CLM WIKI PROJECT
INSURANCE COVERAGE
(West Virginia)
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1. Insurer's Duty to Defend

1.1 Four Corners Rule

"[A]n insurer has a duty to defend an action against its insured only if the claim stated in the underlying complaint could, without amendment, impose liability for risks the policy covers. If the causes of action alleged in the plaintiff's complaint are entirely foreign to the risks covered by the insurance policy, then the insurance company is relieved of its duties under the policy. *See also,* Lee R. Russ, 14 *Couch on Insurance* § 200:20 (1999) ("Although there are exceptions, as a general rule, an insurer's duty to defend the insured is determined primarily by the pleadings in the underlying lawsuit, without regard to their veracity, what the parties know or believe the alleged facts to be, the outcome of the underlying case, or the merits of the claim."). This rule has variously been called the "four corners" rule (because the insurance company's duty is defined by the allegations in the "four corners" of the complaint); the "eight corners" rule (that is, the insurance company or trial court compares the "four corners" of the complaint with the "four corners" of the insurance policy); the complaint rule; the exclusive pleading rule; and the scope of the allegations test. *See* Susan Randall, *Redefining the Insurer's Duty to Defend,* 3 Conn.Ins.L.J. 221, 226 (1996/1997)." *West Virginia Fire & Casualty Co. v Stanley,* 216 W. Va. 40, 56, 602 S.E.2d 483, 499 (W. Va. 2004).

1.2 Consideration of Extrinsic Evidence

"Extrinsic evidence of statements and declarations of parties to an unambiguous written contract occurring contemporaneously with or prior to its execution is inadmissible to contradict, add to, or detract from, vary or explain terms of such contract in the absence of a showing of illegality, fraud, duress, mistake or insufficiency of consideration." *Syl. pt. 2, Mountain State College v Holsinger*, 230 W.Va. 678, 742 S.E.2d 94 (W.Va. 2013) citing *Syl. pt. 1, Kanawha Banking & Trust Co. v Gilbert,* 131 W.Va. 88, 46 S.E.2d 225 (1947).

1.3 Occurrence Requirement

1.3.1 General rule

"In determining whether under a liability insurance policy was or was not an accident—or was or was not deliberate, intentional, expected, desired, or foreseen—primary consideration, relevance, and weight should ordinarily be

given to the perspective or standpoint of the insured whose coverage under the policy is at issue." *Syl. pt. 4, Cherrington v The Pinnacle Group, Inc. a West Virginia Corporation,* 231 W. Va. 470, 745 S.E.2d 508 (W. Va. 2013) citing *Columbia Casualty Co. v Westfield Insurance Co.,* 217 W. Va. 250, 617 S.E.2d 797 (2005).

1.3.2 Faulty workmanship and construction defect claims

"Defective workmanship causing 'bodily harm' or 'property damage' is an "occurrence" under a policy of commercial general liability insurance." Syl. pt. 6, *Cherrington v The Pinnacle Group, Inc. a West Virginia Corporation,* 231 W. Va. 470, 745 S.E.2d 508 (W. Va. 2013), overruling *Syl. pt. 3, Webster County Solid Waste Authority v Brackenrich and Associates, Inc.,* 217 W. Va. 304, 617 S.E.2d 851 (2005), *Syl. pt. 2 Corder v William W. Smith Excavating Co.,* 210 W. Va. 110, 556 S.E.2d 77 (2001) and, *Erie Insurance Property and Casualty Co. v Pioneer Home Improvement, Inc.* 206 W. Va. 506, 526 S.E.2d 28 (1999). However, exclusions within the policy may still affect coverage for the claimed damages, but the court does not "subscribe to insurance policy construction that lends itself to the mantra: what the policy give in one exclusion, the policy then take away in the very next exclusion." *Id @* 488.

1.4 Bodily Injury Requirement

1.4.1 Emotional distress

"[T]he elements of an intentional infliction of emotional distress claim as '[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." *West Virginia Fire & Casualty Co. v Stanley,* 216 W. Va. 40, 52, 602 S.E.2d 483 (W. Va. 2004).

"Absent a physical injury to the plaintiff, our law has recognized claims for negligent infliction of emotional distress only in limited circumstances. *See e.g., Syl. pt.1, Heldreth v Marrs,* 188 W.Va. 481, 425 S.E.2d 157 (1992) (pertaining to when plaintiff witnesses person closely related to him/her suffer critical injury or death as a result of defendant's negligent conduct); Syl. pt. 12, in pat *Marlin v Bill Rich Constr. Inc.,* 198 W.Va. 635, 482 S.E.2d 620 (1996) (allowing plaintiff to recover when defendant negligently exposes him/her to disease, thus causing plaintiff to experience emotional distress based on 'fear of contracting a disease'); *Ricotilli v Summersville Mem. Hosp.,* 188 W. Va. 674, 425 S.E.2d 629 (1992) (applying dead body exception to allow recovery for negligent infliction of emotional distress for negligence in mishandling relative's corpse.)" *Mays v The Marshall University Board of Governors,* Memorandum Decision No. 14-0788, (October 20, 2015)

1.4.2 Consideration of physical manifestations

"[I]n an insurance liability policy, purely mental or emotional harm that…lacks physical manifestation does not fall within a definition of 'bodily injury, sickness or disease'." *Cherrington v The Pinnacle Group, Inc. a West Virginia Corporation,* 231 W. Va. 470, 484, 745 S.E.2d 508 (W. Va. 2013) citing *Smith v Animal Urgent Care, Inc.* 208 W.Va. 664, 542 S.E.2d 827 (2000).

1.5 Property Damage Requirement

1.5.1 Purely economic loss

The general rule in West Virginia is against recovery in negligence for a purely economic loss in the absence of physical harm due to the underlying concept of duty. However, if there is a special relationship between the parties a duty is deemed to exist as they would be foreseeable to the tortfeasor and the economic losses would be proximately caused by the tortfeasor's negligence. This is true even in the absence of contractual privity (e.g. design professional liability to contractor). *See: Aikens v Debow*, 208 W.Va. 486, 587-590, 541 S.E.2d 576 (2000) and, *Eastern Steel Constructors, Inc. v City of Salem,* 209 W.Va.392, 549 S.E.2d 266 (W. Va. 2004).

1.5.2 Loss of use

Where an insured prevails on a claim against the insurer the insured is entitled to damages for aggravation and inconvenience "under *Hayseeds, Inc. v. State Farm Fire & Casualty,* 177 W.Va. 323, 352 S.E.2d 73 (1986), and are not limited to damages associated with loss of use of the personal property but relate as well to the aggravation and inconvenience shown in the entire claims collection process." *Syl. pt. 4 McCormick v Allstate Ins. Co.,* 197 W. Va. 415, 475 S.E.2d 507 (W. Va. 1996).

"When realty is injured the owner may recover the cost of repairing it, plus his expenses stemming from the injury, including loss of use during the repair period. If the injury cannot be repaired or the cost of repair would exceed the property's market value, then the owner may recover its lost value, plus his expenses stemming from the injury including loss of use during the time he has been deprived of his property." *Syl. Pt. 2, Jarrett v. E. L. Harper & Son, Inc*., 160 W.Va. 399, 235 S.E.2d 362 (1977). *Syl. pt. 3 Brooks v City of Huntington,* 234 W. Va. 607, 768 S.E.2d 97 (W. Va. 2014).

"When residential real property is damaged, the owner may recover the reasonable cost of repairing it even if the costs exceed its fair market value before

the damage. The owner may also recover the related expenses stemming from the injury, annoyance, inconvenience, and aggravation, and loss of use during the repair period. If the damage cannot be repaired, then the owner may recover the fair market value of the property before it was damaged, plus the related expenses stemming from the injury, annoyance, inconvenience, and aggravation, and loss of use during the time he has been deprived of his property. To the extent that Syllabus Point 2 of *Jarrett v. E. L. Harper & Son, Inc.*, 160 W.Va. 399, 235 S.E.2d 362 (1977) states otherwise, it is hereby modified. *Syl. pt. 4 Brooks v City of Huntington*, 234 W. Va. 607, 768 S.E.2d 97 (W. Va. 2014).

1.6 Trigger of Coverage for Latent Injury i.e. exposure to asbestos, silica and lead paint

1.6.1 Continuous trigger

The only case in West Virginia addressing a gradual bodily injury with a delayed manifestation was decided recent decision by Judge Andrew N. Frye, Jr. of the Circuit Court of Morgan County entitled *U.S. Silica Co. v. Ace Fire Underwriters Ins. Co.* in 2013 and applied the continuous trigger to coverage.

1.6.2 Injury-in-fact trigger

n/a

1.6.3 Another trigger

n/a

1.7 Trigger of Coverage Non-Latent Injury

1.7.1 General

There must be an occurrence to trigger coverage under the policy of insurance. *See Cherrington v The Pinnacle Group, Inc. a West Virginia Corporation,* 231 W. Va. 470, 745 S.E.2d 508 (W. Va. 2013).

1.7.2 Construction Defect Claims

“defective workmanship causing bodily injury or property damage is an " occurrence" under a policy of commercial general liability insurance.” *Id*

1.8 Duty to Defend Covered and Uncovered Claims

"[I]ncluded in the consideration of whether [an] insurer has a duty to defend is whether the allegations in the complaint…are reasonably susceptible of an interpretation that the claim may be covered by the terms of the insurance polic[y]." *Syl. pt. 5 West Virginia Fire & Casualty Co. v Stanley*, 216 W. Va. 40, 602 S.E.2d 483 (W. Va. 2004) citing *Bruceton Bank v U.S. Fid. And Guar. Ins.*, 199 W. Va. 548, 486 S.E.2d (1997)

"if part of the claims against an insured fall within the coverage of a liability insurance policy and part do not, the insurer must defend all of the claims, although it might eventually be required to pay only some of the claims." *Horace Mann Ins. Co. v Leeber*, 180 W.Va. 3756 at 378, 376 S.E.2d at (W. Va. 1988) citing *Donnelly v. Transportation Insurance Co.*, 589 F.2d 761, 765 (4th Cir.1978), as amended on denial of rehearing, Jan. 30, 1979.

1.9 Duty to defend contractual indemnity and common law indemnity claims

1.9.1 General contractor against insured

"[U]nder our indemnity law, where indemnitors are given reasonable notice by the indemnitee of a claim that is covered by the indemnity agreement and are afforded an opportunity to defend the claim and fail to do so, the indemnitors are then bound by the judgment against the indemnitee if it was rendered without collusion on the party of the indemnitee." *Vankirk v Green Construction Co.*, 195 W. Va. 714 (W.Va. 1995).

1.9.2 Is there an anti-indemnification statute?

Yes. W.Va. Code § 55-8-14 but the statute does not apply to construction bonds or insurance contracts or agreements.

2. Insurer's Wrongful Refusal to Defend

2.1.1 Reliance on coverage defenses to deny indemnity

"[i]n a first-party bad faith claim that is based upon an insurer's refusal to defend, and is brought under W.Va.Code § 33-11-4(9) (2002) (Repl. Vol. 2006) and/or as a common law bad faith claim, the statute of limitations begins to run on the claim when the insured knows or reasonably should have known that the insurer refused to defend him or her in an action. *Noland v Virginia Ins. Reciprocal*, 224 W.Va. 372, 686 S.E.2d 23,40 (2009).

"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, Hayseeds Inc. v. State Farm Fire & Casualty*, 177 W.Va. 323, 352 S.E.2d 73 (1986) , 177 W.Va. 323, 352 S.E.2d 73." *LeMasters v Nationwide Mutual Ins. Co.*, 232 W. Va. 215, 751 S.E.2d 735, 740 (2013).

However, the *Hayseeds* damages do not continue through the pendency of the bad faith action. *Id at 223.*

3. Conditions of Coverage

3.1 Late notice

3.1.2 Factors considered to determine if coverage is forfeited

"In cases which involve liability claims against an insurer, several factors must be considered before the Court can determine if the delay in notifying the insurance company will bar the claim against the insurer. The length of the delay in notifying the insurer must be considered along with the reasonableness of the delay. If the delay appears reasonable in light of the insured's explanation, the burden shifts to the insurance company to show that the delay in notification prejudiced their investigation and defense of the claim. *Syl. pt. 2, Dairyland Ins. Co. v. Voshel*, 189 W.Va. 121, 428 S.E.2d 542 (1993)." *Travelers Indemnity Co. v U.S. Silica Co.*, Memorandum decision No. 14-0343 (Nov. 10, 2015).

The question of reasonableness is generally a question for the fact finder. *State Auto. Mut. Ins. Co. v. Youler*, 183 W.Va. 556, 561, 396 S.E.2d 737, 742 (1990); *See also: Travelers Indemnity Co. v U.S. Silica Co.*, Memorandum decision No. 14-0343 (Nov. 10, 2015).

3.1.3 Prejudice requirement

"If the insurer can produce evidence of prejudice, then the insured will be held to the letter of the policy and the insured barred from making a claim against the insurance company. If, however, the insurer cannot point to any prejudice caused by the delay in notification, then the claim is not barred by the insured's failure to notify." *Syl. pt. 2, Dairyland Ins. Co. v. Voshel*, 189 W.Va. 121, 428 S.E.2d 542 (1993)." *Travelers Indemnity Co. v U.S. Silica Co.*, Memorandum decision No. 14-0343 (Nov. 10, 2015).

4. Meaning of "arising out of"

4.1 Coverage grants/agreements

"*National Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W.Va. 734, 742, 356 S.E.2d 488, 496 (1987): "An exclusion in a ... liability policy should not be so construed as to 'strip the insured of protection against risks incurred in the normal operation of his business,' especially when the insurer was aware of the nature of the insured's normal operations when the policy was sold. *Chemtec Midwest Services, Inc. v. Insurance Company of North America*, 279 F.Supp. 539 (W.D.Wis.1968); see Boswell [v. Travelers Indem. Co.], 38 N.J.Super. 599, 610, 120 A.2d 250, 255 [(1956)]." *Dotts v Taressa J.A.,* 182 W. Va. 586, 390 S.E.2d 568 (1990)

The West Virginia courts have not defined the meaning of "arising out of" but appear overall to take a stance with the above in mind—a more expansive meaning to grant coverage and a less expansive meaning to exclude coverage.

4.2 Exclusions

"'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.' *Syl. pt. 5, Nat'l Mut. Ins. Co. v. McMahon & Sons,* 177 W.Va. 734, 356 S.E.2d 488 (1987), *overruled on other grounds by Potesta v. U.S. Fidelity & Guar. Co.,* 202 W.Va. 308, 504 S.E.2d 135 (1998)." Syl. Pt. 8, *Nat'l Union Fire Ins. Co. of Pittsburgh v. Miller,* 228 W.Va. 739, 724 S.E.2d 343 (2012). *Syl. pt. 3 American National Prop. & Cas. Co. v Clendenen*, Memorandum decision No. 16-0290 (November 15, 2016).

4.3 Other policy forms

See above.

5. Coverage for punitive damages

5.1 Insurable?

Yes. *See Hensley v Erie Ins. Co.,* 168 W. Va. 172, 283 S.E.2d 227 (1981)

5.2 Distinction for statutory multiple damages?

"Where the liability policy of an insurance company provides that it will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury and the policy only excludes damages caused intentionally by or at the direction of the insured, such policy will be deemed to cover punitive damages arising from bodily injury occasioned by gross, reckless or wanton negligence on the part of the insured." *Syl. 2. Hensley v Erie Ins. Co.,* 168 W. Va. 172, 283 S.E.2d 227 (1981)

6. Additional Insured Endorsement

6.1 Contract or writing required

Under the mandatory omnibus clause of 17D-4-12(b)(2) any person driving an automobile with express or implied permission of the owner shall be insured under the owner's liability policy and thereby becomes an additional insured.

Where a construction contract requires that a party be an additional insured under the other party's insurance policy and a certificate of insurance is issued the insurance carrier is estopped from denying the coverage. *See Marlin v Wetzel Cty. Bd. of Ed.*, 212 W.Va. 215, 569 S.E.2d 462 (2002)

6.2 Analysis and factors considered for liability arising out/caused by of the named insured's work

See section 1.3.2 above

The "your-work" exclusion precludes coverage for the defective workmanship of a contractor, but not the defective workmanship of a subcontractor. *Cherrington v The Pinnacle Group, Inc. a West Virginia Corporation*, 231 W.Va. 470 at 487-88, 745 S.E.2d 508 at 525-26 (W. Va. 2013)

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7. Coverage B- Personal and Advertising Injury

7.1 Meaning of publication for "oral or written publication of material, in any manner, that violations a person's right of privacy" offense

The Courts of West Virginia have not defined publication under Coverage B but the case of *State Bancorp, Inc. v United States Fidelityu and Guaranty Insurance Company*, 199 W.Va. 99 (W. Va. 1997) held the letter written intentionally by the defendant's attorney to the bankruptcy Court was excluded from coverage.