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How Will Court's Decision Affect Insurance Consumers?

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Jill Cranston Bentz

As seen in the June 25th issue of *The State Journal*.

On June 11, our Supreme Court unraveled significant progress this State has made in recent years to improve West Virginia's insurance climate. In 2005, the West Virginia Legislature repealed a law that enabled a third party to sue an insurance company under a contract to which it is not a party. Earlier this month, the West Virginia Supreme Court of Appeals, in its decision in *Michael v. Appalachian Heating, LLC*, No. 35127 (June 11, 2010), held that third parties *can* sue insurance companies under the West Virginia Human Rights Act.

By way of background, in 1981, the West Virginia Supreme Court gave third parties the right to sue insurance companies under the Unfair Trade Practices Act (UTPA). This created a fundamental problem for insurance companies doing business in our State because they were no longer able to accurately underwrite -- or price -- the risk of a particular policy. This drove consumers' prices up because companies had to account for the speculative risks of writing a policy in West Virginia.

Over the next two decades, our Supreme Court continued to expand this rule of law, creating incentives for third parties to pursue marginal claims and for insurance companies to settle meritless ones. By the early 1990s, companies in West Virginia had severely curtailed their willingness to write new policies in West Virginia. Premiums had skyrocketed, and the Insurance Commissioner estimated that the cost of these third party suits was approximately $166.7 million per year.

In 2005, Governor Joe Manchin realized that the state's insurance climate was in crisis and proposed repealing the law. The Legislature did so, and within four years, the state's largest insurance companies had reduced rates exceeding $110 million on a noncumulative basis.

On June 11, however, the West Virginia Supreme Court of Appeals released its decision in *Michael et al. v. Appalachian Heating, LLC*, a third party lawsuit. Plaintiffs, the Michaels, resided in a public housing complex in Kanawha County and alleged that Appalachian Heating, a vendor who serviced the complex, negligently performed work, resulting in a fire that damaged the Michaels' property. Appalachian Heating was insured by State Auto Insurance Company, which negotiated a settlement with the Michaels, which they accepted. After receiving the settlement, however, the Michaels felt they were owed more and sued, arguing that State Auto failed to fairly settle their claims for a reasonable amount due to their race and because they resided in public housing.

This is precisely the type of third party claim against an insurance company which the Legislature repealed in 2005. By invoking the West Virginia Human Rights Act, the Michaels circumvented the clear intent of the Legislature to disallow these lawsuits, and this court decision allowed it:

The prohibition of a third-party lawsuit against an insurer under [the UTPA] does not preclude a third-party cause of action against an insurer under...the West Virginia Human Rights Act.

Justices Benjamin and Workman having been disqualified, two of the justices rendering the decision were sitting by temporary assignment. Justice Menis Ketchum dissented, because, in his view, "[t]he Human Rights Act contains no language purporting to regulate insurance settlements" and "the majority opinion judicially expands the Human Rights Act." And, in his opinion concurring in part and dissenting in part, Justice Thomas McHugh wrote:

I wholeheartedly agree with the majority's endeavor to eliminate acts of racial or income-based discrimination in connection with insurance settlements… However, the majority's conclusion that the Legislature has authorized third parties to assert a cause of action for allegedly discriminatory insurance settlements based on the protections extended by the Act is untenable. This is because third-party relief for insurance-related discrimination has never been expressly, or even impliedly authorized in the Act, or in any other legislative enactment for that matter. As a result, the majority has clearly exceeded both the scope of the Act and the intended reach of the Act's protections.

Justices Ketchum and McHugh are right. What the Legislature has written matters. The Court's failure to abide by the law here jeopardizes the efficacy of the Governor's and Legislature's 2005 work and the direct economic benefit it provided to insurance consumers. The *Michael* decision is significant because it opens the floodgates to these types of lawsuits, rendering insurance companies again vulnerable to the inability to accurately assess the risks of the policies they write.

I fear, as Justice Ketchum's dissent contemplates, that this decision "has created a situation ripe for abuse by a handful of litigation lawyers."

The Legislature should respond before consumers feel the impact of this decision.