinion.

Affirmed in part, Reversed in part, and Remanded.