



# West Virginia Bills and Cases

A Monthly Report on Notable Cases and Legislative Happenings Affecting the Insurance Industry in West Virginia

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## EMOTIONAL DISTRESS DAMAGES NOT AVAILABLE FOR THE LOSS OF A DOG

Affirming the Circuit Court of Brooke County, the West Virginia Supreme Court of Appeals disallowed damages for sentimental value, mental suffering, and emotional distress following the negligently inflicted death of a dog. In *Carbasha v. Musulin* (No. 32288, filed July 1, 2005), the Court held that, under West Virginia law, pets are considered personal property and, therefore, a recovery for the loss of a pet is limited in the same manner as any other recovery for loss of personal property.

Tracy Carbasha filed suit seeking compensation for the death of her dog following an auto accident. Ms. Carbasha argued that market value was not adequate compensation for the dog's death and that her loss of companionship and her relationship with the pet should be considered in determining the correct level of damages. The Court, however, noted that, under West Virginia statute, compensation for the loss of a dog is limited to the assessed market value of the animal. Further, dogs are considered personal property under West Virginia law, and recovery for negligently destroyed personal property is limited to the fair market value of the property.

## COURT CLARIFIES POLICY ON REIMBURSEMENT CLAUSES

Answering a certified question from the Mercer County Circuit Court, the West Virginia Supreme Court of Appeals held in *Ferrell v. Nationwide Mut. Ins. Co.* (No. 32050, filed July 8, 2005) that an insurer can seek reimbursement for first-party

medical expense payments when the insured recovers against a negligent third party, and the insurer is also that third party's liability provider.

Kathleen Ferrell received medical expense payments from Nationwide following an auto accident with Kermit Davis. After Ms. Ferrell received payment for the same medical expenses under Mr. Davis' Nationwide liability policy, Nationwide requested reimbursement of the payments received by Ms. Ferrell under her policy, citing a clause in that policy allowing Nationwide to seek reimbursement for medical expense payments from an insured.

The *Ferrell* Court noted that West Virginia law generally does not allow an insurer to pursue subrogation against its insured and that "an insurance carrier may not rely upon a subrogation clause in its policy to receive reimbursement [from a plaintiff-insured] when it also insures the tortfeasor." However, the Court differentiated the "reimbursement" clause in Ms. Ferrell's policy from a typical subrogation clause. The Nationwide policy "require[s] the insured to reimburse [Nationwide] when the proceeds of recovery duplicate our payment." After weighing private parties' interest in freedom to contract against the policy concerns involved in the same insurer representing both parties, the Court decided to give effect to the reimbursement clause in the insurance contract, thereby permitting reimbursement of the already-paid first party medical expenses.

For more information about any of these cases, contact Susan Snowden at (304) 267-8985 or by e-mail at [srsnowden@martinandseibert.com](mailto:srsnowden@martinandseibert.com)

## HIGH COURT AFFIRMS CIRCUIT COURT DECISION DENYING ATTORNEY FEES

Affirming the decision of the Circuit Court of Fayette County, the West Virginia Supreme Court of Appeals held in *Jones v. Sanger* (No. 32048, filed July 7, 2005) that the circumstances surrounding State Farm's payment of underinsured motorist (UIM) benefits under a settlement agreement did not support a finding that the insured had "substantially prevailed" so as to entitle the insured to compensation for attorney fees and costs.

Under West Virginia law, an insured may recover reasonable attorney fees and damages proven for aggravation and inconvenience when the insured "substantially prevails" on a claim for UIM benefits. An insured is said to "substantially prevail" in an action against an insurer when the "action is settled for an amount equal to or approximating the amount claimed by the insured immediately prior to the commencement of the action, as well as when the action is concluded by a jury verdict for such an amount."

The insured in *Jones v. Sanger* initially demanded \$250,000 in his complaint, and State Farm offered \$12,500. At mediation, the insured decreased his demand to \$150,000, and State Farm upped its offer to \$60,000. After a second mediation, the parties settled for \$76,500. Reviewing the lower court's decision under an abuse of discretion standard, the Supreme Court determined that the insured did not "substantially prevail" in the settlement and, therefore, the insured was not entitled to attorney fees.

### **COURT EXAMINES DEFINITION OF "FAMILY MEMBER" IN INSURANCE CONTRACTS**

The West Virginia Supreme Court of Appeals affirmed the summary judgment decision of the Circuit Court of Wyoming County in *Glen Falls Ins. Co. v. Smith* (No. 31972, filed July 1, 2005). The Circuit Court found that the Appellant, Johnny Combs, did not qualify as a "family member" for the purpose of coverage under his mother's ex-husband's UIM policy. The Circuit Court also found that Combs was not covered under his mother's UIM policy because he did not meet the policy's requirement that he be a member of his mother's household.

Combs was injured while a passenger in a single-vehicle accident. After recovering the policy limits under the driver's liability policy, Combs sought to recover under the UIM policies of his mother and Billy Joe Smith, his mother's ex-husband with whom Combs resided. Combs was not a named driver or additional insured under either policy.

Under his mother's policy, Combs had to be a resident of her household at the time of the accident to qualify for coverage. Because Combs admitted that he was residing with Smith at the time, the Supreme Court affirmed the Circuit Court's decision that the mother's policy did not afford coverage.

Smith's policy required Combs reside with Smith and qualify as a "family member" for coverage to extend. The policy defined family member as including relations by blood, marriage, or adoption and including wards and foster children. Combs argued that he should be considered Smith's foster child. Smith was married to Combs' mother before Combs was born and had supported Combs but never adopted him. The Supreme Court determined that Combs did not qualify as a foster child under the legal definition of the term because Combs, who was twenty-two years old at the time of the accident and has a history of gainful

adult employment, "cannot reasonably be considered a 'ward' or 'foster child' of another under the law of this State, particularly where there has never been a legally recognized relationship with the purported parent or guardian."

Because Combs did not meet the definition of "family member" under Smith's policy, the Supreme Court determined that the Circuit Court's decision that no coverage existed under Smith's policy was correct.

### **CIRCUMSTANTIAL EVIDENCE SUFFICIENT TO MAKE PRIMA FACIE CASE IN STRICT LIABILITY ACTION**

Overtaking a summary judgment decision of the Circuit Court of Wood County, the West Virginia Supreme Court held that a plaintiff's introduction of circumstantial evidence in a strict liability action was sufficient to create an issue for trial. In *Bennett v. Asco Services, et al.* (No. 31947, filed July 8, 2005), the Court held that, even when the precise nature of the defect was unknown, evidence that a malfunction occurred was sufficient to defeat summary judgment.

Kenneth Bennett suffered a total loss of his home following a fire that allegedly began in his Toyota Camry which was parked in the garage. Bennett filed suit against the Toyota company, alleging a defect in the vehicle caused the fire, and against the Asco corporation, alleging negligent design, installation, and maintenance of an alarm system in the house. The Circuit Court granted summary judgment on the grounds that Bennett was unable to identify the precise defects in the vehicle that caused the fire and in the alarm system that caused its malfunction.

Strict products liability is established in West Virginia when a plaintiff shows that the product at issue is defective in that it is not reasonably safe

for its intended use. Strict liability removes the plaintiff's burden of showing that the manufacturer was negligent in some aspect of the product's production. Instead, liability is based on proof that the product was defective. The *Bennett* Court held that a plaintiff does not need to identify a specific defect in the product at issue, "but instead may permit a jury to infer the existence of a defect by circumstantial evidence." The plaintiff is not required to eliminate all other possible causes but must show that no other cause is likely.

The West Virginia Supreme Court determined that Bennett had introduced sufficient circumstantial evidence for a reasonable jury to conclude that the fire and subsequent total loss of the home were caused by defects in the vehicle and the alarm system and that neither product was misused. The Court, therefore, reversed the Circuit Court's summary judgment decision and remanded the case.

### **INCOME TAXES SHOULD NOT BE DEDUCTED FROM DAMAGES FOR LOST EARNINGS OR IMPAIRMENT OF FUTURE EARNINGS CAPACITY**

Affirming a summary judgment decision of the Circuit Court of Ohio County in part and reversing in part, the West Virginia Supreme Court of Appeals held in *Hicks v. Jones* (No. 31754, filed July 8, 2005) that insurers may not make income tax based deductions from payments to claimants but that the practice was not a per se violation of the Unfair Trade Practices Act.

Under West Virginia law, personal injury claimants are entitled to receive, as part of their damages, "their lost gross wages without any reduction for taxes or other items deductible from the claimant's paycheck." Under the Internal Revenue Code, damages received as a result of personal injuries are excluded from gross income.

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As part of a personal injury settlement with Garrett Hicks, who was injured in an auto accident with a Liberty Mutual insured, Liberty Mutual made a lost-earnings payment to Hicks with a twenty percent reduction, in accordance with company policy, based on the income tax Hicks would have paid on his earnings. After Hicks supplied Liberty Mutual with documentation showing that he was tax exempt, Liberty Mutual paid Hicks the deducted portion. Hicks then filed suit against Liberty Mutual, alleging that the company's policy violates the West Virginia Unfair Trade Practices Act.

The Supreme Court agreed with the lower court's determination that income tax savings should not be considered in computing damages in either the trial or settlement context. However, the Court held that, because an insurer's culpability under the Unfair Trade Practices Act is based on whether the insurer acted reasonably, and the reasonableness of an insurer's actions is a fact question for a jury, the Circuit Court erred in ruling that Liberty Mutual's policy of making income tax deduction was a violation of the Act as a matter of law.