No. 35127 – *Doris Michael and Todd Battle, by his next friend, Doris Michael, and Kitrena Michael v. Appalachian Heating, LLC, and State Auto Insurance Company*

Ketchum, J., dissenting:

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Unfounded Judicial Expansion of Our Law

The Human Rights Act has the salutary goal of stamping out numerous pernicious forms of discrimination. It appropriately declares that discrimination based upon race, religion, color, national origin, ancestry, sex, age, blindness, disability or familial status are corrosive to the principles of freedom, and destructive to a free and democratic society. *See W.Va. Code*, 5-11-2 [1998]. Motivated by this goal of eliminating discrimination, the majority opinion judicially expands the Human Rights Act into the field of property insurance settlements. The Human Rights Act does not extend as far as the majority opinion has interpreted it to reach. Let me explain.

On the one hand, I firmly believe that every resident of this State is entitled to fair treatment by an insurance company. An insurance company should *never* settle a claim using any of the "terrible ten" factors – race, religion, disabilities, and so on – in the Act as a guide. An insurance company that chooses to rely on race or religion or any of the other wrongful grounds in the Act to guide settlement decisions is acting in an arbitrary and

capricious manner, and is a red flag begging the insurance company to be punished for its callousness, one way or another.

But on the other hand, in my 41 years of practicing law, I *never* had a client who felt that an insurance company *hadn't* discriminated against them in some way, shape or form in settling their claim. This notion was held by all claimants, regardless of their race, creed, origin or status. *Every* person making a claim against an insurance company thinks they wrongfully got the short end of the stick. Because of that, I think the majority opinion has created a situation ripe for abuse by a handful of litigation lawyers.

The West Virginia Unfair Trade Practices Act, *W.Va. Code*, 33-11-1 to -10, previously allowed third-party claimants to file suit against a tortfeasor's insurance company for specific types of "unfair discrimination" and "unfair claim settlement practices."[1] It was a good law that heightened a plaintiff's ability to negotiate with a behemoth insurance company bureaucracy.

Unfortunately, in the past, a handful of overly-aggressive lawyers routinely capitalized upon their clients' senses of being discriminated against, and routinely alleged

[1]*See* Syllabus Point 2, *Jenkins v. J. C. Penney Cas. Ins. Co.*, 167 W.Va. 597, 280 S.E.2d 252 (1981) ("An implied private cause of action may exist for a violation by an insurance company of the unfair settlement practice provisions of W.Va.Code, 33-11-4(9)[.]"

frivolous unfair settlement practice claims in every damage lawsuit they filed. Some lawyers spent most of their time "setting up" insurance companies for unfair settlement practice suits rather than focusing on fairly developing and quickly resolving their client's injury claims. These practices by a few lawyers provided the ammunition for the Legislature to eliminate third-party unfair claim settlement practice lawsuits in 2005. The Unfair Trade Practices Act, *W.Va. Code*, 33-11-4a [2005], now explicitly states:

> A third-party claimant may not bring a private cause of action or any other action against any person for an unfair claims settlement practice.

In place of these "bad faith" suits, the Legislature provided a new (but, by all reports, wholly unsatisfactory) remedy for discriminatory and unfair settlement practices. Now, the statutory remedy for third-party unfair claims practices and unfair settlement discrimination is to file what so far appears to be a largely ineffective administrative complaint with the virtually toothless insurance commissioner. *See W.Va. Code*, 33-11-4a.

Put another way, the Legislature has already provided a remedy – albeit, a weak one – for unfair discrimination in the course of resolving a third-party insurance claim. Because the Legislature has explicitly created a remedy in the Unfair Trade Practices Act, I am troubled that the majority opinion chose to judicially infer the existence of a similar, separate remedy in the Human Rights Act. The Human Rights Act contains no language

purporting to regulate insurance settlements. It is reasonable to assume that there would have been at least *some* specific reference to insurance settlements in either the language of the Human Rights Act, or the rules of the Human Rights Commission, or in the legislative history of the Act. There is none. In fact, the website for the Human Rights Commission says the Commission only "investigates and litigates acts of illegal discrimination in the areas of: Employment, Housing and places of Public Accommodations."[2]

What I foresee, in the future, is that the Human Rights Act will be subjected to the same abuse that maligned the Unfair Trade Practices Act. A handful of litigators will unleash a flood of lawsuits alleging discrimination in the settlement of a third-party property damage claims by insurance companies – and in most of those cases, the evidence of "discrimination" will be entirely spurious. The majority opinion stresses that there must be a causal connection between the claimant's "terrible ten" status (*i.e.*, race, religion, color, national origin, *etc.*) and the actions of the insurance company in order to assert a claim under the Human Rights Act. But my years of practicing law has taught me that a mere allegation of unlawful discrimination can be a powerful weapon for negotiation of a spurious claim. Jurors do not like insurance companies.

[2]*See* http://www.wvf.state.wv.us/wvhrc/jurisdiction.htm, accessed April 23, 2010.

Again, I am also concerned that, among the discriminatory activities listed by the Human Rights Act, discriminatory insurance settlements are not listed as an evil that the Act seeks to eradicate. Justice Cleckley teaches that when we interpret the Human Rights Act, we should look to Section 2 of the Act to determine its purposes and goals. *See West Virginia Human Rights Com'n v. Garretson*, 196 W.Va. 118, 123-127, 468 S.E.2d 733, 738-742 (1996). Section 2 of the Act declares that it was intended to provide three things: "equal opportunity for employment, equal access to places of public accommodations, and equal opportunity in the sale, purchase, lease, rental and financing of housing accommodations or real property." *W.Va. Code*, 5-11-2 [1998]. The majority opinion does not specify which of these three categories a third-party insurance settlement fits into – in fact, the parties never raised this issue or made any argument on this question.[3]

In sum, the Legislature did not consider the complexity of insurance claims settlement when it drafted the Human Rights Act. For instance, the majority opinion has interpreted the Human Rights Act as preventing insurance discrimination on the basis of age; yet the Unfair Trade Practices Act explicitly *allows* insurance companies to make decisions in the sale of life insurance on the basis of age.[4] Under the Unfair Trade Practices Act,

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[3]I can only assume that the majority opinion presumed that discrimination in the course of a third-party claim settlement was the denial of a "place[] of public accommodation." *See*, *W.Va. Code*, 5-11-3(j) [1998].

[4]The Unfair Trade Practices Act, *W.Va. Code*, 33-11-4(7)(a) [2002], states:

(continued...)

insurance companies have to charge customers with the same expected life duration the same premium; if the customers are older or younger, and therefore have a different expectation of life, then the insurance company can charge different premiums. I believe that the majority opinion can and will be misconstrued by lawyers to say that premium decisions which are allowed under the Unfair Trade Practices Act will now be illegal under the Human Rights Act.

I do not believe that the Legislature intended for the Human Rights Act to extend beyond employment, housing and access to public accommodations to the nebulous, highly-regulated realm of insurance law. I therefore respectfully dissent.

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[4](...continued)

> No person shall make or permit any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contract.