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UPDATE ON THE LAW

Martin & Seibert, L.C.

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Court Dismisses Bad Faith Claims Based On Prior Ruling of No Coverage

Martin & Seibert has successfully secured the dismissal of common law and statutory bad faith claims. In *Jefferson v. Medical Rehabilitative Services, Ltd., Nationwide Mutual Fire Ins. Co., et al.*, (Civil Action No. 04-C-520), the plaintiff filed a sexual harassment Complaint against Medical Rehabilitative Services, Ltd. and one of its employees. The employee defendant settled and then filed a Third-Party Complaint alleging Nationwide had a duty to indemnify and defend Mason and Medical Rehab under homeowner’s policies issued to Mason, and also alleging first-party bad faith.

Nationwide filed a Counterclaim for Declaratory Relief contending that the homeowner’s policies it issued to Mason did not provide coverage to either Mason or Medical Rehab. The trial court agreed and granted Nationwide’s Motion for Summary Judgment. Nationwide then filed a Motion to Dismiss arguing that the bad faith claim did not survive the coverage determination. Again, the trial court agreed granting Nationwide’s Motion to Dismiss.

Judge Recht specifically found that, pursuant to dispositive case law from the West Virginia Supreme Court, once it is determined there is no coverage, any claims for breach of contract or first-party bad faith cannot be maintained because “there is now no underlying contractual duty on which to base such a claim.” The determination of no coverage also extinguishes the common law bad faith claim because the policyholder has not substantially prevailed against his insurer on the underlying contract action.

Judge Recht also dismissed Mason’s and Medical Rehab’s statutory bad faith claims holding that a fair reading of subsections (b), (d) and (f) of W.Va. Code § 33-11-4(9) “requires any reasonable person to conclude that coverage must exist for these claims to be justiciable.” As to subsection (e) of W.Va. Code § 33-11-4(9), the court found no evidence that Nationwide failed to either timely affirm or deny coverage as Nationwide provided the insured a reservation of rights letter 13 days after notice of the underlying suit.

Reinsurer Not Liable For Equitable Contribution

Finding that a reinsurer and the primary insurer did not cover the same risk, the U.S. District Court for the Southern District of West Virginia has denied a claim for equitable contribution in a multi-insurer dispute arising from a $25 million verdict. *Executive Risk Indemnity, Inc. v. Charleston Area Medical Center, et al.*, (Civil Action No. 2:08-cv-810, S.D.W.Va., decided July 30, 2009).

In 2008, a state court jury awarded a Charleston physician $25 million in a defamation case where the physician alleged the hospital improperly suspended his privileges when he chose to become self-insured for medical malpractice. The verdict included $5 million in compensatory damages and $20 million in punitive damages. The verdict was reduced by the trial court to $10 million and ultimately settled for $11.5 million. The settlement was funded in part by CAMC, which contributed a portion of its self-insured retention, and the balance was to be funded by CAMC's insurers: Executive Risk Indemnity and Employers Reinsurance. A third insurer, Vandalia, did not contribute to the settlement.

Thereafter, Executive Risk Indemnity instituted a declaratory judgment action in federal court alleging, *inter alia*, equitable contribution. That claim was dismissed after Chief Judge Joseph Goodwin found that Executive Risk and Employers Reinsurance did not insure the same risk. The Court found Executive Risk was the primary insurer for Directors, Officers and Trustees Liability and that Employers Reinsurance provided excess D&O coverage, as well as health care/professional liability coverage and general liability coverage. Specifically, the Court held: "Because the West Virginia Supreme Court of Appeals has held that the doctrine of equitable contribution arises when there is a common obligation and one party has to pay more than its fair share of that obligation, the court would be unlikely to find such a common obligation in the context of primary insurers and excess insurers."

The Court also denied any claims of the hospital that it was a third–party beneficiary to a reinsurance contract between Vandalia and Employers Reinsurance. All other claims of the various entities including breach of contract, bad faith, and unjust enrichment claims by the hospital remain.

No Order as To How Discovery Must Proceed

The U.S. District Court for the Northern District of West Virginia has granted a defendant's Motion to Compel the deposition of plaintiff's treating physician holding there is no "rule of discovery priority."

In *Carman v. Bayer Corp., et al.*, (Civil Action No. 5:08-cv-148, N.D.W.Va., decided July 1, 2009), the plaintiff alleged he suffered a major depressive disorder with death wishes, suicidal and homicidal ideations, memory problems, sensory problems, nausea and memory loss as a result of toxic exposure in the workplace. He disclosed a physician as his expert witness on causation and damages.

The defendant then sought to depose the physician to which plaintiff objected, arguing that fact witnesses must be deposed before experts and that a plaintiff's expert should not be deposed before the defense expert disclosure is filed.

Magistrate Judge James Seibert flatly rejected plaintiff's argument finding no priority of discovery in the Federal Rules of Civil Procedure.

Commissioner Reminds Insurers of Record Retention Requirements

Amidst a growing number of cases in which trial courts are issuing Protective Orders requiring the destruction or return of medical records at the conclusion of litigation, the West Virginia Insurance Commissioner has released Informational Letter 172.

The Informational Letter reiterates the Commissioner's record retention requirements set out in 114 CSR §15-14.4 which requires insurers to retain all records, including medical records, obtained during its investigation and evaluation of a claim.

In the Informational Letter, released September 17, 2009, the Commissioner reminded insurers that 114 CSR §14-3 requires the retention of all notes and work papers concerning a claim in such detail that pertinent events and dates of such events can be reconstructed during any examination by the Commission. A violation of this provision, the Commission stated, could result in adverse findings as to how the insurer conducts its business, which could subject the insurer to fines or suspension of its license.

The Commission also stressed the importance of complete claim file records for purposes of administrative complaints and fraud investigations. "Record retention is also an important tool in detecting fraudulent insurance claims. … Consistent maintenance of essential claim records by insurers is crucial to a comprehensive investigation of potentially fraudulent claims. Additionally, use of such claim information is necessary to protect the citizens of West Virginia from insurance fraud," the Commission stated.

The Commission concluded, stating: "The applicable insurance laws and rules demand consistent and comprehensive maintenance of all essential claim records by insurers to ensure that the laws protecting consumers of this state are being followed and that claims are being properly resolved. If records necessary for an adequate market conduct review are missing, the OIC will be substantially hindered in carrying out its legislative mandate and thus may subject insurers to penalties."

Interplead Funds Disbursed to Beneficiary of Life Insurance Policy

The U.S. District Court for the Southern District of West Virginia has rejected a claim that the wife of a deceased life insurance holder is entitled to half the proceeds because the premiums were paid out of marital assets. In *Lincoln Nat. Life Ins. Co. v Simpkins*, (Civil Action No. 2:08-cv-1188, S.D.W.Va., decided September 11, 2009), Judge David Faber held that the named beneficiary of the policy, the decedent's son, was entitled to100% of the proceeds.

Lincoln filed an interpleader placing the policy proceeds plus interest into the Court pending resolution of the competing claims of Mrs. Simpkins and her son. Relying on domestic relations law, Mrs. Simpkins alleged she was entitled to one-half the proceeds as a result of her late husband's payment of policy premiums with funds that would have been considered marital assets in the event the couple had divorced prior to the elder Mr. Simpkins' death. The Court found that the code section she relied upon concerned domestic relations and was specifically limited for that purpose. The Court further found the policy was clear and unambiguous and thus awarded 100% of the proceeds to the named beneficiary.

Court Dismisses Third-Party Bad Faith Claim

The U.S. District Court for the Southern District of West Virginia has dismissed a bad faith claim against Travelers because the plaintiff was a third-party claimant now barred from bringing statutory bad faith claims.

In *Southern WV Paving, Inc. v. Elmo Greer & Sons*, *LLC, et al.,* (Civil Action No. 2:09-cv-342, S.D.W.Va., decided June 29, 2009), Judge Joseph Goodwin found that the plaintiff, a subcontractor of Elmo, was not an insured under a Travelers surety bond and thus could not sue Travelers for alleged unfair claim handling when Travelers denied the subcontractor's demand for payment under a surety bond.

The dispute arose when Travelers issued a payment bond to the McDowell County Board of Education as a contractor's condition precedent to a construction contract. The bond named the Board as the owner and Elmo as the contractor. Elmo subsequently subcontracted with Southern WV Paving. When the subcontractor was not paid, it contacted Travelers demanding payment. Travelers declined. When suit was filed, Travelers filed a Motion to Dismiss, arguing Southern WV Paving was a third-party claimant who could no longer pursue statutory bad faith claims in West Virginia.

The District Court agreed based upon statutory definitions of third-party claimants.

Formula For Calculation of Pre-Judgment Interest

The U.S. District Court for the Northern District of West Virginia has devised a formula for the calculation of pre-judgment interest in civil case where losses accrue weekly.

In *Miner v. Berland*, (Civil Action No. 5:08-cv-127, N.D.W.Va., decided September 17, 2009), the Court held that interest must be calculated by multiplying the amount due each week by the applicable annual rate of interest, then dividing that number by 365 days. Thereafter, that number is multiplied by the number of days from the date due until the judgment date.

The issue arose in a breach of contract/breach of partnership fiduciary duty case whereby the parties entered into a greyhound racing kennel agreement. Plaintiff was to receive a percentage of gross receipts of the kennel and the right to choose one greyhound pup for every year the contract was in existence in exchange for obtaining a racing contract.

In August, a jury found the defendant breached the contract and breached his partnership fiduciary duty to the plaintiff and awarded plaintiff damages in excess of $300,000.00. Because the losses accrued weekly, the parties were ordered by the Court to agree upon the calculation of pre-judgment interest. The parties were unable to reach an agreement and the Court thereafter chose the defendant's formula for the calculation of pre-judgment interest.

One Year Statute of Limitations For First Party Bad Faith Claims

The statute of limitations in first-party statutory and common law bad faith claims is one year and begins to run when the insured knows or reasonably should have known that the insurer refused to defend, held the West Virginia Supreme Court in *Noland v Virginia Insurance Reciprocal, et al.*, (No. 34702, W.Va., filed September 24, 2009).

In 1998 a former patient at Beckley Appalachian Regional Hospital filed a medical malpractice claim in which he alleged negligent treatment rendered him a quadriplegic. The hospital then filed a third-party complaint against one of its nurses alleging he rendered the deficient care seeking indemnification and contribution. The nurse was an insured under the hospital's policy issued by Virginia Insurance Reciprocal and was also separately insured under a personal policy. The Reciprocal denied coverage and a defense to the nurse who then filed a bad faith suit for that refusal. The Reciprocal separately filed a declaratory judgment action to determine if it owed a duty to defend the nurse which was resolved in favor of the nurse for the period between the filing of the third-party complaint and the date the patient settled his claim. Thereafter, the Circuit Court ruled, the duty to defend rested with the nurse's personal carrier, ACE American.

First, the Court reversed the Circuit Court's restriction of the time in which The Reciprocal had to defend, finding that the nurse was an insured and thus entitled to the benefit of exhaustion of the umbrella policy without regard to his personal malpractice policy.

As to the bad faith claims, the Court considered W.Va. Code §55-2-12, the statute of limitations governing tort cases, finding that a one year statute of limitations applies. The same logic was then applied to common law claims by Justice Robin Davis who authored the opinion.

The Court next considered when the statute would begin to run, holding that when an insurer refuses to defend, any bad faith involved in that decision terminates when the decision is conveyed to the insured. Hence, that is when the statute of limitations begins to run. The Court specifically noted the ruling applies only to bad faith claims predicated on a refusal to defend. The Court made no ruling as to when the statute begins to run on first- party bad faith claims based on other grounds.

As a result, the nurse's bad faith claims against certain adjusters and executives of The Reciprocal were dismissed while the bad faith claim directly against the insurer will proceed as timely filed.

Jury Rejects Goose Claim

Last year a CSX conductor filed suit against the railroad alleging federal workplace violations when he was injured after he encountered a goose in the rail yard. After 25 minutes of deliberation, a jury rejected those claims in July.

In *Richards v. CSX Transportation*, (Civil Action No. 3:08-cv-79, S.D.W.Va.), plaintiff alleged FELA violations against CSX for not removing geese from the railyard. Plaintiff was injured when performing a brake test on a train and was startled by the goose thus falling backward and twisting his ankle. At trial, plaintiff's counsel argued that CSX knew or should have known the goose was a hazard to employees.

Court Finds Misjoinder, Severs and Remands Portion of Claim

In considering a remand motion, the U.S. District Court for the Northern District of West Virginia has severed product liability claims from a medical malpractice claim filed as one civil action thereafter retaining jurisdiction over the product liability claim and remanding the medical malpractice claim to state court.

In *Hughes v. Sears Roebuck and Co., et al.*, (Civil Action No. 2:09-cv-93, N.D.W.Va., decided September 3, 2009), the plaintiff alleged faulty design, manufacture, and sale of a treadmill which she alleged caused her to be thrown off the device causing her personal injury. Plaintiff sought treatment for those injuries and was allegedly misdiagnosed. Thus, she sued Sears and Icon, the manufacturer of the treadmill, both of whom are out-of-state corporations, and a West Virginia doctor.

Sears removed the case to federal court and the plaintiff moved to remand the action to the Circuit Court of Barbour County. Sears also then moved to sever the claims due to fraudulent misjoinder of the West Virginia physician. The doctrine of fraudulent misjoinder – as opposed to the doctrine of fraudulent joinder - is an assertion that claims against certain defendants, while provable, have no real connection to the claims against other defendants and were included to defeat diversity jurisdiction.

Analyzing the case under Rule 20(a) of the Federal Rules of Civil Procedure, the District Court determined the claims did not arise from the same transaction or occurrence although they occurred on the same day. Next, the Court held the claims did not present common questions of law or fact finding the claims are “legally and actually distinct” and that the proof necessary to support the two claims will be “markedly different.”

Thus, the Court severed the claims and maintained jurisdiction over the products liability case and remanded the medical malpractice action.

Philip Gaujot Appointed Judge in Monongalia County

Morgantown lawyer Philip D. Gaujot was appointed the new judge in Morgantown on August 26. Gaujot, 64, was appointed by Governor Joe Manchin after the Legislature created the third judgeship through Senate Bill 338 during the 2009 legislative session.

Gaujot is a graduate of West Virginia University with a bachelor’s degree in political science and a law degree. He has practiced law for 38 years in such positions as administrative law judge for Workforce West Virginia, assistant attorney general, and in solo practice.

He has been a member of the Board of Directors of the West Virginia University Alumni Association since 2007 and is a past member of the Board of Directors of the Mon. General Hospital Foundation.

"I am absolutely humbled. I am humbled that I can serve the community as a judge because I do think the judge of a circuit court is one of the most important, if not the most important, jobs in the county," Judge Gaujot said. "I look forward to representing the people of this county and doing it in the fairest way. I believe that I can set aside any preconceived thoughts that I might have, or even biases that I might have, and rule based upon the merits of a case and the facts and the law. I believe I have the wisdom to do that.”

Portions of Bad Faith Case Against Life Insurer Dismissed

The U.S. District Court for the Southern District of West Virginia has dismissed one count of a first party "bad faith" case and a claim for the tort of outrage for a denial of a life insurance claim but has allowed the statutory claim to remain. In *White v American General Life Ins. Co.*, (Civil Action No. 2:08-cv-978, S.D. W.Va., decided August 24, 2009), Judge John T Copenhaver, Jr. found material questions of fact remain about the actual denial of a life insurance claim but found a bad faith claim can not be predicated solely upon a violation of an insurance regulation nor can the claim of tort of outrage survive based on mere allegations of improper denial.

The dispute arose when Andrew White, a 23 year-old Iraqi war veteran diagnosed with post-traumatic stress disorder died in his sleep from an accidental drug overdose including his PTSD medication. Because the policy had been in effect for less than two years, the insurer investigated, reserved its rights and ultimately denied the claim for alleged material misrepresentations on the application, namely whether the decedent suffered from a "mental disorder."

Prior to the application, as a teenager, the plaintiff had been treated for depression by a family physician. The decedent, however, answered no to a question about "mental disorders." Judge Copenhaver found the question to be ambiguous.

"Considered devoid of all context, the question of whether one suffers from a 'mental disorder' is, at least to a certain extent, ambiguous. If someone who was confined to mental institution, and diagnosed with schizophrenia, were asked whether he had ever been diagnosed with a mental disorder, the question, and requisite answer, is clear. However, the answer to the same question posed to a person who was told by a family physician that he was suffering from 'depression' after breaking up with his high school girlfriend, is not so clear."

Because it was ambiguous, the denial of the claim as a purported violation of the Unfair Claims Settlement Practices Act will proceed.

Plaintiff also alleged a separate cause of action for violation of the Insurance Commissioner's regulation, 114 CSR § 14-6.7, which requires notice in a denial letter of the claimant's option of contacting the Insurance Commissioner. The Court held this does not separately state a "bad faith" cause of action.

Finally, the Court dismissed the tort of outrage claim holding: "It cannot be said that the insurance company's denial of a $50,000 claim for life insurance benefits here, without more, constitutes intentional or reckless conduct 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'"

Fuller to Speak at National Symposium

Martin & Seibert attorney E. Kay Fuller will speak at the DRI annual Insurance Coverage and Practice Symposium in December. She will address emerging trends and theories in coverage and bad faith cases.

"In these challenging economic times, insurers should be on guard for policyholders trying new theories to create coverage that might not otherwise exist," Fuller said. Her discussion will highlight recent attempts to expand coverage and how the manner in which insurers treat those demands may also be "set ups" for bad faith cases.

The symposium will be held December 3-4 at the Sheraton New York Hotel and Towers. Registration is available online at http://www.dri.org.

Attorney's Fees Awarded In Discovery Disputes

Attorney's fees ranging from $150 to $450 per hour have been approved by federal courts in recent months as appropriate fees to be awarded in motions which permit recovery of fees per the Federal Rules of Civil Procedure.

$150 per hour was awarded by the Northern and Southern Districts of West Virginia and the awards have been entered against plaintiffs and defendants. In *Carden v. Wal-Mart Stores, Inc., et al.* (Civil Action No. 5:08-cv-63, S.D.W.Va., decided September 4, 2009), Magistrate R. Clarke VanDervort awarded fees of $150 per hour to be paid the plaintiff upon remand of a case in which the Court found removal based on an argument of fraudulent joinder to be inappropriate.

Magistrate James Seibert awarded the plaintiff fees and then doubled them to also serve as sanctions in a discovery dispute in *Progressive Minerals, LLC v. Rashid, et al.*, (Civil Action No. 5:07-cv-108, decided August 28, 2009), when a defendant failed to answer discovery, appear for his deposition, appear for a hearing on the plaintiff's motion to compel or to attend mediation. The Court accepted plaintiff's fee petition which demonstrated rates ranging from $200 per hour to $450 per hour and then doubled the amount as a sanction, finding defendant's conduct of ignoring the rules and applicable caselaw and "stonewalling the submission of legitimately requested discovery" and thereafter disobeying orders of the Court abused the judicial process. The Court specifically found there was no evidence of the prevailing rates for discovery disputes in the Northern District and in the absence of such found the requested rates to be appropriate for similar work performed in 2009.

Magistrate Seibert also granted a defendant's request for payment of fees of $150 per hour in a discovery dispute in *McConnell v. Griffith, City of Wheeling, et al.*, (Civil Action No. 5:08-cv-113, N.D.W.Va., decided July 31, 2009)

Fees ranging from $150 to $250 per hour were also awarded by District Judge John Preston Bailey in a civil rights action. In *The Constitution Party of WV v. Jezioro, et al.*, (Civil Action No. 2:08-cv-61, N.D.W.Va., decided August 31, 2009), plaintiff was successful in declaring an anti-petitioning portion of a statute unconstitutional, thus permitting political activity in state parks. Thereafter, three attorneys representing The Constitution Party sought fees under 42 USC §1983. Judge Bailey ultimately reduced the fees requested granting $215 per hour to a West Virginia attorney with 40 years experience; $150 per hour to his son who has five years experience and $250 per hour to an attorney from The Rutherford Institute who specializes in constitutional cases.

Applying a lodestar analysis, Judge Bailey considered the experience of each attorney involved and the other work each attorney performs on a routine basis. The Court considered fee awards throughout the Northern District and Fourth Circuit finding fees for recent cases brought under fee-shifting statutes ranged from $150 to $380 per hour.

Insurers Paid $39.5 Billion From 9/11 Attacks

As the country observed the eighth anniversary of the September 11 attacks, the Insurance Information Institute released a report indicating that the attacks resulted in $39.5 billion of insured losses adjusted for inflation. Insurers paid claims for life, property damage, business interruption, aviation, workers compensation and liability.

A total of 2,976 people died in the attacks in New York, Washington, D.C. and Pennsylvania, excluding the 19 hijackers. It was the worst terrorist attack on record in terms of fatalities and insured property losses. Of the claims paid, 33% were for business interruption, 30% for property, 12% for other liability and 11% for aviation liability. Life claims accounted for 3% of the claims paid.

O’Connor Calls Judicial Elections “Ugly”

Calling it an “ugly” system, retired U.S. Supreme Court Justice Sandra Day O’Connor called for an end to West Virginia’s partisan election of judges. Citing first hand knowledge when she ran for judge in Arizona, O’Connor indicated that campaigns sponsored by partisan funds can create conflicts of interest.

O’Connor is serving as honorary chair to the Governor’s Independent Commission on Judicial Reform. Speaking at a public hearing at the West Virginia University College of Law in September, O’Connor advocated for gubernatorial appointments to the bench.

Chris Bonneau, a University of Pittsburgh professor, presented research results at the hearing, arguing that campaign spending increases voter participation. Other groups including the West Virginia Chamber of Commerce appeared before the Commission advocating the appointment method.

More than half the states appoint their top appeals courts, but a greater number elect at least some of their trial-level judges, according to research by the American Judicature Society. In those states which elect judges, the majority are through non-partisan election. West Virginia, however, maintains a partisan election process. A final report of the Commission is due Nov. 15.

West Virginia Leads the Nation in Disabilities

West Virginia leads the nation in a number of areas, the latest being the state with the highest percentage of citizens with disabilities. Per a report of the U.S. Census American Community Survey, approximately 19% of West Virginians report having a disability. This is higher than the national average of 12%. The state’s aging population, physically demanding jobs, and bad habits from smoking to shunning exercise are attributed to this result.

The likeliest factors, the data indicates, relate to long-term health problems which can lead to chronic illnesses like diabetes and cardiovascular disease, which in turn can lead to disability. Other factors could include the treatment of stroke patients and the relative lack of access to new medications.

"I don't think there's a single answer," said Mary Carter, a professor in West Virginia University's Department of Community Medicine. "It likely reflects a combination of the high rate of certain diseases prevalent in West Virginia along with certain types of industries and behaviors," she said.

West Virginia ranks high in obesity, cigarette smoking and physical inactivity and, correspondingly, in ailments like cardiovascular disease, diabetes, and hypertension. The state also has one of the highest percentages of residents 65 or older, said Carter.

Economic factors may also play a role. People with disabilities often have lower incomes and less education than the national average, said one researcher. Lower income and disability can soon become self-reinforcing, he said.

Federal Court Orders Production Of Privileged Documents

In ongoing discovery disputes as to production of materials involving asbestos-related claims, the U.S. District Court for the Northern District of West Virginia has compelled production of purportedly privileged material a law firm sent to an expert witness.

CSX Transportation, Inc. v. Gilkison, et al., (Civil Action No. 5:05-cv-202, N.D.W.Va., decided June 4, 2009), stems from a claim by CSX that a Pittsburgh law firm, who represented thousands of asbestos claimants, may have knowingly engaged in fraud when referring plaintiffs to a former Clarksburg radiologist for x-ray screenings. In discovery, CSX sought records from Dr. Ray Harron relating to his income from the law firm and x-ray reviews he conducted which allegedly produced an abnormally high result of positive asbestosis findings. Dr. Harron objected generally and provided no responsive documents.

When CSX filed a Motion to Compel, neither Dr. Harron nor the law firm defendant filed a response. Later, the firm filed a Motion for Protective Order arguing that Dr. Harron had possession of documents it sent to him in the course of prior litigation that contained protected work product, specifically requests for "chart reviews." The law firm further claimed it was unaware of this until notified by counsel for Dr. Harron when preparing a response to the Motion to Compel.

Magistrate Judge James Seibert ordered the documents produced on May 14, 2009, finding an intentional and willful failure by Dr. Harron to comply with the Federal Rules of Civil Procedure which waived any objections. As to the firm's objections, the Magistrate held the firm lacked standing to object to the motion. The Order was affirmed by Judge Frederick P. Stamp, Jr.

The Magistrate held and the District Judge adopted the ruling that the law firm had a duty to inquire when discovery requests were made in order to protect its privileged documents due to the "long and close relationship" between the firm and Dr. Harron and the likelihood Dr. Harron would have documents over which the firm would claim privilege.

Retired Judge Gustke Passes Away

Retired Judge Arthur N. Gustke passed away Sunday, September 27, 2009, at his home. He was 80.

Judge Gustke was elected in 1974 and served as a judge in Wood and Wirt Counties through 1992, then re-elected in 1976 and 1984. Judge Gustke then became a Senior Status Judge, serving by appointment around the state as needed.

The bulk of Judge Gustke's docket during his tenure centered on juvenile matters and The Arthur N. Gustke Child Shelter in Parkersburg is named after him.

Judge Gustke was also an early president of the West Virginia Judicial Association which provides continuing legal education for circuit judges.

A Parkersburg native, he was a United States Army Signal Corps veteran. He graduated from West Virginia University College of Law in 1956 and served on the board of the West Virginia University-Parkersburg Foundation and the Wood County Commission on Crime, Delinquency and Corrections.

Commissioner Will Not Regulate Debt Contracts

The West Virginia Insurance Commissioner has issued an Informational Letter announcing that the Department does not consider either debt cancellation contracts or debt suspension agreements as insurance products subject to Commission regulation.

In Informational Letter 171, the Commission defined debt cancellation contracts as "a loan term or a contractual arrangement modifying loan terms under which a lender agrees to cancel all or part of a customer's obligation to repay an extension of credit from that lender upon the occurrence of a specified event." The agreement may be separate from or a part of other loan documents

Debt suspension agreements are defined as "a loan term or contractual arrangement modifying loan terms under which a lender agrees to suspend all or part of a customer's obligation to repay an extension of credit from that lender upon the occurrence of a specified event.

The Commissioner found that neither contract requires a lender to indemnify another nor pay a determinable contingency. Instead, the contracts simply require the lender to cancel or waive the borrower's debt upon the happening of a specified event. As such, the administration of the contracts are beyond Commission's oversight.

Court Remits $3.9 Million Bad Faith Verdict

Last year a jury in the Southern District of West Virginia returned a $3.9 million verdict in a "bad faith" case against General Casualty Company of Wisconsin. The verdict has now been reduced to $1.2 million by Judge John Copenhaver.

In an opinion released September 15, 2009, Judge Copenhaver reduced a $1.7 million award for increased costs of litigation to $100,000.00 and reduced a $1.8 million award for aggravation, annoyance and inconvenience to $200,000.00. Phase One damages of $94,474.71 for property damage remained.

In *North American Precast, Inc. and G&G Builders, Inc. v. General Casualty Company of Wisconsin,* (Civil Action No. 3:04-cv-1307, S.D.W.Va., decided September 15, 2009), a dispute began when precast planks manufactured by North American collapsed during construction of a regional jail in Barboursville. The general contractor, G&G Builders, submitted claims to North American for property damage to the walls and floor of the jail. North American, in turn, tendered those claims to its insurer, General Casualty. When G&G sued North American in Ohio, General Casualty refused to defend or indemnify. North American ultimately confessed judgment of $1.8 million and assigned its first party bad faith claims to G&G.

The case then proceeded as to the amount of property damage and the breach of contract/bad faith claims. In post-trial motions, General Casualty argued the judgment was against the weight of the evidence to which the District Court agreed.

The Court, however, rejected the defendant's argument that a corporation cannot sustain aggravation, annoyance and inconvenience, but did reduce that portion of the verdict.

The plaintiff now has the option of accepting the remitted verdict or moving for a new trial.

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