# WEST VIRGINIA STATE BAR PRACTICE HANDBOOK

## CHAPTER 39

## INSURANCE LAW

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# I. INTRODUCTION

Insurance law is an extremely broad topic. In addition to the fact that insurance policies are written for nearly every risk imaginable, the insurance industry is heavily regulated. This compilation is not intended to be an exhaustive review of all of the different lines of insurance available in West Virginia or an exposition on the statutory and regulatory mandates applicable to West Virginia insurers. Instead, this compilation is intended to provide a basic overview of the most commonly litigated insurance issues in West Virginia courts.

# II. THIRD PARTY INSURANCE

## A. THIRD PARTY – INSURER'S DUTY TO INSURED

In the context of liability insurance policies, an insurer typically agrees to defend and indemnify an insured against risks and under conditions specified in the insurance policy. *Tackett v. American Motorists Ins. Co.*, 213 W.Va. 524, 528, 584 S.E.2d 158, 162 (2003). "Unquestionably, the terms of the pertinent insurance contract govern the parties' relationship and define the scope of coverage as well as the existence of the insurer's duty to defend its insured." *Id.*

### i. Duty to Defend

An insurer's duty to defend its insured is broader than its duty to indemnify *Camden-Clark Memorial Hosp. Ass'n v. St. Paul Fire and Marine Ins. Co.*, 224 W.Va. 228, 237, 682 S.E.2d 566, 575 (2009). According to *Bruceton Bank v. U.S. Fid. & Guar. Ins. Co.*, 199 W. Va. 548, 486 S.E.2d 19 (1997), "[a]n insurer's duty to defend is normally tested by whether the allegations in the complaint against the insured are reasonably susceptible of an interpretation that the claim may be covered by the terms of the policy." In *Silk v. Flat Top Constr., Inc.*, 192 W. Va. 522, 453 S.E.2d 356 (1994), the Court noted that, "[a]n insurer must meet a rigorous standard to avoid its obligation to defend."

### ii. Defense Under Reservation of Rights

Where the issue of coverage is in question, an insurer may defend a claim under a reservation of rights, thus permitting the insurer to deny coverage if it is later determined that the claim is not covered under the policy. In *Farm Fam. Mut. Ins. Co. v. Bobo*, 199 W. Va. 598, 486 S.E.2d 582 (1997), the Supreme Court of Appeals of West Virginia stated that a defense under a conditional reservation of rights letter does not constitute a waiver of a later-found exclusion.

### iii. Duty to Indemnify

With regard to the coverage analysis, the Supreme Court of Appeals of West Virginia has stated that, "[w]hen a complaint is filed against an insured, an insurer must look beyond the bare allegations contained in the third party's pleadings and conduct a reasonable inquiry into the facts in order to ascertain whether the claims asserted may come within the scope of the coverage

that the insurer is obligated to provide." *F & M Mut. Fire Ins. Co. of W. Va. v. Hutzler*, 191 W. Va. 559, 447 S.E.2d 22 (1994).

With regard to the interpretation of insurance contracts, the Supreme Court of Appeals of West Virginia has stated that (1) in general rule, language of an insurance policy its accorded its common and customary meaning; (2) the plain meaning of the policy provisions are accepted without interpretation or construction, except where ambiguity warrants such further consideration of the policy language; and (3) where the provisions of an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended. *Boggs v. Camden-Clark Memorial Hosp. Corp.*, 225 W. Va. 300, 305, 693 S.E.2d 53, 58 (2010).

*Horace Mann Ins. Co. v. Leeber*, 180 W. Va. 375, 376 S.E.2d 581 (1988), provides a good summary of the principles that govern the coverage analysis: (1) ambiguity is construed in favor of the insured; (2) the duty to defend is broader than the duty to pay; (3) the allegations in the complaint normally control the coverage analysis; (4) the insurer must defend all allegations whether covered or not; (5) the insured's right to a defense will not be foreclosed unless such a result is inescapably necessary; and (6) the insurer need not defend if the alleged conduct is entirely foreign to the risk insured against.

**iv. Reasonable Expectations**

The doctrine of reasonable expectations provides that the objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations. *Costello v. Costello*, 195 W.Va. 349, 465 S.E.2d 620 (1995). Generally, in West Virginia, the doctrine of reasonable expectations is limited to those instances in which the policy language is ambiguous. *See National Mutual Insurance Company v. McMahon & Sons, Inc.*, 177 W.Va. 734, 356 S.E.2d 488 (1987).

However, West Virginia courts have recognized that the doctrine of reasonable expectations may apply in other limited circumstances and that ambiguity is not a prerequisite to the application of the doctrine. *See Luikart v. Valley Brook Concrete & Supply*, 613 S.E.2d 896, 903 (W. Va. 2005); *Am. Equity Ins. Co. v. Lignetics*, 284 F. Supp. 2d 399, 406 (N. D. W. Va. 2003)(applying West Virginia law). Specifically, the doctrine of reasonable expectations may apply when an exclusion was never communicated to the insured or when there was a misconception about the insurance purchased. *See Romano v. New England Mut. Life*, 362 S.E.2d 334 (W. Va. 1987) (the court applied the reasonable expectations doctrine to find that the insured reasonably believed that he was entitled to coverage in light of promotional materials provided to him); *Keller v. First National Bank*, 403 S.E.2d 424 (W. Va. 1991)(the bank created an expectation of credit life insurance even though the bank's offer was extended by mistake; the bank could not deny coverage).

### v. Waiver and Estoppel

Although the doctrines of waiver and estoppel are both grounded in equity, they differ significantly in application. To effect a waiver, there must be evidence which demonstrates that a party has intentionally relinquished a known right. Estoppel applies when a party is induced to act or to refrain from acting to her detriment because of her reasonable reliance on another party's misrepresentation or concealment of a material fact. *See Potesta v. U.S. Fidelity & Guar. Co.*, 202 W.Va. 308, 504 S.E.2d 135 (1998).

In order to rely on the doctrine of estoppel to prevent an insurer, who has previously stated one or more reasons for denying coverage, from asserting other, previously unarticulated reasons for denying coverage, the insured must prove that s/he was induced to act or to refrain from acting to her/his detriment because of her/his reasonable reliance on the previously stated ground(s) for declination. *Id*.

An estoppel against an insurer is conduct or acts on the part of the insurer which are sufficient to justify a reasonable belief on the part of the insured that the insurer will not insist on compliance with the provisions of the policy and that the insured in reliance upon such conduct or acts has changed his position to his detriment. *Id*.

To assert waiver to prevent the insurer, in subsequent litigation, from asserting other, previously unarticulated reasons for denying coverage, there is no requirement that an insured have detrimentally relied upon an insurer's previously stated reason(s) for denying coverage. Rather, the insured must show, by clear and convincing evidence where waiver is implied, that the insurer intentionally and knowingly waived the previously unarticulated reason(s) for denying coverage. However, while implied waiver may be employed to prohibit an insurer, who has previously denied coverage on specific ground(s), from subsequently asserting a technical ground for declination of coverages, implied waiver may not be utilized to prohibit the insurer's subsequent denial based on the nonexistence of coverage. *Id*.

Generally, the principles of waiver and estoppel are inoperable to extend insurance coverage beyond the terms of an insurance contract. Exceptions to the general rule that the doctrine of estoppel may not be used to extend insurance coverage beyond the terms of an insurance contract, include, but are not necessarily limited to, instances where an insured has been prejudiced because: (1) an insurer's, or its agent's, misrepresentation made at the policy's inception resulted in the insured being prohibited from procuring the coverage s/he desired; (2) an insurer has represented the insured without a reservation of rights; and (3) the insurer has acted in bad faith. *Id*.

## B. THIRD PARTY BAD FAITH

The term "third-party claimant" is defined as "any individual, corporation, association, partnership or any other legal entity asserting a claim against any individual, corporation, association, partnership or other legal entity insured under an insurance policy or insurance contract for the claim in question." See W.Va. Code § 33–11–4a(j)(1). Third-party bad faith cases in West Virginia were eliminated by statute. See W.Va. Code § 33–11–4a(a).

Notwithstanding the statutory abolition of third-party bad faith suits, a third-party claimant has two remedies against an insurer of another for an unfair claims settlement practice or the bad faith settlement of a claim: (1) the filing of an administrative complaint with the W.Va. Insurance Commissioner (see W.Va. Code § 33–11–4a(a)); or (2) receiving an assignment of the first-party policyholder's rights against the insurer (see *Strahin v. Sullivan*, 220 W. Va. 329, 337, 647 S.E.2d 765, 773 (2007)).

### C. THIRD PARTY – DECLARATORY JUDGMENT ACTION

Pursuant to W. Va. Code, § 55-13-1, courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. Declaratory judgment actions are often filed in insurance cases to determine the rights and duties of both the insurer and insured.

In *Cox v. Amick*, 195 W. Va. 608, 466 S.E.2d 459 (1995), Justice Cleckley wrote in his concurring opinion that the Declaratory Judgment Act empowers a circuit court to grant declaratory relief in a case of actual controversy. If there is no "case" in the constitutional sense of the word, then a circuit court lacks the power to issue a declaratory judgment. *Id*. A declaratory judgment may not be used to secure a judicial determination of moot questions or where no controversy exists. *Id*. Furthermore, "the Act does not itself mandate that circuit courts entertain declaratory judgments; rather, the Act makes available an added anodyne for disputes that come within the circuit courts jurisdiction. It serves a valuable purpose. It is designed to enable litigants to clarify legal rights and obligations before acting upon them. Because the Act offers a window of opportunity, not a guarantee of access, the courts, not the litigants, ultimately must determine when declaratory judgments are appropriate and when they are not. Consequently, circuit courts retain substantial discretion in deciding whether to grant declaratory relief. As we have stated in other contexts, the Declaratory Judgment Act neither imposes an unflagging duty upon the courts to decide declaratory judgment actions nor grants an entitlement to litigants to demand declaratory remedies." *Id*.

Accordingly, "[t]here is clearly no support in West Virginia jurisprudence for the position that an insurer in denying coverage must immediately file a declaratory judgment action. All that is required of the insurer is to seek a circuit court's determination on the coverage issue, instead of refusing to defend based solely upon its own determination of coverage. I suggest an independent declaratory judgment is not necessary to accomplish this objective." *Id*. These comments seem to indicate that separate declaratory judgment actions may be unnecessary because the issue of coverage can be determined in the underlying case.

In *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156 (1986), the Supreme Court of Appeals of West Virginia held that where an insured is required to retain counsel to defend himself in litigation because his insurer has refused without valid justification to defend him, in violation of its insurance policy, the insured is entitled to recover from the insurer the expenses of litigation, including costs and reasonable attorney's fees. Furthermore, where a declaratory judgment action is filed to determine whether an insurer has a duty to defend its insured under its policy, if the insurer is found to have such a duty, its insured is entitled to

recover reasonable attorney's fees arising from the declaratory judgment litigation. *Id*. The Court went on to state that whether an insurer's refusal to defend was in good or bad faith is largely irrelevant once it has been established that the insurer breached its contract with its insured because the focus of the declaratory judgment inquiry is simply to determine whether the insurer had a duty to defend under the terms of the insurance policy.

The same principles apply where an excess insurer brings a declaratory judgment action against the primary insurer. *See Allstate Ins. Co. v. State Auto. Mut. Ins.*, 178 W. Va. 704, 364 S.E.2d 30 (1987).

## III. FIRST PARTY INSURANCE

A first-party bad faith action is one wherein the insured sues his/her own insurer for failing to use good faith in settling a claim filed by the insured. *See Loudin v. National Liability & Fire Ins. Co.*, --- S.E.2d ----, 2011 WL 4536682 (2011). In West Virginia, an insurer's duties are defined by statute and by the common law duty of good faith and fair dealing which is implied into the insurance contract.

### A. THE INSURANCE CONTRACT

The insurance contract should be read as a whole with all policy provisions given effect. If the policy as a whole is unambiguous then the insured will not be allowed to create an ambiguity out of sections taken out of context. *Soliva v. Shand, Morahan & Co., Inc.*, 176 W.Va. 430, 345 S.E.2d 33 (1986) (overruled on other grounds) The policy language should be given its plain, ordinary meaning. In no event should the plain language of the policy be twisted or distorted. *Id*. A doubt which would not be tolerated in other kinds of contracts will not be created merely because the contract is one of insurance. *Id*. A policy should never be interpreted so as to create an absurd result, but instead should receive a reasonable interpretation, consistent with the intent of the parties. *Id*. If, after applying the above rules, reasonably prudent and intelligent people could honestly differ as to the interpretation of the contract language, then an ambiguity will be said to exist. *Id*. Any ambiguity in an insurance contract will be interpreted against the insurer unless it would contravene the plain intent of the parties. *Id*.

Where the policy language involved is exclusionary, it will be strictly construed against the insurer in order that the purpose of providing indemnity not be defeated. *National Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W.Va. 734, 356 S.E.2d 488 (1987) (overruled on other grounds). An insurance company seeking to avoid liability through the operation of an exclusion has the burden of proving the facts necessary to the operation of that exclusion. *Id*.

### B. FIRST PARTY COMMON LAW BAD FAITH

An insurer's common law duty of good faith and fair dealing is implied in the insurance contract. A breach of this duty occurs where a policyholder must sue his own insurance company over any first party claim, and the policyholder substantially prevails in the action. Importantly, whether the insurer's refusal to pay was in good faith or bad faith is largely irrelevant once it has been established that the insurer has breached the insurance contract. In such cases, the company

is liable for net economic loss, aggravation, inconvenience, and the payment of the policyholder's reasonable attorneys' fees. Presumptively, reasonable attorneys' fees in this type of case are one-third of the face amount of the policy, unless the policy is either extremely small or enormously large. *See Hayseeds, Inc. v. State Farm Fire & Cas.*, 177 W.Va. 323, 352 S.E.2d 73 (1986) (property damage); and *Marshall v. Saseen*, 192 W.Va. 94, 100, 450 S.E.2d 791, 797 (1994) (UIM). In awarding attorney fees, courts normally apply the test set forth in Syllabus Point 4 of *Aetna Casualty and Surety Co. v. Pitrolo*, 176 W.Va. 190, 342 S.E.2d 156 (1986).

An insured "substantially prevails" in a property damage action against his or her 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. In either of these situations the insured is entitled to recover reasonable attorney's fees from his or her insurer, as long as the attorney's services were necessary to obtain payment of the insurance proceeds. *See Jordan v. National Grange Mut. Ins. Co.*, 183 W.Va. 9, 393 S.E.2d 647 (1990). In *Thomas v. State Farm Mut. Auto Ins. Co.*, 181 W. Va. 604, 383 S.E.2d 786 (1989), the Supreme Court of Appeals of West Virginia expanded the definition of "substantially prevails" to situations where the insurer makes a low offer or no offer at all.

Furthermore, when examining whether a policyholder has substantially prevailed against an insurance carrier, a court should look at the negotiations as a whole from the time of the insured event to the final payment of the insurance proceeds. If the policyholder makes a reasonable demand during the course of the negotiations, within policy limits, the insurance carrier must either meet that demand, or promptly respond to the policyholder with a statement why such a demand is not supported by the available information. The insurance carrier's failure to promptly respond is a factor for courts to consider in deciding whether the policyholder has substantially prevailed in enforcing the insurance contract, and therefore, whether the insurance carrier is liable for the policyholder's consequential damages under *Hayseeds* and its progeny. *See Miller v. Fluharty*, 201 W.Va. 685, 500 S.E.2d 310 (1997).

The common law duty of good faith and fair dealing may also be breached, in a third party situation, where an insurance company fails to settle a claim against its insured where the demand is within policy limits and a jury returns a verdict against the insured in excess of the policy limits. In *Shamblin v. Nationwide Mut. Ins. Co.*, 183 W.Va. 585, 396 S.E.2d 766 (1990), an insured brought an action against his insurer for failure to settle a claim in the underlying litigation within policy limits. The West Virginia Supreme Court held that, in such cases, it is the insurer's burden to prove by clear and convincing evidence that it attempted in good faith to negotiate a settlement, that any failure to enter into a settlement where the opportunity to do so existed was based on reasonable and substantial grounds, and that it accorded the interests and rights of the insured at least as great a respect as its own.

The Court then stated that, in assessing whether an insurer is liable to its insured for personal liability in excess of policy limits, the proper test to be applied is whether the reasonably prudent insurer would have refused to settle within policy limits under the facts and circumstances, bearing in mind always its duty of good faith and fair dealing with the insured. Further, in determining whether the efforts of the insurer to reach settlement and to secure a

release for its insured as to personal liability are reasonable, the trial court should consider whether there was appropriate investigation and evaluation of the claim based upon objective and cogent evidence; whether the insurer had a reasonable basis to conclude that there was a genuine and substantial issue as to liability of its insured; and whether there was potential for substantial recovery of an excess verdict against its insured. Not one of these factors may be considered to the exclusion of the others. *Id*.

Punitive damages may be assessed against the insurance company in a common law bad faith case if the insured can prove the insurance company acted with actual malice. *See Hayseeds*, *supra*. "Actual malice" in the context of a common law claim for breach of the insurance contract means that the insurance company actually knew that the policyholder's claim was proper, but willfully, maliciously and intentionally denied the claim. *See McCormick v. Allstate Ins. Co.*, 197 W.Va. 415, 475 S.E.2d 507 (1996). "Actual malice" in either context is a bright line standard which is highly susceptible to summary judgment for the insurance company. *Id*.

In *Grubbs v. Westfield Ins. Co.*, 430 F. Supp.2d 563 (N.D. W.Va. 2006),the court held that in-house employee-adjusters have no common law duty of good faith and fair dealing to insureds because the adjuster is not a party to the insurance contract.

### C. FIRST PARTY STATUTORY "BAD FAITH"

An insurer's obligations to its insureds are contained in the Unfair Trade Practices Act ("UTPA"), W.Va. Code § 33-11-4(9), *et seq*., and the corresponding West Virginia Insurance Commissioner's Rules, 114 C.S.R 14.1, *et seq*. Under the UTPA, an insured must prove that the insurer violated the provisions of the UTPA in the adjustment of the underlying claim, that the insurer's conduct was not an isolated violation, but instead demonstrates a general business practice of violating the UTPA, and that the insurer's conduct with respect to its handling of the insured's claim actually caused injury to the insured. W.Va. Code § 33-11-4(9). These violations are often referred to as "statutory bad faith" but are also properly referred to as UTPA violations.

A general business practice can be proven in one of two ways: (1) the insurance company violated the UTPA in more than one claim; or (2) the insurance company violated multiple provisions of the UTPA in a single claim. Under the second method, an insured must demonstrate multiple violations arising from separate, discrete acts or omissions in the handling of the claim. A "general business practice" may not be found under the second method, even if there are multiple violations of the UTPA, if the factual basis for each of the violations arises from the same isolated conduct. In addition to showing that there are multiple violations arising from different factual scenarios, an insured must show that the several discrete acts or omissions constituting multiple violations are indicative of the habit, custom, usage or business policy of the insurance company. *See* W. Va. Code § 33-11-4(9); *Dodrill v. Nationwide Mututal Ins. Co.*, 491 S.E.2d 1 (W.Va. 1996); and *Russell v. Amerisure Ins. Co.*, 433 S.E.2d 532 (W. Va. 1993).

An insured need not substantially prevail, as defined in *Hayseeds*, *supra*, in order to succeed in a statutory bad faith action. *See McCormick v. Allstate Ins. Co.*, 197 W. Va. 415, 475 S.E.2d 507 (1996).

Punitive damages in a statutory bad faith case may not be awarded unless the policyholder can establish “actual malice” on the part of the insurer. “Actual malice” in the context of a claim made under the Unfair Trade Practices Act means that the insurer actually knew the claim was proper, but willfully, maliciously, and intentionally used an unfair business practice in settling or failing to settle the policyholder’s claim. *McCormick v. Allstate*, 202 W. Va. 535, 505 S.E.2d 454 (1998).

Claims adjusters can be held liable to insureds for violations of the UTPA. *See Taylor v. Nationwide Mut. Ins. Co.*, 214 W. Va. 324, 589 S.E.2d 55 (2003).

### D. FIRST PARTY – FEDERAL PREEMPTION – ERISA – RICO

In *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549 (1987), the Supreme Court of the United States held that ERISA preempts state common law bad faith actions against ERISA-regulated employee benefit insurance plans. However, in *Ball v. Life Planning Servs., Inc.*, 187 W. Va. 682, 421 S.E. 2d 223 (1992), the Supreme Court of Appeals of West Virginia held that ERISA did not preempt a suit under W.Va. Code § 33-12-21 against an agent. *See also Custer v. Pan Am. Life Ins. Co.*, 12 F.3d 410 (4th Cir. 1993) (holding that ERISA preempts statutory bad faith actions; and *Summer v. Carelink Health Plans, Inc.*, 461 F. Supp. 2d 482 (S.D. W.Va. 2006), (holding that common law and statutory bad faith claims are not sustainable under ERISA).

## IV. THE PRIMA FACIE CASE OF LIABILITY AND DAMAGES IN FIRST PARTY INSURANCE CLAIMS

### A. FIRST PARTY INSURANCE COMPANY COMMON LAW CLAIM MISCONDUCT – SUBSTANTIALLY PREVAIL – LIABILITY AND DAMAGES

“Whenever a policyholder substantially prevails in a property damage suit against its insurer, the insurer is liable for: (1) the insured’s reasonable attorneys’ fees in vindicating its claim; (2) the insured’s damages for net economic loss caused by the delay in settlement, and damages for aggravation and inconvenience.” Syl. Pt. 1 of *Hayseeds Inc. v. State Farm Fire & Cas.*, 177 W. Va. 323, 352 S.E.2d 73 (1986); s*ee also Hadorn v. Shea*, 193 W. Va. 350, 456 S.E.2d 194 (1995); and *Miller v. Fluharty*, 201 W. Va. 685, 500 S.E.2d 310 (1997).

### B. FIRST PARTY INSURANCE COMPANY COMMON LAW CLAIM MISCONDUCT– BAD FAITH –DAMAGES

#### i. Compensatory Damages

In *Marshall v. Saseen*, 192 W. Va. 94, 450 S.E.2d 791 (1994), the Court held that where the insured substantially prevails, the insured may recover damages for net economic loss caused by the delay in settlement, aggravation and inconvenience, and attorney fees. Furthermore, where an insurer fails to settle within its policy limits, it may be liable in a separate suit for the excess

verdict returned by a jury for its failure to make a good faith settlement within its policy limits under the principles set out in *Shamblin v. Nationwide Mutual Insurance Co.*, 183 W.Va. 585, 396 S.E.2d 766 (1990). *Marshall* at Syl. Pt. 7.

#### ii. Punitive Damages

Where an insurer acts with actual malice in the handling of the claim, the insured may be able to recover punitive damages. *See Hayseeds*, 177 W. Va. 323, 352 S.E.2d 73 (1986).

#### iii. Actual Malice

"[P]unitive damages for failure to settle a property dispute shall not be awarded against an insurance company unless the policyholder can establish a high threshold of actual malice in the settlement process. By 'actual malice' we mean that the company actually knew that the policyholder's claim was proper, but willfully, maliciously and intentionally denied the claim." *Hayseeds*, 177 W. Va. 330, 352 S.E.2d 80. This is intended to be a bright line standard that is highly susceptible to summary judgment for the defendant, equivalent to the law of libel and slander, or the West Virginia law of commercial arbitration. *Id.*

### C. FIRST PARTY STATUTORY CLAIM BAD FAITH – LIABILITY AND DAMAGES

#### i. Joinder of Insurer in Underlying Claim

In the first-party context, an insurance company may be joined in the action regarding the underlying claim for which coverage is disputed and a bifurcation and stay of the bad faith claim from the underlying action are discretionary. *Light v. Allstate Ins. Co.*, 203 W.Va. 27, 506 S.E.2d 64 (1998).

#### ii. Violation of the Statute

An implied private cause of action exists for a violation by an insurance company of the unfair settlement practice provisions of W. Va. Code § 33–11–4(9). *See Jenkins v. J.C. Penney Cas. Ins. Co.*, 167 W. Va. 597, 280 S.E.2d 252 (1981) (overruled on other grounds by *State ex rel. State Farm Fire & Cas. Co. v. Madden*, 192 W. Va. 155, 451 S.E.2d 721 (1994)).

A violation of the UPTA can lead to liability even in cases where coverage disputes are not involved. According to *Morton v. Amos-Lee Securities, Inc.*, 195 W. Va. 691, 466 S.E.2d 542 (1995), there is a private cause of action for a violation of W. Va. Code § 33-11-4(1)(a) which prohibits misrepresentation and false advertising of insurance policies. *Mutafis v. Erie Ins. Exchange*, 561 F. Supp. 192 (N.D. W. Va. 1983), provides another example. In that case, two insurance company employees placed a note in an investigation file that the insured was "heavily involved with the mafia." A jury returned a verdict in favor of the insured finding that the employees violated W. Va. Code § 33–11–4(3) prohibiting the publication or dissemination of a false statement critical of a person's financial condition and W. Va. Code § 33–11–4(5) which prohibits knowingly filing with any public official or placing before the public any false material

statement of fact as to a person's financial condition or knowingly making any false entry in a book, report or statement or omitting a true entry of any material fact pertaining to a person's business. Appellate history at 728 F.2d 672 (4th Cir.1984); 174 W. Va. 660, 328 S.E.2d 675 (1985); and 775 F.2d 593 (4th Cir. 1985).

**iii. General Business Practice**

In order to prevail on a claim brought under the Unfair Claim Settlement Practice provision of the UTPA, the insured must show that the insurer violated W. Va. Code § 33-11-4(9) with such frequency as to indicate a general business practice. "More than a single isolated violation of W. Va. code, 33-11-4(9), must be shown in order to meet the statutory requirement of an indication of 'a general business practice,' which requirement must be shown in order to maintain the statutory implied cause of action." Syl. Pt. 3 of *Dodrill v. Nationwide Mut. Ins. Co.*, 201 W. Va. 1, 491 S.E.2d 1 (1996) (internal citations omitted). 'To maintain a private action based upon alleged violations of W.Va. code § 33-11-4(9) in the settlement of a single insurance claim, the evidence should establish that the conduct in question constitutes more than a single violation of W.Va. code § 33-11-4(9), that the violations arise from separate, discrete acts or omissions in the claim settlement, and that they arise from a habit, custom, usage, or business policy of the insurer, so that, viewing the conduct as a whole, the finder of fact is able to conclude that the practice or practices are sufficiently pervasive or sufficiently sanctioned by the insurance company that the conduct can be considered a "general business practice" and can be distinguished by fair minds from an isolated event." *Dodrill* at Syl. Pt. 4.

A general business practice may be shown through violations of multiple sections of the W. Va. Code § 33-11-4(9) in a single claim or the violation of the same provision of W. Va. Code § 33-11-4(9) in multiple claims. *See Dodrill*, 201 W.Va. 10, 491 S.E.2d 10.

**iv. Punitive Damages**

"Where an insured asserts a first-party claim against his or her insurance carrier for unfair claim settlement practices under W. Va. Code § 33-11-4(9) [1985], punitive damages shall not be awarded against the insurer unless the policyholder can establish a high threshold of actual malice in the settlement process." Syl. Pt. 2 of *McCormick v. Allstate Ins. Co.*, 202 W. Va. 535, 505 S.E.2d 454 (1998).

**v. Actual Malice**

In the context of a UTPA claim, actual malice means that the insurance company actually knew that the policyholder's claim was proper, but willfully, maliciously and intentionally utilized an unfair business practice in settling, or failing to settle, the insured's claim. *Id*.

**vi. Common Law vs. Statutory Bad Faith**

The conditions and predicate for bringing a case under the UTPA are wholly different from those necessary for bringing an underlying contract action or for bringing a common law

bad faith action. See McCormick at Syl. Pt. 9. "Whereas under *Hayseeds* it is necessary that a policyholder substantially prevail on an underlying contract action before he may recover enhanced damages, under [the UTPA] there is no requirement that one substantially prevail; it is required that liability and damages be settled previously or in the course of the [UTPA] litigation. [The UTPA] instead predicates entitlement to relief solely upon violation of the West Virginia Unfair Trade Practices Act, W. Va. Code § 33-11-4(9), where such violation arises from a 'general business practice' on the part of the insurer." *Hayseeds* at Syl. Pt. 9.

## V. STATUTE OF LIMITATIONS

In *Wilt v. State Auto. Mut. Ins. Co.*, 203 W. Va. 165, 506 S.E.2d 608 (1998), the Supreme Court of Appeals of West Virginia held that the one year statute of limitations applies to UTPA claims. According to *Klettner v. State Farm Mut. Auto. Ins. Co.*, 205 W. Va. 587, 519 S.E.2d 870 (1999), the stature of limitations on a UTPA claim does not begin to run until the appeal period has expired on the underlying cause of action.

In *Noland v. Virginia Insurance Reciprocal*, 224 W. Va. 372, 686 S.E.2d 23 (2009), the Supreme Court of Appeals West Virginia held that the one year statute of limitations applies also to common law bad faith refusal to defend claims and begins to run when the insurer refuses coverage. This case also adopts the discovery rule.

## VI. SELF-INSURERS AND INDEPENDENT CLAIMS ADJUSTERS

According to *Hawkins v. Ford Motor Co.*, 211 W. Va. 487, 566 S.E.2d 624 (2002), common law and statutory bad faith apply only to those in the insurance business and not to self-insureds. *See also Stafford EMS, Inc. v. J.B. Hunt Transport, Inc.*, 270 F. Supp. 2d 773 (S.D.W. Va. 2003) (self-insured company, adjusting service, and its employee held not liable for bad faith liability.)

In *Fleming v. United Teacher Assocs. Ins. Co.*, 250 F. Supp. 2d 658 (S.D.W. Va. 2003) Judge Faber found that an insurance agent acting within the scope of employment for an insurer may not be sued individually in tort or in contract and cannot be joined to the action to defeat diversity.

According to *Taylor v. Nationwide Mut. Ins. Co.*, 214 W. Va. 324, 589 S.E.2d 55 (2003), claims adjusters are subject to the UTPA. See also However, in *Garvin v. Southern States Ins. Exch. Co.*, 329 F. Supp. 2d 756 (N.D.W. Va. 2004), Judge Keeley found that the claim investigator for the tortfeasor was not subject to the UTPA because he was not engaged in "business of insurance."

## VII. REINSURANCE

Many risks can be adequately insured by a single policy. However, in some cases, the potential risk may be too large for a single insurer to bear. In such cases, many insurers seek to limit their risk through reinsurance. While a reinsurance policy is similar in some respects to the primary insurance policy, there are some important distinctions regarding the order of priority

and a reinsurer's obligation to pay on claims made against the primary policy. The determination of when a reinsurer's obligation to pay is triggered requires an analysis of the language used in the reinsurance contract and the facts of the particular case. The U.S. District Court for the Southern District of West Virginia undertook such an analysis in *Executive Risk Indem., Inc. v. Charleston Area Medical Center, Inc.*, 681 F. Supp. 2d 694 (S.D.W.Va. 2009).

In February 2008, a Kanawha County jury rendered a verdict against the Charleston Area Medical Center ("CAMC") in the amount of Twenty Five Million Dollars, including Twenty Million Dollars in punitive damages. By virtue of a settlement agreement, CAMC reduced its obligation to Eleven Million Five Hundred Thousand Dollars. CAMC contributed a portion of its self-insured retention to the settlement with the balance to be paid by three of CAMC's insurers: Executive Risk Indemnity, Inc. ("ERI"); Vandalia Insurance Company ("Vandalia"); and Employers Reinsurance Corporation ("ERC").

ERI provided the CAMC with a defense in the underlying action, subject to a reservation of rights regarding punitive damages. Vandalia's policy contained two provisions that provided CAMC with excess coverage over the limits of the ERI policy. The Vandalia policy was subject to a reinsurance policy issued by ERC. ERI subsequently filed a declaratory judgment action to determine each of the insurers' contribution to the settlement. Many claims were raised by the parties in the declaratory judgment action; however, this article addresses only those claims for which ERC, as Vandalia' reinsurer, assumed primary responsibility to indemnify CAMC.

Specifically, CAMC argued that Vandalia operated merely as a conduit between CAMC and ERC and that ERC assumed all of Vandalia's liability to CAMC. According to the allegations in the declaratory judgment action, ERC established Vandalia as a pass-through entity that permitted CAMC to enter the reinsurance market and directly access ERC's services without having to involve a primary insurer thereby avoiding the associated costs. CAMC further alleged that for twenty-five years, CAMC dealt directly with ERC and not Vandalia. Given these facts, CAMC, ERI, and Vandalia argued that ERC assumed primary responsibility for satisfying Vandalia's portion of the settlement. ERC disputed these allegations by arguing, among other things, that various contracts controlled the relationships of the parties and the alleged course of conduct was not reflected in those contracts thereby barring that extra-contractual evidence.

To determine whether or not CAMC stated a claim against ERC for breach of contract, the District Court first examined the basic principles of reinsurance. The District Court first noted that reinsurers are generally not directly liable to the primary insured. "Reinsurance is defined as 'insurance purchased by one underwriter from another, the latter wholly or partially indemnifying the former against the risks that it has assumed. The rights as between the underwriters are governed by the terms of the reinsurance contract.'" *Executive Risk, Inc.*, 681 F. Supp. 2d 715 (citing *Higginbotham v. Clark*, 189 W. Va. 504, 432 S.E.2d 774, 780 (1993)).

The District Court next examined the first of two different types of reinsurance agreements: the "indemnity reinsurance agreement." Under this type of agreement, the primary insurer indemnifies the insured under the primary insurance contract. The primary insurer then cedes all or part of the risk of the primary insurance contract to another insurer, referred to as the reinsurer. *See Executive Risk, Inc.*, 681 F. Supp. 2d 715. The U.S. Supreme Court further explained the indemnity reinsurance agreement in this way:

> it is the ceding company that remains directly liable to its policyholders, and that continues to pay claims and collect premiums. The indemnity reinsurer assumes no direct liability to the policyholders. Instead, it agrees to indemnify, or reimburse, the ceding company for a specified percentage of the claims and expenses attributable to the risks that have been reinsured, and the ceding company turns over to it a like percentage of the premiums generated by the insurance of those risks.

*Executive Risk, Inc.*, 681 F. Supp. 2d 715 (citing *Colonial Am. Life Ins. Co. v. Comm'r of Internal Revenue*, 491 U.S. 244, 247, 109 S. Ct. 2408, 105 L.Ed.2d 199 (1989)). Accordingly, "[a] reinsurance contract confers no rights on the insured. In fact, the reinsurer is not directly liable to the insured. The reinsurer's only obligation is to indemnify the ceding insurer on the risk transferred." *Executive Risk, Inc.*, 681 F. Supp. 2d 715.

The second type of reinsurance agreement is known as an "assumption reinsurance agreement." As the name implies, the reinsurer in an assumption reinsurance agreement assumes direct liability to the primary insured. "Unlike in an indemnity reinsurance agreement, as part of an assumption reinsurance agreement, 'the reinsurer steps into the shoes of the ceding company with respect to the reinsured policy, assuming all its liabilities and its responsibility to maintain required reserves against potential claims. The assumption reinsurer thereafter receives all premiums directly and becomes directly liable to the holders of the policies it has reinsured.'" *Id*. (internal citation omitted).

In determining which type of reinsurance agreement ERC entered into with Vandalia, the District Court first noted that reinsurance contracts are interpreted like any other contract and "that '[w]here the provisions of an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended.'" *Id*. at 716-717 (citing *Blankenship v. City of Charleston*, 223 W. Va. 822, 679 S.E.2d 654, 655 (2009)).

After reviewing the reinsurance contract, the District Court concluded that ERC and Vandalia had entered into an indemnity reinsurance agreement and that no extra-contractual conduct could be used to alter the express terms of the reinsurance agreement. The District Court further concluded that CAMC was not a third-party beneficiary of the reinsurance agreement and that coverage from ERC for CAMC could not be extended by the doctrines of waiver and

estoppel. However, the District Court did find that CAMC had sufficiently pled that the reinsurance contract had either been abrogated or modified by the parties' course of conduct.

In support of this position, the District Court noted that ". . . a valid, unambiguous written contract may be modified or superceded by a subsequent contract based on a valuable consideration." *Executive Risk, Inc.*, 681 F. Supp. 2d 724 (internal citations omitted). The District Court next examined each of CAMC's allegations regarding its dealings with ERC: (1) CAMC paid premiums to ERC for over twenty-five years; (2) ERC accepted CAMC's premium payments; (3) notice of claims never came to ERC from Vandalia, but either came from CAMC through directly to ERC or through another company; (4) all communications and coordination that the Reinsurance Certificate designated as Vandalia's responsibility were routinely handled by CAMC; and (5) ERC dealt with CAMC directly and operated as though ERC, and not Vandalia, was the primary insurer CAMC. Taking these allegations as true, the District Court concluded that "ERC and CAMC's extra-contractual relationship sufficiently demonstrated that they either agreed upon the modification to allow ERC to assume Vandalia's obligations to CAMC or agreed to create a new contract between ERC and CAMC that abrogated the terms of the Hercules policy and the Reinsurance Certificate." *Id.*

This case progressed through discovery and the parties subsequently filed various motions for summary judgment. The District Court ultimately concluded that ERC was not obligated to indemnify CAMC because CAMC had not made a *prima facie* showing that it was entitled to coverage under the Vandalia policy. *See Executive Risk Indemnity, Inc. v. Charleston Area Medical Center, Inc.*, 2011 WL 1833194 (S.D.W.Va. 2011).

## VIII. MOTOR VEHICLE INSURANCE

### A. COMPULSORY COVERAGE

Coverage required by West Virginia's financial responsibility statute is compulsory and broadly based. The statute is designed to set minimum coverages to which all insurance policies issued on motor vehicles are subject. *State Farm Mut. Auto. Ins. Co. v. Universal Underwriters Ins. Co.*, 181 W. Va. 609, 383 S.E.2d 791 (1989); W. Va. Code §§17D-4-2, 17D-4-12, 33-6-31.

West Virginia Code §33-6-31(b) addresses both uninsured and underinsured motorist coverage. It provides, first, that every automobile liability insurance policy issued or delivered in West Virginia contain uninsured motorist coverage with minimum limits of coverage as set forth in W. Va. Code §17D-4-2. Minimum liability limits for bodily injury are $20,000 per person and $40,000 per accident; minimum liability limits for property damage are $10,000. Additionally, each policy shall offer an option for somewhat higher dollar limits of uninsured motorist coverage, which coverage is automatically included unless waived in writing by the insured. The section's third proviso is that each policy shall offer an option for both uninsured and underinsured motorist coverage up to the dollar limits of the liability insurance purchased by the insured. *Bias v. Nationwide Mut. Ins. Co.*, 179 W. Va. 125, 126, 365 S.E.2d 789, 790 (1987).

## B. UNDERINSURED MOTORIST COVERAGE

Underinsured coverage is not mandatory, but an offer of optional coverage is required by statute, and the insurer has the burden of proving that an effective offer was made, and that any rejection of the offer by the insured was knowing and informed. *Id*. at Syl. Pt. 1. The offer must state, in definite, intelligible, and specific terms, the nature of the coverage offered, the coverage limits, and the costs involved. *Id*. If the insurer fails to satisfy this requirement, such coverage will be read into the policy by operation of law. *Id*. at Syl. Pt. 2. *See also Jewell v. Ford*, 214 W. Va. 511, 590 S.E.2d 704 (2003).

The form for making offers of optional uninsured and underinsured coverages shall be as prescribed by the West Virginia Insurance Commissioner. W. Va. Code §33-6-31(d). "[A] knowing and intelligent rejection of optional uninsured and underinsured motorists' coverages by any named insured under an insurance policy creates a presumption that all named insureds under the policy received an effective offer of the optional coverages and that such person exercised a knowing and intelligent rejection of such offer. The named insured's rejection is binding on all persons insured under the policy." *Burrows v. Nationwide Mut. Ins. Co.*, 215 W. Va. 668, 600 S.E.2d 565 (2004).

## C. STATUTE OF LIMITATIONS

A direct action against a known tortfeasor is governed by a two-year statute of limitations. However, once a plaintiff settles with a known tortfeasor and obtains the UM/UIM carrier's consent and waiver of subrogation, a plaintiff may institute a direct action against the UM/UIM carrier. *See* Syl. Pt. 1 of *Jones v. Sanger*, 204 W. Va. 333, 512 S.E.2d 590 (1998). That action is governed by a ten-year statute of limitations applicable to contracts. *Id*. at Syl. Pt. 2. In the case of an unknown "John Doe" action, a two-year statute of limitations applies because that action is really designed to represent a plaintiff's suit against an actual tortfeasor. Plumley *v. May*, 189 W. Va. 734, 434 S.E.2d 406 (1993); *Dalton v. Doe*, 208 W. Va. 319, 540 S.E.2d 536 (2000) (*per curiam*).

## D. STACKING

With a few exceptions, anti-stacking provisions in West Virginia are valid and enforceable and do not violate public policy, but in the absence of clear provisions to the contrary, coverages may be stacked. *Hamric v. Doe*, 201 W. Va. 615, 499 S.E.2d 619 (1997). The Supreme Court held that anti-stacking provisions which prevent an insured from stacking both uninsured and underinsured coverages are enforceable provided they do not violate a statute or public policy. *Mitchell v. Federal Kemper Ins. Co.*, 204 W. Va. 543, 514 S.E.2d 393 (1998).

## E. GUEST STATUTES

West Virginia neither has its own guest statute, nor does it recognize any other state's guest statute. In *Paul v. National Life*, 177 W. Va. 427, 352 S.E.2d 550 (1986), the Supreme Court of Appeals of West Virginia held that automobile guest passenger statutes violate West Virginia public policy.

### F. DISCLOSURE OF POLICY LIMITS

House Bill 4486 was passed on March 10, 2012, and provides that "[e]ach insurer that may provide personal lines liability insurance coverage . . . to pay all or a portion of a claim asserted against an insurance policy insuring a motor vehicle shall provide, within thirty days of its receipt of a written request from a claimant's attorney who has given written notice that he or she represents the claimant: (1) A response providing the following information relating to each of the insurer's known policies of insurance, including excess or umbrella insurance, which does or may provide liability coverage for the claim: (A) The name of the insurer; (B) The name of each named insured of the subject policy; and (C) The limits of any motor vehicle liability insurance policy at the time of the events that are the subject of the claim; or (2) The declarations page of any motor vehicle liability policy applicable at the time of the events that are the subject of the claim, appropriately redacted to comply with applicable privacy laws or regulations. . ." Furthermore, §114-14-4.1 of the West Virginia Insurance Commissioner's regulations state that "[n]o person shall knowingly fail to fully disclose to first-party claimants all pertinent benefits, coverages or other provisions of an insurance policy or insurance contact under which a claim is presented." Additionally, once a lawsuit is filed, coverage information is subject to discovery to both first and third party claimants. An argument may be made against the insurer that it has violated the West Virginia Unfair Trade Practices act by requiring the claimant to file a lawsuit to obtain such information. It is a violation of the UTPA to fail to disclose this information.

### G. PERSONAL INJURY PROTECTION ("PIP")

There is no PIP in West Virginia**.**

### H. EXCLUSIONS

When an insurer incorporates into a policy of motor vehicle insurance an exclusion pursuant to W. Va. Code § 33-6-31(k), the insurer must adjust the corresponding policy premium so that the exclusion is "consistent with the premium charged." The Supreme Court of Appeals of West Virginia has held that when an insurer has failed to satisfy the statutory criteria of W. Va. Code § 33-6-31(k), requisite to incorporating an exclusion in a policy of motor vehicle insurance, the enforcement of such an exclusion is violative of West Virginia's public policy. *Mitchell v. Broadnax*, 208 W. Va. 36, 537 S.E.2d 882 (2000). The West Virginia Legislature, however, subsequently clarified the Court's erroneous interpretation of the relevant statutory language, stating:

> [n]othing in this chapter may be construed as requiring specific line item premium discounts or rate adjustments corresponding to any exclusion, condition, definition, term or limitation in any policy of insurance, including policies incorporating statutorily mandated benefits or optional benefits which as a matter of law must be offered. Where any insurance policy form, including any endorsement thereto, has been approved by the commissioner, and the corresponding rate has been approved by the commissioner, there is a presumption that the policy forms and rate structure are in full compliance with the requirements of this chapter. It is the intent of the Legislature that the

> amendments in this section enacted during the regular session of two thousand two are: (1) A clarification of existing law as previously enacted by the Legislature, including, but not limited to, the provisions of subsection (k), section thirty-one of this article; and, (2) specifically intended to clarify the law and correct a misinterpretation and misapplication of the law that was expressed in the holding of the Supreme Court of Appeals of West Virginia in the case of *Mitchell v. Broadnax*, 537 S.E.2d 882 (W. Va. 2000). These amendments are a clarification of the existing law as previously enacted by this Legislature.

W. Va. Code §33-6-30(c). *See Hutchens v. Progressive Paloverde Insurance Co*., 211 F.Supp.2d 788 (S.D.W.Va. 2002).