

Insurance Bad Faith

A Practitioner's Perspective on the Successful Handling of a Bad Faith Insurance Case

Presented at the
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Hi.

No, it's not Neon saying hello. It's your welcome to the quirky world of insurance quiz time.

Here are your three questions for this Friday afternoon in June.

1. May an insurance company employ the existence of \$25,000.00 in available med-pay from a West Virginia automobile insurance policy to deprive the injured policyholder of \$1 million dollars in otherwise available med-pay from a Pennsylvania automobile insurance policy?

2. May a commercial trucking company, which has been given permission by the West Virginia P.U.C. to self-insure, employ its status as a self-insured to avoid personal injury liability which an insurance company would have under the initial permission rule of *Universal Underwriters*?

3. Will the West Virginia Supreme Court recognize the new tort of policyholder abuse?

Answers.

1. State Farm says yes; I say no; Judge Spillers says no; and now it's up to the West Virginia Supreme Court.

2. The trucking company says yes; CIGNA says no; I say no; Judge Keeley says no (if she has to predict what the West Virginia Supreme Court will say); and now it's up to the West Virginia Supreme Court.

3. State Farm says no way in hell; Jim Peterson and I say yes; Judge Spillers says yes; and now it's up to the West Virginia Supreme Court.

Attached Reference materials.

1. Judge Spillers' March 10, 1994, opinion and order granting a declaratory judgment to the plaintiff for \$1 million in policy benefits in *Klein v. State Farm I*.

2. Plaintiff's brief to determine if \$500,000 in self-insurance is available to the plaintiff from *Jackson v. Donahue & BTI*.

3. Plaintiff's amended and supplemental complaint in *Klein v. State Farm II* and the trial court's certified question order.

**In the United States District Court
for the Northern District of West Virginia**

Cassandra Dianne Jackson,)	
)	
<i>Plaintiff,</i>)	
)	
vs.)	Civil Action No. 92-0013-E
)	
Harvey Donahue and Builder's)	
Transport, Inc.,)	
)	
<i>Defendants.</i>)	

**Memorandum in support of the
plaintiff's motion to determine defendant
BTI's \$500,000.00 in self-insurance is
available to the plaintiff**

FACTS

At the time of the 1991 crash in West Virginia of BTI's tractor trailer in which the plaintiff was injured:

- ◆ Defendant Donahue was a BTI employee truck driver.
- ◆ Defendant Donahue was operating the BTI tractor-trailer for the purpose of delivering cargo on behalf of BTI.
- ◆ The plaintiff was a passenger in the BTI tractor with the acquiescence of defendant Donahue.
- ◆ BTI had a stated corporate rule against allowing passengers in its tractors.
- ◆ The plaintiff's presence in the BTI tractor was a violation by Donahue of BTI's stated corporate rule against allowing passengers in its tractors.
- ◆ BTI had applied to the State of West Virginia for authorization to self-insure for its first \$500,000.00 in liability for personal injury and non-cargo property damage.

◆The State of West Virginia had granted BTI authorization to self insure for its first \$500,000.00 in liability for personal injury and non-cargo property damage.

◆BTI had \$14.5 million in liability insurance with CIGNA (actually with INA, a CIGNA subsidiary). The CIGNA coverage has a primary layer of \$1.5 million available over BTI's \$500,000.00 in self-insurance and an excess layer of \$13 million available over \$2 million.

DISCUSSION

In *Universal Underwriters Ins. Co. v. Taylor*, 408 S.E.2d 358 (W.Va. 1991), the court held, *inter alia*,

“Any provision in an insurance policy which attempts to contravene W.Va. Code, 33-6-31(a), is of no effect.” Syl.Pt.2.

“The mandatory omnibus requirements imposed by W.Va. Code, 33-6-31(a), indicate that the legislature has demonstrated a clear intent to afford coverage to anyone using a vehicle with the owner's permission as a means of giving greater protection to those who are involved in automobile accidents. The statute should be liberally construed to effect coverage.” Syl.Pt.3.

“Based on our recognition that a liability insurance contract is for the benefit of the public as well as for the benefit of the named or additional insured, we hereby determine that the state motor vehicle omnibus clause, W.Va. Code §33-6-31(a) (Supp. 1991), requires an insurer to provide coverage when permission has been granted by the insured owner of the vehicle or its authorized agent to a driver who then causes injury or property damage during the permissive use. Given the remedial nature of the omnibus clause, insurance coverage is not affected by the fact that the driver's use of the vehicle may have exceeded or differed from the owner's or his agent's specifications. We hereby overrule our previous decision in *Collins v. New York Casualty Co.*, 140 W.Va. 1, 82 S.E.2d 288 (1954) to the extent that *Collins* designated West Virginia as a ‘minor deviation’ rule state.” Syl.Pt. 4

In a previous filing with the court in this case BTI argued *Universal's* “initial permission” rule is inapplicable to BTI's self-insurance, because BTI could find nothing in the W.Va. Code or elsewhere stating this, and because BTI did not agree to be bound by W.Va. Code, §33-6-31(a). Whether BTI *agreed* to be bound by a statute is about as useful to the relevant analysis as

would be having a good count on this year's Chilean salmon export tonnage. If the statute applies, it applies, period.

As for identifying a code provision requiring self-insurance to provide protection equivalent to that of an insurance policy, BTI perhaps should have kept looking. It might have found the following.

ARTICLE 2A SECURITY ON MOTOR VEHICLES

“§17c-2a-1. Purpose of article.

The purpose of this article is to promote the public welfare by requiring every owner or registrant of a motor vehicle licensed in this State to maintain certain security during the registration period for such vehicle.”

“§17D-2A-2. Scope of article.

This article applies to the operation of all motor vehicles required to be registered to have proof of security pursuant to article three [§17A-31 et seq.], chapter seventeen-A of this Code, with the exception of motor vehicles owned by the State, any of its political subdivisions or by the federal government.”

“§17D-2A-3. Required security; exceptions.

Every owner or registrant of a motor vehicle required to be registered and licensed in this state shall maintain security as hereinafter provided in effect continuously throughout the registration or licensing period...

Every nonresident owner or registrant of a motor vehicle, which is operated upon any road or highway of this state, and which has been physically present within this state for more than thirty days during the preceding three hundred sixty-five days, shall thereafter maintain security as hereinafter provided in effect continuously throughout the period such motor vehicle remains within this state.

No person shall knowingly drive or operate upon any road or highway in this state any motor vehicle upon which security is required by the provisions of this article unless such security is in effect.

Such security shall be provided by one of the following methods:

(a) By an insurance policy delivered or issued for the delivery in this state by an insurance company authorized to issue vehicle liability and property insurance policies in this state within limits which shall be no less than the requirements of... 17D-4-2...; or

(b) ***By any other method approved by the commissioner of the department of motor vehicles of this state as affording security equivalent to that offered by a policy of insurance, including qualification as a self-insurer under the provisions of §17D-6-2; or***

(c) By depositing with the state treasurer such cash or other securities in the manner set forth in ... §17D-4-16...” (emphasis added)

The security self-insurance must include, in order to afford this statutorily-required equivalent of an insurance policy, is coverage of harm caused by the negligence of a permissive user, which is mandated by Code, §33-6-31(a). *Universal, supra*, in making West Virginia an “initial permission” jurisdiction, deemed insurance coverage must follow the owner’s vehicle as long as the operator’s initial permission to use it was validly given by the owner. There is no plausible basis in context to distinguish self-insurance from an insurance policy, and therefore the “initial permission” rule must apply to BTI’s self-insurance.

BTI has dual legal capacities. As Donahue’s employer it is liable to the plaintiff, if at all, under the law of *respondeat superior*. But as the self-insurer of a vehicle involved in a collision in West Virginia, its self-insurance is available to the plaintiff precisely as would be an insurance policy serving the same purpose. BTI’s liability to the plaintiff as a self-insurer is an obligation distinct from, and in no way dependent on, whether BTI is vicariously liable for Donahue’s negligence.

CONCLUSION

W.Va. Code, §17D-2A-3(b), in combination with W.Va. Code, §33-6-31(a), the holding in *Universal, supra*, and the public policy upon which these two code sections and *Universal* are predicated, require BTI’s \$500,000.00 in self-insurance to be available to the plaintiff.

BTI's rule prohibiting passengers is analogous to an exclusion in an insurance policy in that BTI's rule, like an exclusion, is unenforceable if its effect is to restrict liability coverage in contravention of state insurance statutes. *Universal*, Syl.Pt.2. BTI's rule prohibiting passengers is thus unenforceable where, as here, its effect would be to deny a member of the public the benefit of liability coverage to which the person has statutory access.

Barry Hill, of counsel for the plaintiff

**In the
Circuit Court of Brooke County
West Virginia**

Elayne Klein , as Legal Guardian of)	
Scott Sarubin, and Murray Klein ,)	
)	
<i>Plaintiffs</i> ,)	
)	
vs.)	Case No. 93-C-194 Sp
)	
State Farm Mutual Automobile)	
Insurance Company ,)	
)	
<i>Defendant</i> .)	

**Supplemental and Amended
Complaint for Policy Holder Abuse**

1.

On February 6, 1993, civil action 93-C-40 Sp (hereinafter referred to as the West Virginia case) was filed in the Circuit Court of Brooke County, West Virginia.

2.

The plaintiffs in the West Virginia case are the same as the plaintiffs in the instant case; and the defendant in the West Virginia case is, as here, State Farm Mutual Automobile Insurance Company. Hereinafter the plaintiffs, whether in reference to the instant case, in reference to the West Virginia case, or in reference to the Pennsylvania case identified *infra*, will be referred to as the policyholders.¹

3.

The relief sought in the West Virginia case by the policyholders was and is generally:

- a. a declaratory judgment holding \$25,000.00 in medical payments coverage in a State Farm policy issued in West Virginia to Scott Sarubin is not the equivalent of "first party coverage" as this term is used in the Pennsylvania Motor Vehicle Financial

¹ Elayne Klein is the natural mother and legal guardian of Scott Sarubin, who has been adjudicated mentally incompetent to handle his own affairs. Elayne Klein is married to Murray Klein, who is Scott Sarubin's step father.

Responsibility Law (MVFRL); therefore there is no “first party coverage” at a higher priority under the MVFRL than the first party coverage under three State Farm policies issued in Pennsylvania to Elayne Klein and Murray Klein; and therefore Scott Sarubin is entitled, as a resident relative of Murray Klein and Elayne Klein, to \$1 million in first party extraordinary medical benefit from one of the State Farm policies issued to Murray Klein and Elayne Klein.²

b. A money judgment against State Farm for medical expenses incurred by Scott Sarubin as a result of the injuries he received in an automobile collision which occurred on March 20, 1991, in Brooke County, West Virginia.³

4.

State Farm was served with process in the West Virginia case on February 9, 1993. Thereafter State Farm, through one of its employees at its Wheeling, West Virginia, office requested and obtained an extension of time to April 13, 1993, to respond to the policyholders’ complaint in the West Virginia case.⁴

5.

Between February 9, 1993, when State Farm was served with process at its Bloomington, Illinois, headquarters and April 13, 1993, the extended date by which to respond to the complaint in the West Virginia case, State Farm, through managerial employees in West Virginia, Pennsylvania, and perhaps Illinois and Maryland as well, devised and implemented the following scheme.

a. State Farm hired two law firms, one in Pittsburgh, Pennsylvania, the other in Warminster (Bucks County), Pennsylvania. The pertinent actions of these two firms were at all times mentioned herein controlled by State Farm.

² To be precise the complaint in the First Case asks for a finding of the availability of \$10,000.00 basic medical benefit from one of the Pennsylvania policies, nothing from \$10,000.00 through \$100,000.00, and for \$1 million in excess of \$100,000.00.

³ Scott Sarubin, who was a 20-year-old student at Bethany College at the time of the collision, sustained serious brain damage in it, which has left him mentally and physically handicapped. His medical expenses are approximately \$1 million to date, and the present value of future medical and custodial expenses is in excess of \$7 million.

⁴ The extension was a voluntary one given by the plaintiffs’ attorneys. State Farm’s response would have been due 30 days after service, so the extension amounted to an additional 39 days within which to respond.

b. On April 12, 1993, the Warminster firm filed a civil action no. 93-003039-14-1 in the Common Pleas Court of Bucks County, Pennsylvania (hereinafter referred to as the Pennsylvania case) on behalf of State Farm against Murray Klein and Scott Sarubin. The Pennsylvania case asked for a declaratory judgment in State Farm's favor with respect to the *exact same issues* already raised in the West Virginia case, which had been filed more than two months earlier.

c. On April 13, 1993, the Pittsburgh firm filed a motion in the West Virginia case, which motion admitted jurisdiction and venue are appropriate in Brooke County, West Virginia, but asked the Circuit Judge of Brooke County to dismiss the West Virginia case on the ground that Brooke County, West Virginia, is not as convenient a forum as Bucks County, Pennsylvania, to litigate the validity of State Farm's denial of the policy benefits over which the policyholders had sued State Farm in West Virginia.⁵

6.

Following written and oral arguments by the plaintiffs' attorneys and the Pittsburgh firm, the Circuit Court of Brooke County denied State Farm's forum *non conveniens* motion to dismiss the West Virginia case on April 26, 1993.

7.

By a letter dated May 5, 1993, the Warminster Firm and State Farm were provided with full documentation of the Brooke County Circuit Court's refusal to dismiss the West Virginia case on forum *non conveniens* grounds. This letter also suggested to State Farm it ought consider abating the Pennsylvania case in light of the refusal of the Brooke County Circuit Court to dismiss the West Virginia case.

8.

On May 13, 1993, the policyholders were served with process in the Pennsylvania case.

9.

By a letter dated May 13, 1993, the Pittsburgh Firm, the Warminster Firm, and State Farm were told if State Farm did not abate the Pennsylvania case by May 21, 1993, it could

⁵State Farm's motion to dismiss the West Virginia case did not allege the case could be resolved more quickly or at less expenses in Pennsylvania than in West Virginia. The principal argument advanced by State Farm

expect consequences to follow for continuing with duplicative, vexatious litigation in Pennsylvania which State Farm knew would result in expenses, attorney fees, aggravation, and inconvenience to its policyholders.

10.

On May 21, 1993, counsel from the Pittsburgh firm announced State Farm would continue to pursue the Pennsylvania case irrespective of the financial and other consequences to its policyholders. Also on May 21, 1993, the Circuit Court of Brooke County announced a scheduling order by which all issues would be submitted for final decision in the West Virginia case on November 12, 1993.

11.

Thereafter State Farm vigorously pursued the Pennsylvania Case (as is outlined *infra* with actual knowledge the issues in the Pennsylvania case were identical to those in the West Virginia case, and with actual knowledge State Farm was forcing its policyholders to:

- a. hire counsel in Eastern Pennsylvania to litigate the Pennsylvania case, *or*
- b. pay counsel already retained in West Virginia to travel back-and-forth to Eastern Pennsylvania to litigate the Pennsylvania case⁶, *and*
- c. either abandon the West Virginia case or face effectively doubling their attorney fees and expenses.

12.

The policyholders refused to be coerced into abandoning their chosen forum, West Virginia, so they hired additional attorneys in Bucks County, Pennsylvania, to represent them in the Pennsylvania case.

in support of its motion to dismiss on forum *non conveniens* grounds was the coverage issue implicates questions of Pennsylvania law.

⁶ The existence of this option was purely fortuitous. The policyholders' lawyers in the West Virginia case are the same as here, Zagula, Hill & Dittmar and Hill, Peterson, Carper, Bee & Deitzler, both of which firms have offices only in W.Va. However, one of the policyholders' lawyers, Barry Hill, is a member of the Pennsylvania Bar.

13.

On June 2, 1993, the policyholders served their answer in the Pennsylvania case.

14.

On June 14, 1993, State Farm filed a “reply to new matter raised in the defendants’ answer” in the Pennsylvania case.

15.

On a date sometime during June 1993 State Farm filed a “suggestion of adjudication of defendant Scott Sarubin as an incapacitated person and appointment of guardian” in the Pennsylvania case.

16.

On June 23, 1993, State Farm filed a motion for summary judgment and a supporting memorandum in the Pennsylvania case.

17.

On July 30, 1993, the policyholders filed a brief in response to State Farm’s summary judgment motion and a motion to stay all proceedings in the Pennsylvania case.

18.

On September 3, 1993, State Farm filed a supplemental brief in support of its motion for summary judgment in the Pennsylvania case.

19.

On September 29, 1993, the Bucks County Common Pleas Court entered an order staying all proceedings in the Pennsylvania case until final resolution of the West Virginia case.

20.

On October 18, 1993, State Farm filed an application and supporting brief for reconsideration of the stay order which had been entered in the Pennsylvania case.

21.

On November 4, 1993, the Bucks County Common Pleas Court entered a memorandum opinion and order denying State Farm's motion for reconsideration and continuing the stay in the Pennsylvania case.

22.

Discovery in the West Virginia case was closed on August 27, 1993.

23.

On November 12, 1993, following the filing of briefs and oral argument, the coverage issue was submitted in the West Virginia case to the Circuit Court of Brooke County, West Virginia, for a final decision.

24.

State Farm's conduct has been and continues to be culpable, intentional, deliberate, unjustified and unjustifiable conduct implemented pursuant to a scheme concocted by State Farm to use its vastly superior financial resources to abuse its policyholders by coercing them into acceding to State Farm's selection of a forum or paying double attorney fees and expenses, into abandoning the policyholders' attorneys-of-choice in West Virginia⁷, and into either abandoning altogether the policyholders' attempt to collect policy benefits or accepting a fractional low-ball settlement.⁸

⁷ State Farm had actual knowledge at the time it was served with process in the West Virginia case, and before it filed anything in the West Virginia case and before it initiated the Pennsylvania case, the same attorneys representing the policyholders in the West Virginia case also represent the policyholders in a product liability civil action filed on the same day as the West Virginia case and arising from the same March 20, 1991, Brooke County automobile collision (*Klein v. Bridgestone/Firestone*, which was removed to the U.S.D.C., N.D. W.Va., where it is pending as civil action no. 93-0033-W). Because the physical injury and medical treatment aspects of the product case and the West Virginia State Farm case were and are identical, the policyholders had good reason to pursue both cases in West Virginia through the same lawyers, and State Farm knew this before it concocted and implemented its scheme to punish its policyholders for having the audacity to sue State Farm in a court other than the one State Farm preferred.

^{8,9} The authority upon which liability against State Farm is predicated is §870 of the Restatement (Second) of Torts. §870 recognizes intentional tortious conduct may occur and result in liability without falling into a traditional category of tort liability. Rather than refer to such conduct as an innominate tort of *prima facie* tort, as some courts have, the plaintiffs have elected to denominate the tortious conduct alleged against State Farm as Policy Holder Abuse.

25.

State Farm's initiation and pursuit of the Pennsylvania case, although lawful *per se*, nonetheless under the circumstances constituted and continues to constitute deliberate, culpable, unjustified and unjustifiable conduct intended to abuse its policyholders by harming them financially, emotionally, and in their ability to pursue everyday life without unreasonable interference.⁹

26.

As results of State Farm's conduct, the policyholders:

- a. have incurred economic losses, including but not limited to attorney fees and litigation expenses incident to the Pennsylvania case; and
- b. will in the future incur additional economic losses, including but not limited to attorney fees and litigation expenses incident to the Pennsylvania case¹⁰; and
- c. have sustained emotional distress, aggravation, inconvenience, and other compensable noneconomic harm; and
- d. will in the future incur additional emotional distress, aggravation, inconvenience, and other compensable noneconomic harm.¹¹

27.

State Farm's conduct has been, and continues to be, of such a malevolent character as to allow a reasonable inference of actual malice to be drawn from it.

The policyholders' attorneys recognize the cause of action alleged in this complaint, at least as denominated, is a novel one. However, they believe it is within the purview of §870 of the Restatement (Second) of Torts, and they believe it is reasonable to ask for recognition of the claim stated as a claim upon which relief can be granted.

¹⁰ . ¹¹ Although the Pennsylvania case is presently under a stay order, the stay will be lifted as of final resolution of the West Virginia case (or possibly sooner), at which time State Farm will be able to continue pursuing the Pennsylvania case at the trial and appellate court levels in Pennsylvania.

Accordingly, the policyholders ask for a judgment against State Farm in an amount which will fairly compensate them for the economic and noneconomic harm caused them by State Farm's conduct. The policyholders also ask for a judgment against State Farm for punitive damages in an amount sufficient to punish State Farm for intentionally and maliciously abusing its policyholders and to deter State Farm and other insurance carriers from the same or similar conduct in the future.