

Insurance Companies Beware: Recent West Virginia High Court Ruling May "Unleash a Flood of Lawsuits"

July 26, 2010

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Since 2005, insurers operating in West Virginia have been able to rest a bit more easily knowing that so-called third-party bad faith or *Jenkins* claims had been eliminated by amendments to the West Virginia Unfair Trade Practices Act. A recent West Virginia Supreme Court of Appeals opinion, however, could end all of that.

In its June 11, 2010 decision in *Michael v. Appalachian Heating, LLC*, Case No. 35127, the West Virginia Supreme Court of Appeals held that the West Virginia Human Rights Act prohibits unlawful discrimination by a tortfeasor's insurer "in the settlement of a property damage claim when the discrimination is based upon race, religion, color, national origin, ancestry, sex, age, blindness, disability or familial status." Moreover, the Court specifically held that "[t]he prohibition of a third-party law suit against an insurer under the [West Virginia Unfair Trade Practices Act] does not preclude a third-party cause of action against an insurer under...the West Virginia Human Rights Act."

The impact of this decision on insurers could be tremendous. Justice Ketchum, who filed a dissenting opinion in *Michael*, thinks the majority opinion "has created a situation ripe for abuse by a handful of litigation lawyers." According to Justice Ketchum, "[a] handful of litigators will unleash a flood of lawsuits alleging discrimination in the settlement of a third-party property damage claims by insurance companies - and in most of those cases, the evidence of 'discrimination' will be entirely spurious."

The facts underlying the *Michael* decision originated from the alleged negligence of Appalachian Heating, who was hired by the Charleston-Kanawha Housing Authority to repair and/or replace climate control units in a public housing development located in Charleston, West Virginia. The Plaintiffs, who resided together in an apartment located in the development, are African American. The apartment in which the Plaintiffs were living caught fire due to the alleged negligence of Appalachian Heating, causing a total loss of the Plaintiffs' personal property and rendering the apartment temporarily uninhabitable. State Auto Insurance Co., also a defendant in the action, provided liability insurance coverage to Appalachian Heating.

State Auto settled the Plaintiffs' property damage claims; however, the Plaintiffs filed separate lawsuits alleging that State Auto had violated the West Virginia Human Rights Act in settling their claims. The complaints alleged that State Auto discriminated against the Plaintiffs in making the settlement because of the Plaintiffs' race and the fact that they resided in public housing. In filing a motion to dismiss the complaints, State Auto argued that the West Virginia Unfair Trade Practices Act ("UTPA") provided the only method for bringing a third-party action against an insurance company in West Virginia, i.e., an administrative complaint with the Insurance Commissioner.

The Court disagreed, ultimately reasoning that an insurer is a "person" under the West Virginia Human Rights Act, and its actions are governed by the Act. The Court noted that the Unfair Trade Practices Act, seeks to remedy a "different harm" than the Human Rights Act, and as such the UTPA does not bar third-

party suits against insurers under the Human Rights Act.

Although the full impact of *Michael* is not yet known, insurers must take notice of this fairly revolutionary decision. Indeed, nearly every insured in West Virginia will arguably fit into some class that is protected by the Human Rights Act.

With that said, insurers certainly have options and can be proactive in warding off successful *Michael* actions by carefully documenting their legitimate reasons for settlement decisions. Additionally, if faced with a *Michael* action, insurers who are not similarly situated to State Auto, i.e., those who are not faced with property damage claims or similar claims within the areas traditionally protected by the Human Rights Act, can be aggressive in filing motions to dismiss. The majority also specifically explained that it was not discussing the validity of liability waivers signed by the Plaintiffs.

Though certainly not a guarantee, securing waivers covering *Michael* actions when entering into settlement agreements aid insurers in achieving summary judgment in *Michael* actions. Finally, if *Michael* actions increase tremendously as *Jenkins* actions did prior to the 2005 amendments to the UTPA, lobbying efforts may bring about changes to the Human Rights Act in light of *Michael* in order to stem the tide of the new generation of spurious third-party bad faith claims in West Virginia.