

BAD FAITH BLOG

# Fraud and Collusion Defeat Logger's Attempt to Enforce West Virginia Consent Judgment

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Injured logger, as an assignee of claims by a timber lessee and land owner, brought an action against his employer's liability insurer to recover a consent judgment for the \$1M policy limits. After the trial court entered summary judgment in favor of the logger, the employer's insurer appealed. The Supreme Court of Appeals of West Virginia found the consent judgment was not binding on the insurer because it was not a party to the underlying suit and the settlement and assignment were void for fraud and collusion.

*Penn-America Insurance Company v. Osborne*

The logger injured his leg in a timbering accident while working for H&H Logging ("H&H") on land owned by Heartwood Forest ("Heartwood") and leased by Allegheny Wood Products ("Allegheny") for timber-harvesting operations. After the logger injured his leg, he filed suit against H&H, Allegheny and Heartwood ("Tort Lawsuit").

H&H, Heartwood and Allegheny each had CGL policies. H&H contacted its insurer, Penn-America and requested a defense for itself as to the logger's claims, but it did not request a defense for Allegheny or Heartwood. Penn-America denied the claim due to the deliberate acts exclusion in its policy and informed H&H it would not provide a defense.

Thereafter, H&H retained counsel at its own expense. Meanwhile, Allegheny and Heartwood requested a defense from Allegheny's insurer, Liberty Mutual. Liberty Mutual accepted coverage and provided a defense to Allegheny and Heartwood. However, Allegheny and Heartwood subsequently discovered their contract with H&H required H&H to defend and indemnify them for suits arising from the contract. Allegheny and Heartwood wrote H&H on two occasions requesting H&H and/or its insurer, Penn-America, provide them a defense. However, H&H failed to forward the request to Penn-America. Moreover, there was never any direct communication with Penn-America from Allegheny and Heartwood requesting defense and indemnification. Therefore, Liberty Mutual continued to provide Allegheny and Heartwood a defense in the Tort Lawsuit.

At one point, Allegheny and Heartwood filed a Motion for Leave to File a Third-Party Complaint for Declaratory Relief against Penn-America for failing to provide them a defense; however, the motion was never called up for hearing and the third-party complaint was never actually filed.

Before trial, the logger approached Allegheny and Heartwood about entering into a pre-trial settlement agreement. The attorney hired by Liberty Mutual to defend Allegheny and Heartwood negotiated the pre-trial settlement. Penn-America was not given any notice of the pre-trial settlement. The logger, Allegheny and Heartwood stipulated to the following "facts":

1. Penn-America breached its duty to provide a defense and coverage to Allegheny and Heartwood;
2. Due to Penn-America's breach Allegheny and Heartwood suffered damages because they expended funds and other resources in the defense of the action;
3. Allegheny and Heartwood were compelled to mitigate their claims by entering into a settlement agreement to preserve and protect the assets of Allegheny and Heartwood; and
4. Allegheny and Heartwood tried to resolve coverage issues by filing a third-party complaint for declaratory relief against Penn-America.

Additionally, Allegheny and Heartwood consented to a \$1M Judgment for the logger's leg injury and agreed to assign any claims of bad faith against Penn-America to the logger. In return, the logger agreed not to execute on the \$1M Judgment against Allegheny and Heartwood and instead he would collect the Judgment from Penn-America by asserting his assigned claims. Thereafter, the logger dismissed his lawsuit against Allegheny and Heartwood and filed a new lawsuit asserting his assigned claims against Penn-America.

Penn-America denied liability on the logger's assigned claims and further noted that none of the parties to the Tort Lawsuit contacted it since it first denied coverage to the logger's employer, H&H. Moreover, Penn-America attempted to challenge the reasonableness of the \$1M Consent Judgment; however, the trial court prohibited Penn-America from reviewing the medical records or other evidence to support the severity of the logger's injuries. Cross-motions for summary judgment were filed by the logger and Penn-America, and the trial court granted the logger's summary judgment finding in favor of him for \$1M on the Consent Judgment.

On appeal, the court first addressed Penn-America's argument the Consent Judgment was not binding. The court cited West Virginia law holding a consent judgment against an insured party is not binding on that party's insurer when the insurer was not a party to the proceeding in which the consent judgment was entered. This case illustrated the suspect nature of consent judgments; none of the parties to the settlement agreement had any motive to contest liability or an excessive amount of damages. Further, there was no evidence supporting a claim of \$1M for an injured leg. The appellate court took note the trial court prohibited Penn-America from conducting discovery on the reasonableness of the Judgment. However, the most important factor for the court was the fact Penn-America was not a party to the Tort Lawsuit in which the Consent Judgment was entered. Therefore, summary judgment should not have been entered against Penn-America.

Next, the court evaluated the assignment of claims against Penn-America to the logger. Conspicuously absent from the settlement agreement was any mention of the fact Allgeheny and Heartwood were being defended and were provided with coverage in the lawsuit filed by the logger. Penn-America contended the stipulated facts in the settlement agreement were materially untrue and therefore, the assignment should be voided. The court agreed the settlement agreement was based on false factual bases. In finding the assignment void, the court pointed out that fraud and collusion may permeate assignments like the ones in this case. Ultimately, the court held that recovery on an assigned insurance bad faith claim may not be based on untrue factual bases.

Here, it was untrue Allgeheny and Heartwood were without insurance coverage and the consent judgment was not necessary to protect their assets. At all times, Allgeheny and Heartwood were provided a defense by Liberty Mutual. Moreover, Allgeheny and Heartwood never filed a third-party complaint for declaratory relief contrary to the "facts" stated in the settlement agreement. Finally, there was evidence of concealment; the parties never notified Penn-America of their pre-trial settlement negotiations nor did they seek coverage directly from Penn-America. Based upon all of these factors, the court found the settlement agreement and the assignment were void.

This decision by the West Virginia Supreme Court of Appeals provides some relief to insurers who are faced with the untenable position of having to defend coverage positions and the reasonableness of large, uncontested judgments after the fact. The appellate court in this case was willing to protect the insurer from a large uncontested judgment which was the product of fraud and collusion.