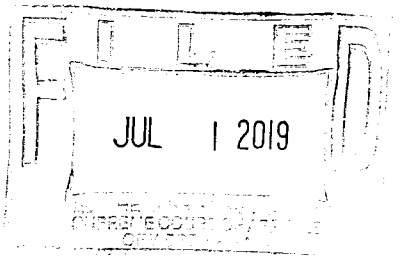
No. 19-0103

IN THE SUPREME COURT OF APPEAL OF WEST VIRGINIA

CHARLESTON



WEST VIRGINIA COUNTIES GROUP
SELF-INSURANCE RISK POOL,

Petitioner,

v.

GREAT CACAPON VOLUNTEER
FIRE DEPARTMENT,

Respondent.

REPLY BRIEF OF PETITIONER WEST VIRGINIA COUNTIES GROUP SELF-INSURANCE RISK POOL

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In Reply to the Respondent, Great Cacapon Volunteer Fire Department's, Brief, the Petitioner, the West Virginia Counties Group Self-Insurance Risk Pool, submits the following:

I. REPLY ARGUMENT

A. The alleged alternative definitions of "subrogation" supplied by the Respondent in fact support WVCoRP's argument that its claim is not one for subrogation.

The lion's share of the Respondent's Brief is devoted to making a distinction without a difference; attempting to differentiate definitions of "subrogation" which are all in accord with one another. See Respondent's Brief at pgs. 6-10. The key definition supplied by Black's Law Dictionary, and adopted by this Court in *Kittle v. Icard*, 185 W.Va. 126, 130, 405 S.E.2d 456, 460 (1991), states that subrogation is a remedy "for the benefit of one secondarily liable *who had paid the debt of another* and to whom in equity and good conscience should be assigned the rights and remedies of the original creditor." (Emphasis added). None of the supposedly varied definitions supplied by the Respondent differ from this definition in substance. Accordingly, all of the above support the differentiation of a claim such as the one brought by WVCoRP in this matter from one for subrogation.

As noted by the Respondent, "[i]n its normal sense, subrogation gives the payor a right to collect what it has paid from the party who caused the damage." *Id.* Subrogation "implicates diverse circumstances whereby one party may acquire rights derived from another party's rights – such as sureties, co-debtors, persons paying the debts of strangers, creditors, and officers." *Foster v. City of Keyser*, 212 W. Va. 1, 21, 501 S.E.2d 165, 185 (2012). "The doctrine of subrogation has been greatly expanded, and is broad enough to cover all cases in which one person ***pays an obligation*** which in justice and good conscience ***should have been paid by another.***" 18 M.J. Subrogation § 4 (2018) (Emphasis added). Contrary to the Respondent's implications, these definitions do not differ materially from the Black's definition, cited *supra*.

What all of these definitions of subrogation have in common with one another is that they include, as a defining element, the precondition that a subrogation plaintiff ***has paid the debt of another***. The primary aspect differentiating this claim from a subrogation claim is the fact that a risk pool administrator does not expend its own funds when it pays claims. See, e.g., W. Va. CSR § 114-65-2.4 (stating that the risk pool is comprised of member funds). Rather, it is merely an administrator of the pooled self-insurance retention fund of its member political subdivisions. See W. Va. CSR § 114-65-2.1. When a risk pool administrator causes funds to be expended from the risk pool it administers, it does not incur a loss, and therefore does not acquire a right of subrogation thereby; rather, it is providing its members with their own pooled money to cover their losses.

WVCoRP is not an insurer who received compensation in return for assuming the risks of premium payers. See Respondent's Brief at pg. 9. Nor is it a purchaser of a right of action, a creditor, or a surety. See id. at pg. 7 (quoting *Foster v. City of Keyser*, 212 W. Va. 1, 21, 501 S.E.2d 165, 185 (2012)). It is a non-profit administrator of a pool formed between self-insured political subdivisions, which is contractually empowered to file suit on its members' behalf to recover self-insured funds from responsible parties. See W. Va. CSR § 114-65-2.1, *et seq*. Each member political subdivision retains its own risks because, ultimately, the members must replenish the pool to meet future liabilities. See W. Va. CSR § 114-65-10.1-2. As stated by Judge Stucky in *Beckner v. Nicholson*, "through their contributions to the 'Fund', the [member entities] are not undertaking to indemnify another, ***they are undertaking to indemnify their own losses as a group***." *Beckner v. Nicholson*, Civil Action No. 12-C-2356, ¶ 36 (W. Va. JC 13, May 7, 2014) (Emphasis added) (Included in the Petitioner's "Supplementation of Authorities"). In a governmental self-insurance risk pool like that administered by WVCoRP, ***"[n]o third-party***

underwrites the risk of loss of the various political subdivisions." *Id.* at ¶ 32 (Emphasis added). Thus, if the Respondent's position is correct, WVCoRP is unable to recoup its members funds. Accordingly, it is the finances of the member political subdivisions which are depleted.

A similar distinction was recognized in the California appellate case of *Black Diamond Asphalt, Inc. v. Superior Court*, 114 Cal. App. 4th 109 (Cal. App. 3d Dist., 2003) (Attached). In *Black Diamond*, a trucking company sought to file a cross-claim in a wrongful death action against the independent contractor trucker who was involved in the accident. See *id.* at 113. Because the trucker's insurance carrier was insolvent, the California Insurance Guarantee Association (CIGA) took over the insolvent carrier's obligations. See *id.* The trucker argued that the cross-claim was improper, because California law prohibits subrogation actions against an individual whose insurance obligations are covered by the CIGA. See *Black Diamond* at 120; Cal. Ins. Code § 1063.1(c)(5), (c)(9). However, the trucking company sought to recover money paid out of its self-insured retention fund, not a payment to be made by its insurer. See *Black Diamond* at 120. The claim at issue was therefore characterized as an action for equitable indemnity, not subrogation, and the claim was permitted. See *id.* Likewise, the Plaintiffs in this case seek to recover funds paid out of the Commission's self-insurance fund. The only distinction is that the Morgan County Commission has pooled its self-insurance fund with other member political subdivisions.

The difference between a subrogation claim and a claim of the type herein can be analogized in the following way. Assume that a person is injured in a car accident, and incurs medical bills which they cannot pay. A stranger pays the injured person's medical bills, upon contractual condition that the stranger acquires a right to sue the tortfeasor and recover the expended amount. This is a subrogation claim, as the stranger paid the debt of another, and by doing so acquired a right recover their loss. Now assume that, rather than a stranger expending

their own funds, the medical debt was paid out of a managed investment account owned by the injured person and administered by a third party. Also assume that the third party administrator caused the funds to be expended from that account, and has the contractual right to file suits on the injured person's behalf to replenish that account. This is not a subrogation claim, because the third-party administrator has not paid a debt from his own funds on another's behalf. Rather, if the suit is unsuccessful, it is the injured person who ultimately bears the loss, not the administrator. This case, being far more akin to the latter, is definitively outside any applicable definition.

As noted above, the additional definitions argued by the Respondent do not contradict or expand upon the definition stated in Black's and *Kittle, supra.* Rather, this section of the Respondent's Brief attempts to redefine subrogation to mean any lawsuit filed without providing any authority which supports their proposed new definition. All of the listed definitions, which are in fact in accord with the Black's Law Dictionary definition relied upon by WVCoRP in the Petitioner's Brief, and adopted by this Court in *Kittle v. Icard*, define "subrogation" to mean a right of action acquired by one person ***who has paid the debt of another***. Accordingly, because WVCoRP did not itself incur a loss to pay the debt of another, this action is not one for subrogation, and the Circuit Court's holding to the contrary should be reversed.

B. The applicable regulations are unmistakable that the operation of and participation in a governmental self-insurance risk pool is not the conduct of insurance.

The Respondent's Brief argues that the operation of a governmental self-insurance risk pool should be considered tantamount to an insurance company for purposes of the Act, and listing alleged similarities between the two. See Respondent's Brief at pgs. 8-10. While these alleged similarities are by and large inaccurate and misleading as to the operation of a risk pool, such alleged similarities are irrelevant. The regulations promulgated by the Commissioner of Insurance, empowered by W. Va. Code § 29-12A-17(d), are unequivocal, stating in plain and unmistakable

words that "[a] pool is not an insurance company, its operation does not constitute the transaction of insurance, and it is not subject to the insurance laws of this State unless otherwise specifically stated herein." W. Va. CSR § 114-65-3.3. That should constitute the final word on this question, and no itemized similarities between a risk pool and an insurance company should alter it.

Nonetheless, the Respondent is mistaken in its characterization of a risk pool's operation. As stated at greater length in the Petitioner's Brief, and the foregoing section of this Reply, a risk pool created pursuant to the applicable Insurance Commissioner regulations does not, as the Respondent inaccurately asserts "collect premiums and pay losses." See Respondent's Brief at pgs. 9-10. It does not "indemnify another party against the risk of loss." See *id.* at 10. The risk pool from which liabilities are paid is the collective property of its members, not of WVCoRP; WVCoRP merely facilitates the mechanism by which the risk pool members self-insure on a group basis. See W. Va. CSR § 114-65-2.1, 4.

Entities which choose to self-insure collectively do not lose their status as being self-insured, and forming a risk pool does not render that self-insurance pool's administrator tantamount to an insurance company. "The phrase 'self-insurance' means, generally, ***the assumption of one's own risk*** and, typically, involves the setting aside of a special fund to meet losses and pay valid claims, ***instead of insuring against such losses and claims through an insurance policy***." Syl. Pt. 1, *Jackson v. Donahue*, 193 W. Va. 587, 457 S.E.2d 524 (1995) (Emphasis added). "A risk pool is another form of self-insurance, but on a group basis. The members of the group share the risks." *Beckner* at ¶ 36. What's more, a mountain of case law makes clear that "self-insurance is not insurance at all." See, e.g., *Wake County Hosp. Sys., Inc. v. National Casualty Co.*, 804 F. Supp. 768, 774 (E.D.N.C. 1992) (collecting cases). This principle also follows logically. Given the definition of self-insurance, any person who does not have

applicable insurance and is not insolvent is "self-insured." By lacking insurance, they assume their own risks, and by having adequate funds, they are responsible to pay incurred liabilities. As demonstrated by the aforementioned case law, a risk pool member is in the same position legally as any self-insured person or entity.

Accordingly, the functioning of a governmental self-insurance risk pool is materially distinct from that of an insurance company. Moreover, the picayune details which differentiate the two are in any case irrelevant, as the Insurance Commissioner has authoritatively declared by regulation that a risk pool is not an insurance company, its operation does not constitute the conduct of insurance, and it should therefore not be treated as tantamount to insurance.

C. The Act is plainly an "insurance law" from which WVCoRP is exempt.

The Respondent's argument that the West Virginia Governmental Tort Claims and Insurance Reform Act does not constitute an "insurance law of the State" ignores substantial portions of the statute, as well as the express words of the Legislature in enacting the same. See Respondent's Brief at pgs. 13-14. Also contrary to the Respondent's contentions, the Act does not merely limit liabilities with the goal that it will indirectly have a cost-saving impact on political subdivisions' insurance expenses; it directly regulates the amount insurers may charge political subdivisions for coverage, grants the Insurance Commissioner increased oversight and regulatory power over the terms of insurance contracts entered into between insurance companies and political subdivisions, and enables the issuance of group insurance policies to political subdivisions. See W. Va. Code § 29-12A-17.

In *Beckner*, the Circuit Court of Kanawha County held that the UTPA was an insurance law, because it was enacted to "regulate trade practices in the business of insurance." See *Beckner* at ¶ 26. Likewise, in *State ex rel. Clark v. Blue Cross Blue Shield, Inc.*, 203 W. Va. 690, 510 S.E.2d 764 (1998), this Court held that the former W. Va. Code § 33-24-27 was an insurance law,

because it was "enacted... for the purpose of regulating the business of insurance." The Act was enacted expressly to "***regulate the costs and coverage of insurance*** available to political subdivisions," and seeks to accomplish that goal through direct regulation of the cost and type of insurance available to political subdivisions and granting increased power to oversee the insurer-insured relationship of political subdivisions to the Insurance Commissioner. W. Va. Code § 29-12A-1; see also W. Va. Code § 29-12A-17. It would be profoundly inconsistent, both logically and precedentially, to conclude that such a law is not an insurance law.

The characterization of the Act as an "insurance law of the State" is one which is unavoidable given the foregoing. That being the case, the unmistakable words of W. Va. CSR § 114-65-3.3 that "[a] pool is... not subject to the insurance laws of this State unless otherwise specifically stated herein" compels the conclusion that it is not subject to the Act's prohibition on subrogation claims against political subdivisions, even if the instant claim could be considered such a subrogation claim.

D. The public policy considerations argued by the Respondent benefit private insurance companies, who are not the intended beneficiary of the Act.

It is beyond dispute that the public policy goals of the Legislature in enacting the Act were to limit the liabilities of political subdivisions in order to preserve public funds to better enable those entities to meet their obligations to the public. See W. Va. Code § 29-12A-1, 2. Therefore, it would constitute a perversion of the Act's expressly stated goals for it to be construed in ways that cause ***more*** public funds to be expended than would be in its absence. As discussed in the Petitioner's Brief, fewer public funds are expended when the Act is interpreted to allow a risk pool administrator to recover funds expended from its members' collective self-insurance retention fund, be it by an interpretation that such a suit does not constitute a subrogation claim, or an

interpretation that the Act's bar on subrogation claims does not apply to governmental self-insurance risk pools.

As discussed repeatedly in the briefing of this matter, the risk pool represents the collective self-insurance retention fund of its member political subdivisions. Their contributions to the pool are only what is necessary to maintain adequate reserves. Any excess funds in the pool are returned to the contributing political subdivisions. See W. Va. CSR § 114-65-12. WVCoRP is merely the authorized non-profit administrator who manages the operation of the pool on behalf of its members. See W. Va. CSR § 114-65-2.1. Therefore, in the event that WVCoRP is not permitted to recover amounts expended from the pool to cover liabilities from a responsible tortfeasor, the loss is borne 100% from public funds.

This stands in stark contrast with the other potential outcome as the stated goals of the Act are concerned. If a governmental self-insurance risk pool administrator is permitted to recover risk pool funds from a privately insured political subdivision, such as the VFD, the loss will be paid by private insurance funds. The only potential adverse impact of that outcome, as the stated goals of the act are concerned, is that the VFD's insurance premiums may increase. While it is true that the VFD's insurance premiums are derived from public funds, this remains a fraction of the damage suffered by the public coffers in the opposite scenario.

Furthermore, the Respondent's argument appears to be that interpreting the Act to permit a suit by a risk pool administrator to recover funds expended from its members' pooled self-insurance retention fund would be "unfair" to political subdivisions who insure with a private insurance company. See Respondent's Brief at pg. 16. However, there is no authority mandating that any political subdivision must contract with a private insurance company; it is not a fixed state of being. As pointed out by the Respondent, a political subdivision is equally free to form a risk

pool, or to self-insure on its own. Reading between the lines, the true argument appears to be that it would be unfair *to private insurance companies*, as political subdivisions would lose one incentive to insure their liabilities with those companies. However, private insurance companies are not the intended beneficiaries of the Act, and have no claim on the beneficence of its policy goals.

The balancing of equities, and the stated policy goals of the Act broadly favor the interpretation of the Act urged by WVCoRP in this matter. The Petitioner therefore respectfully prays this Honorable Court hold in accord with those stated goals, and reverse the holding of the Circuit Court to the contrary.

II. CONCLUSION

WHEREFORE, for the reasons stated herein, the West Virginia Counties Group Self-Insurance Risk Pool respectfully prays this Honorable Court REVERSE the rulings of the Circuit Court in this matter which are mad the subject of this Appeal, and direct the Circuit Court below to enter an order DENYING the Great Cacapon Volunteer Fire Department's Motion to Dismiss.

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