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*

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

Benjamin, Justice, concurring:

The nature of the instant litigation coupled with the trial court's detailed findings and narrow ruling regarding reserve information at issue herein underscores the propriety of the denial of the requested writ of prohibition. The basis of Ms. Murfitt's claim against Erie Insurance Property & Casualty Company (hereinafter "Erie") is that Erie violated West Virginia law by failing to make a good faith attempt to settle her claim against an Erie insured arising from an automobile accident in which she sustained significant injuries. West Virginia law imposes a duty upon insurers doing business in this state to attempt "in good faith to effectuate a prompt, fair and equitable settlement[] of claims in which liability has become reasonably clear." W. Va. Code § 33-11-4 (9) (f) (2002). Additionally, our law prohibits an insurer from refusing to pay a claim "without conducting a reasonable investigation based upon all available information." W. Va. Code § 33-11-4 (9) (d). At the time of the actions at issue herein, our law likewise provided that a third-party, such as Ms. Murfitt, could assert a private cause of action directly against an insurer who failed to comply with mandates of our Unfair Trade Practices Act, W. Va. Code § 33-

11-1, *et seq.*

After settling her claim against Erie's insured on the second day of trial for substantially more than any Erie pre-trial settlement offer, Ms. Murfitt amended her complaint to assert a bad faith cause of action directly against Erie arising from its conduct in handling her claim. The primary issues to be resolved in this direct action against Erie are, therefore, what Erie knew about Ms. Murfitt's claim, when Erie knew it and whether Erie attempted, in good faith, to effectuate a fair and equitable settlement in light of the information available to it at the time any particular settlement offer was made. From the limited record before this Court, it appears Erie consistently offered to settle Ms. Murfitt's claim for less than her incurred medical bills and without regard for her lost wages for nearly two years prior to the commencement of the trial of the underlying personal injury action. Then, within the month before the personal injury trial was to commence, Erie's settlement offer increased exponentially without any objective evidence of newly discovered facts justifying such a dramatic increase. Ultimately, Erie offered to settle Ms. Murfitt's claim for $800,000 on the second day of trial, an offer nearly sixteen times greater than Erie's average settlement offer for the two years prior to trial.

A fundamental prosecution theory for a failure to offer reasonable settlement claim is that the insurer indeed valued the claim much higher than its settlement offers

indicated. Thus, the critical evidence necessary to succeed on such a claim is how the insurer valued the claim at the time the settlement offers were made. Where, as here, the insurer admits that its reserves for a particular claim are fact-dependant, i.e., set in light of the information available regarding a particular claim, the reserve amount is directly relevant and constitutes primary evidence of whether the insurer attempted, in bad faith, to settle a claim for substantially less than the amount it deemed reasonable and equitable compensation for the injuries sustained.

As few jurisdictions recognize common-law third party bad faith actions, most discussion regarding the ability to discover reserve information has occurred in the context of first party bad faith claims where the basis of the claim is a denial of coverage, failure to settle and/or failure to defend. In those contexts, several courts have recently found reserve information to be both relevant and discoverable because it demonstrates the propriety of the insurer's actions. *See, Oak Lane Printing & Letter Service v. Atlantic Mut. Ins. Co.* 2007 W.L. 1725201, *4 (E.D.Pa. June 13, 2007) ("For instance, reserve information is relevant to a bad faith claim where the insurer fails to settle or where there is a disputed issue regarding the value of the claim."); *United States Fire Ins. Co. v. Bunge North America, Inc.*, 2007 W.L. 1531846, *9 (D. Kan. May 25, 2007) ("the information sought may demonstrate the extent to which the Insurers investigated and considered Bunge's claim, and thus is relevant to the question of good or bad faith in failing to indemnify or defend Bunge.");

Athridge v. Aetna Cas. & Sur. Co., 184 F.R.D. 181, 192 (D.C. 1998) (evidence of settlement reserve is relevant in action for breach of fiduciary duty to insured or insured's assignee because information will aid in demonstrating thoroughness with which claim was investigated).

The United States District Court for the Northern District of California recently discussed the relevancy of reserve information to claims of bad faith in a first-party context in *Bernstein v. Travelers Insurance Company*, 447 F.Supp.2d 1100 (N.D. Cal. 2006). Although the claim at issue in *Berstein*, involved the insurer's alleged knowing refusal to release payments to its insureds,[1] the circumstances therein are analogous to the issue

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[1]According to the court in *Bernstein*,

> Central to plaintiffs' theory of the case is that Travelers repeatedly and knowingly refused to release payments that it knew it owed on the claims, and that Travelers' business strategy over at least the first 20 months of the claims processing period was to make unjustifiable demands for proof of claims, to unjustifiably delay making payments, and then to pay less than it actually believed it owed, all in order to soften Berstein up for a settlement offer that Travelers knew was appreciably smaller than the real value of plaintiffs' claims.

Bernstein, 447 F.Supp.2d at 1108. While I recognize that an insurer owes a higher duty to its own insured than to a third-party claimant, the reasoning utilized by the court in *Bernstein* is persuasive to me due to the similarity of the theory asserted therein (refusing to make payments knowingly owed to an insured) to that asserted in the instant matter (making unreasonably low settlement offers knowing the claim had a much higher value). The relevance and persuasive nature of the *Bernstein* analysis is further demonstrated by the court's recognition therein that "there is a closer apparent proximity between the amount of

(continued...)

presented herein, the failure to make reasonable settlement offers. Discussing the relevance of reserve information to the claims asserted, the court stated:

> In assessing the "discovery relevance" of the targeted information, we must consider all the litigation purposes for which plaintiffs might use it – as direct evidence on a disputed issue, as grounds for challenging or testing positions taken during the litigation by the defendants, or as means to help develop evidence that could be used, directly or circumstantially, to litigate more reliably the principal issues in the case.

Bernstein, 447 F.Supp.2d at 1105-06 (footnote omitted). With respect to a bad faith action, the court noted that reserve information may be relevant to "'the question of whether . . . the insurer had conducted a proper investigation or given reasonable consideration to all of the factors involved in a specific case[.]'" *Id.* at 1107, quoting, *Lipton v. Superior Court*, 48 Cal. App.4th 1599, 1614 (2nd Dist. 1996). Explaining the relationship between reserve information and the bad faith claims asserted, the court recognized that:

> [c]ritical to [the] theory of the case is a posited self-conscious disconnect (a large, unbridgeable gap) between, on the one hand, what Travelers was communicating to, demanding of, and paying its insured and, on the other hand, what Travelers actually thought it owed and would owe under the claims. Under this theory, what Travelers' "internal assessment of the subject claim" actually was at various junctures is the critical factual issue in the litigation.

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[1](...continued)
a reserve and the coverage issue in a third party action (alleging bad faith in declining to fund an insured's defense) than in a first party case." *Id.* at 1105.

> Plaintiffs assert that discovery of the reserves that Travelers set aside, and of internal documents, comments and communications related to those reserves, will enable plaintiffs to uncover and prove what Travelers "internal assessments" really were – and thus to demonstrate that there were big, inexplicable differences between what Travelers communicated to and demanded of plaintiffs and what Travelers really understood about both coverage and valuation issues. . . . Without the materials sought through this discovery, plaintiffs and the court would be more dependent on oral testimony from Travelers' agents about what they really thought about the claims as they were being processed – and thus more vulnerable to good faith errors of memory or to deception.

Id. at 1108-09 (footnote omitted). Similarly, the critical issue in this matter is whether Erie's pre-trial settlement offers were reasonably related to what Erie actually thought it owed on Ms. Murfitt's claim. Considered discovery of the reserve dates and amounts constitute the best objective evidence of how Erie valued Ms. Murfitt's claim in light of Erie's admission that the reserves were set in light of the facts known to Erie without necessitating inquiry into the internal thought processes of Erie's agents.

By permitting the discovery of the dates and amounts of reserves, the reasonableness of Erie's settlement offers may be determined. If the reserves are vastly greater than the settlement offers made, such fact may show that Erie violated West Virginia law by attempting, in bad faith, to settle Ms. Murfitt's claim for far less than Erie reasonably believed its value to be. By contrast, if the reserves were reasonably related to the settlement offers made, the same could be used as a defense by Erie to demonstrate that it made a good

faith attempt to settle Ms. Murfitt's claim for an amount it deemed reasonable in light of all facts known.[2]

In light of the record presented herein, this Court properly denied Erie's requested writ of prohibition. The trial court's order is appropriately narrow and protects against the discovery of the thought processes underlying the establishment of Erie's reserves in that is provides only for the date a particular reserve was established and its amount. By permitting discovery of the reserve amounts and dates, the trial court's order permits Ms. Murfitt access to evidence critical to the prosecution of her claim, evidence existing only in the possession of Erie. It would be difficult, if not impossible, to prove a claim that an insurer offered unreasonably low and inequitable settlement amounts in light of the value the insurer placed on a claim without access to evidence indicating how the insurer actually valued the claim. By allowing Ms. Murfitt to discover reserve amounts and dates, the trial court's order properly gives Ms. Murfitt access to critical information for which she has a substantial need and which she could not otherwise obtain. Accordingly, I concur in the denial of the requested writ of prohibition.

[2]When faced with a claim that it violated West Virginia law by failing to make reasonable settlement offers, I have little doubt that an insurer would be eager to disclose its reserve information where the same is reasonably related to its settlement offers because such a relation could serve as a defense to the bad faith allegations.