No. 33209 *State of West Virginia ex rel. Erie Insurance Property & Casualty Company v. The Honorable James P. Mazzone, Judge of the Circuit Court of Ohio County, and Elizabeth Murfitt*

FILED
June 29, 2007
released at 10:00 a.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Starcher, J., concurring:

I concur with the majority's opinion. I write separately, however, to fully explicate the meaning of the majority's opinion.

West Virginia law requires an insurance company, upon receiving notice of a liability claim, to establish a "reserve" for that claim. *See*, *e.g.*, *W.Va. Code*, 33-7-5 [1957], 33-8-22 [2004]. This means the insurance company must set aside an amount of money equal to the expected amount that will be paid out in the claim – the "loss and loss adjustment expenses" in insurance industry parlance. This ensures that the claim gets paid, and ensures the money isn't spent elsewhere.[1] Insurance companies establish a reserve not only because the law requires it, but also because it is a good accounting practice.

West Virginia law also required an insurance company to "attempt[] in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has

[1]Some insurance companies spend policyholder premiums on activities other than claims. During the liquidation of a medical malpractice insurer in 1997, it was revealed that company money had been spent on such things as buying cattle, paying casino debts, for contributions to political parties, to remodel the Republican state headquarters, for luxury baseball skybox seats, for loans to company board members that were forgiven and never repaid, for rare paintings and for buying a retirement complex. *See Verba v. Ghaphery*, 210 W.Va. 30, 39-40, 552 S.E.2d 406, 415-16 (2001) (Starcher, J., dissenting).

become reasonably clear." *W.Va. Code,* 33-11-4(9) [2002].[2] Liability is "reasonably clear" when a reasonable person with knowledge of the relevant facts and law would conclude, for good reason, that the defendant is liable to the plaintiff. Syllabus Point 2, *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W.Va. 634, 600 S.E.2d 346 (2004). A "fair and equitable settlement" is a settlement that is made by an insurer impartially, honestly, and free from prejudice, self-interest or other improper influence. Syllabus Point 6, *Hicks ex rel. Saus v. Jones*, 217 W.Va. 107, 617 S.E.2d 457 (2005).

The plaintiff below, Elizabeth Murfitt, was a hotel maid whose wrist was shattered in an October 19, 2000 car wreck caused by a man insured by the defendant, Erie Insurance Property & Casualty Company. Ms. Murfitt incurred over $50,000.00 in medical bills in multiple wrist surgeries, and was totally deprived of her $12,500.00 a year job.

Ms. Murfitt's attorneys contend that Erie knew all along the seriousness and magnitude of Ms. Murfitt's injuries, and knew liability was clear. However, because she was "an unsophisticated woman, with no income," the plaintiff's attorneys contend that Erie made "low ball" settlement offers – starting at $47,000.00 – and then dragged the case out for over two years. As proof, the plaintiff's attorneys note that the amount of Erie's settlement offers jumped by a factor of ten in the days before trial, and that the case was

[2]Unfortunately, in 2005 the Legislature replaced third-party causes of action for violations of the Unfair Trade Practices Act – lawsuits like the instant case – with a purely administrative remedy. *See W.Va. Code,* 33-11-4a [2005]. Fortunately, for now, first-party insureds continue to retain the right to pursue damages in court when an insurance company violates the Act and refuses to negotiate with its own customers fairly and in good faith.

finally settled on the second day of trial in November 2002 for seventeen times Erie's original offer.[3]

At some point after Ms. Murfitt made a claim to Erie, it appears that Erie did what it was supposed to do by law and by practice, and established a reserve.

Ms. Murfitt is now suing Erie for bad faith, and wants Erie to produce evidence of the reserve value Erie placed on her claim at the time Erie was making its lowball offers. Erie, however, claims that the reserve value number is attorney work product protected from discovery. This is nonsense.

First, the reserve value was a number created by Erie because of the law, not because Ms. Murfitt was threatening litigation. The West Virginia Insurance Commissioner, as well as the commissioner of probably every other state in which Erie does business, has the right to inspect Erie's books to ensure that sufficient money is being kept in reserve to pay pending claims. *See W.Va. Code*, 33-2-9 [2006]. The only way for the Insurance Commissioner to know if the amount reserved is truly sufficient to pay the claim is to look at precisely the same evidence the plaintiff is seeking in this case.

Second, the reserve value in Ms. Murfitt's case should have been derived from the facts behind Ms. Murfitt's wreck and her injuries and economic losses. These facts are

[3]From several months after the accident until the weeks before the trial, Erie's highest offer was $55,000.00. Three weeks before trial, Erie's settlement offer jumped to $275,000.00, and jumped to $500,000.00 three days before trial. Erie offered $600,000.00 at the trial's beginning, and settled on the second day of trial for $800,000.00 – nearly sixteen times the amount of the offer Erie insisted was fair for two years.

all discoverable. It is bewildering then when an insurance company assembles these facts in one place to calculate a monetary value – but then says that the entire assemblage of facts is privileged and undiscoverable.

Third, insurance reserves are established to resolve claims. Paying claims is what insurance companies are supposed to do, and the value of most claims should be fairly resolved through negotiation rather than litigation. This means that the primary purpose of an insurance reserve has nothing to do with litigation, and everything to do with prompt, fair, and equitable settlement of claims in which liability has become reasonably clear. Litigation is supposed to be the exception, not the rule. And if an insurance company prepares every claim with the goal of taking the claim into litigation, I think it is fair to say that the insurance company, as a general business practice, is failing to fairly settle claims and is instead breaking the law by "[c]ompelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered[.]" *W.Va. Code*, 33-11-4(9)(g).

Simply put, in most cases I believe that the documents created in the establishment of a reserve are nothing more than routine business records, not opinion work product created in response to litigation. The primary motivating purpose behind the creation of an insurance reserve is to comply with state law, and to comply with good insurance accounting procedures. These documents are therefore fully discoverable.

This case has been dragging on for nearly seven years. The insurance company delayed making a fair offer to settle the plaintiff's lawsuit until the trial began. Now, when

the insurance company's actions are under the microscope, the company has tried to squirm out of producing documents in discovery. When the circuit court has ordered the production of the documents, the insurance company has twice run to this Court asking for a "do-over" in the form of writs of prohibition.

This Court correctly supported the circuit court's order requiring Erie to produce the documents pertaining to the creation of a reserve in Ms. Murfitt's case.

I therefore respectfully concur.