West Virginia Bills and Cases

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

July 2005 *Volume 5, Issue 7*

COLLATERAL ESTOPPEL LIMITED IN ESTABLISHING BUSINESS PRACTICES

Answering questions certified by the Circuit Court of Greenbrier County, the West Virginia Supreme Court of Appeals limited the use of collateral estoppel in establishing general business practices in its recent opinion in *Holloman v. Nationwide Mutual Ins. Co.* (No. 32286, Filed June 21, 2005).

Collateral estoppel prevents relitigation of issues that have been conclusively decided in a previous action. The application of the doctrine requires identical legal and factual issues and a final judgment on the issue in the prior litigation. Furthermore, the party against whom collateral estoppel is invoked must have been a party, or be in privity with a party, to the prior litigation and have had an adequate opportunity to litigate the issue.

To maintain an action under West Virginia's Unfair Trade Practices Act (UTPA), a Plaintiff must not only show that the insurer violated the UTPA in its handling of the Plaintiff's claim, but also show that "the insurer committed violations of the UTPA with such frequency as to indicate a general business practice." The Plaintiff in the *Holloman* case unsuccessfully attempted to use collateral estoppel to satisfy the "general business practice" requirement for an action under the UTPA, arguing that a nine-year old decision in the case of *Dodrill v. Nationwide Mutual Ins.Co.*, which held that Nationwide's general business practices violated the UTPA, was conclusive of the issue. Instead, the Court found that evidence presented by Nationwide that it had made changes in its claims organization and business practices prevented the application of collateral estoppel.

The *Holloman* Court reasoned that the factual issues in the two cases were not identical because Nationwide had made changes to its relevant business practices, and, therefore, the requirements of collateral estoppel were not met. The Court also noted that the requirement that a party against whom collateral estoppel is invoked must have had an opportunity to litigate the issue in the prior action would not be met when "the acts forming the basis of the issue previously decided are different than the acts forming the basis of the action in which collateral estoppel is invoked."

JOHN DOE AUTO CLAIMS ONLY AVAILABLE AGAINST INJURED PERSON'S OWN UM PROVIDER

Citing the Legislature's intent to limit auto accident claims against "John Doe" defendants, the West Virginia Supreme Court of Appeals held in *Collins v. Heaster* (No.31971, Filed June 21, 2005) that "where a person alleges injuries caused by a John Doe defendant in a motor vehicle accident, recovery for damages caused by the John Doe is limited to recovery under the injured person's own uninsured motorist policy of insurance."

A vehicle, owned by the Defendant and operated by an unknown driver, struck the Plaintiff, an EMS employee, at the scene of a house fire in Harrison County. The Plaintiff argued that because the vehicle was being moved from the "zone of danger" of the fire, the named insured's consent could be implied, and, therefore, under West Virginia's omnibus statute, the named insured's liability coverage would extend to the John Doe. The Court, however, found the circumstances were not "sufficient to rise to the level of an emergency justifying the presumption of the vehicle owner's implied consent."

The *Collins* opinion notes that in cases involving "certain extreme emergencies" the vehicle owner's consent may be implied. In such cases, the substitute driver would be considered a permissive user and covered under the vehicle's liability policy. Driver incapacitation and "imminent risk of serious bodily harm to an occupant of the vehicle" are cited as potential examples of such emergencies. The Court has specifically rejected intoxication as justification for implied consent.

SPECULATIVE TESTIMONY INSUFFICIENT FOR PROXIMATE CAUSE

Expert testimony that is speculative in nature does not by itself support a finding that a defendant's actions proximately caused a plaintiff's injuries. In *Spencer v. McClure* (No. 32057, filed June 15, 2005), the West Virginia Supreme Court upheld the Kanawha County Circuit Court's judgment that, as a matter of law, the evidence presented by the Plaintiff was insufficient to establish that negligence by the Defendant proximately caused the Plaintiff's injuries.

Spencer involved a multiple-vehicle auto accident in which the Plaintiff's vehicle was struck by at least three other vehicles. Under West Virginia tort law, a Plaintiff has the burden of showing that a Defendant's negligence proximately caused the Plaintiff's injuries. West Virginia law defines proximate cause as "the last negligent act contributing to the injury and without which the injury would not have occurred." A Plaintiff does not have to show that the

continued on page 3 (Proximate Cause)

DECISION WHETHER OCCURRENCE IS 'ACCIDENT' MADE FROM INSURED'S PERSPECTIVE

The West Virginia Supreme Court ruled in *Columbia Casualty Co. v. Westfield Ins. Co.* (No.31941, Filed June 10, 2005) that the suicide deaths of two inmates of the Randolph County Jail were accidents so as to trigger the County Commission's liability insurer's duty to defend. Though the Court noted that, from the inmates' perspective, the deaths can reasonably be viewed as not being accidental, the insured's viewpoint controls in determining whether an incident is an accident.

The estates of both inmates sued the County Commission – insured by Westfield - and the sheriff – insured by Columbia. Columbia undertook a defense on behalf of the Commission and the sheriff while Westfield denied coverage and refused to provide a defense on the grounds that the suicides did not amount to an occurrence under the policy. Columbia then sued Westfield in U.S. District Court for the Northern District of West Virginia seeking a declaratory judgment that Westfield was wrong in denying coverage. Columbia appealed to the Fourth Circuit, which certified the question of whether the suicides were occurrences under the policy to the West Virginia Supreme Court.

The Westfield policy defines an occurrence as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Westfield argued that the suicides were not accidents because the inmates' resulting deaths were intended. Relying on the principle that "the insured's standpoint controls in determining whether there has been an occurrence," the Court held that, in light of the duties and responsibilities regarding the jail, "the commission did not have a desire, plan, expectation, or intent that the death would occur." Because the Court found that the deaths were not intentional from the standpoint of the Commission, the deaths were deemed to be 'occurrences' under the policy.The Westfield policy defines an occurrence as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Westfield argued that the suicides were not accidents because the inmates' resulting deaths were intended. Relying on the principle that "the insured's standpoint controls in determining whether there has been an occurrence," the Court held that, in light of the duties and responsibilities regarding the jail, "the commission did not have a desire, plan, expectation, or intent that the death would occur." Because the Court found that the deaths were not intentional from the standpoint of the Commission, the deaths were deemed to be 'occurrences' under the policy.

"NEWLY ACQUIRED AUTO" CLAUSE APPLIES EVEN WHEN NEW VEHICLE IS ON SEPARATE POLICY

Overturning the Circuit Court of Pleasants County, the West Virginia Supreme Court of Appeals held that a "Newly Acquired Auto" clause, which extends coverage to vehicles obtained by the insured during the policy period, provides coverage to such vehicles even when the insured has already listed the vehicle on a different policy.

The insured in *Satterfield v. Erie Ins. Co.* (No. 32511, Filed June 30, 2005) contacted Erie Insurance prior to the accident that gave rise to the lawsuit and requested that a recently-purchased 1993 Pontiac Grand Am be included on his family auto policy. The dispute arose over whether a separate commercial auto policy that extended coverage to "autos you acquire during the policy period" would also cover the vehicle. It was undisputed that the clause's only express limitation, that the insured must tell the insurer about the new vehicle, was met.

Erie argued that the objective of the "Newly Acquired Auto Clause" is to provide temporary coverage until the vehicle can be listed in a policy and that, because the Grand Am was named on the family policy, it was no longer a newly acquired auto. However, the Court reasoned that the clause was clear and unambiguous and that, therefore, full effect should be given to its plain meaning. The Court also noted that the outcome would have been different if the "Newly Acquired Vehicle Clause" had contained language requiring the insured to choose between the policies for coverage or language limiting coverage for a "newly acquired vehicle" to instances where "no other insurance policy provides coverage for that vehicle."

POOR WORKMANSHIP NOT COVERED BY COMMERCIAL GENERAL LIABILITY POLICIES

The West Virginia Supreme Court of Appeals in *Webster County Solid Waste Authority v. Brackenrich & Assoc.* (No. 31862, Filed June 30, 2005) affirmed the Webster County Circuit Court's holding that a commercial general liability (CGL) policy did not cover liability resulting from poor workmanship. The Court noted that CGL policies are designed to insure against tort liability, whereas claims based on poor workmanship are contractual in nature.

The Defendants in *Brackenrich* contracted with the Plaintiff to design and construct an upgrade to the Webster County Landfill. Following the work, the Plaintiff filed a complaint alleging defects in design, construction, supervision, and inspection of the landfill and obtained permission to bring Nationwide Ins. Co., the Defendant's CGL carrier, into the action. Nationwide responded by seeking a declaratory judgment that the policy did not cover claims resulting from poor workmanship.

The Plaintiff's argument in favor of finding coverage was based on the grounds that the "products-completed operations hazard"coverage contained ambiguities that should be construed in the insured's favor. The Court, however, determined that, because an "occurrence" under the policy language had not occurred, there was no need to look at that portion of the policy. The "occurrences" alleged by the Plaintiff were deemed to be professional, rather than

continued on page 3 (General Liability)

PROXIMATE CAUSE - CONTINUED FROM PAGE 1

Defendant's negligent act was the sole proximate cause.

Two doctors testified regarding the Plaintiff's injuries; however, neither were able to testify that the Defendant's actions caused or contributed to the injuries. The Court ruled that a doctor's speculative testimony that the Defendant's actions could have caused the Plaintiff's injuries was insufficient to allow a reasonable jury to find that the Defendant proximately caused the Plaintiff's injuries. Other than the doctor's testimony, only the Plaintiff's own testimony supported her action against the Defendant.

GENERAL LIABILITY - CONTINUED FROM PAGE 2

ordinary, negligence. Liability resulting from professional negligence is specifically exempted in the CGL policy; the Court found that exclusion valid.

In reaching the conclusion that no coverage exists, the Court noted that the insured did not request that Nationwide indemnify or defend against the lawsuit. Further, "the record indicates that the individual who purchased the policy . . . never understood the policy at issue to provide [the insured] with 'products-completed operations hazard' coverage pertinent to its engineering services."