# A CASE TO WATCH: *REVI, LLC V. CHICAGO TITLE INSURANCE CO.*

Walter J. Andrews*
Jennifer E. White*

On February 24, 2015, the Supreme Court of Virginia agreed to determine whether a Fairfax County Circuit Court judge "erred by ruling that a judge, and not a jury, must resolve whether an insurer acted in bad faith" under Virginia Code section 38.2-209 in *REVI, LLC v. Chicago Title Insurance Co*.[1] Although Virginia federal courts and circuit courts have previously held that the issue is one for the trial judge and not the jury, the parties' arguments in *REVI* raise interesting issues about legislative intent and word choice that promise an instructive opinion from the Court in late summer 2015.

## I. First-Party Bad Faith Actions in Virginia

Analysis *REVI* requires a basic understanding of first-party bad faith actions in Virginia.[2] Insurers have a duty of good faith only if coverage exists. Therefore, it is the policyholder's initial burden to establish that the alleged loss is a covered loss under the policy.[3] If this preliminary hurdle is overcome, "the court"[4] must apply a "reasonableness" standard to determine whether the in-

* Walter J. Andrews is a partner and head of the Insurance Coverage Counseling and Litigation practice in Hunton & Williams LLP's offices in McLean, Virginia, and Miami, Florida. Jennifer E. White is an associate in Insurance Coverage Counseling and Litigation practice in Hunton & Williams LLP's office in McLean, Virginia, and chair of the Virginia Association of Defense Attorneys' Young Lawyers Section. The authors thank attorney Tillman Breckenridge of Reed Smith LLP for providing copies of case pleadings, orders and transcripts, and appellate documents.

1 No. 141562, 2015 Va. Lexis 30, at *1 (Feb. 24, 2015).

2 "An insurer's first-party insurance obligation is its duty to compensate the insured for direct losses within the policy coverage. An insurer's third-party insurance obligation is its duty to defend the insured against claims by another, injured party and to indemnify the insured for losses sustained through such claims." A&E Supply Co., Inc. v. Nationwide Mut. Fire Ins. Co., 798 F.2d 669, 676 n.8 (4th Cir. 1986). For a thorough discussion of first- and third-party insurance and the duty of good faith, see Insurance Law in Virginia (Howard C. McElroy & John M. Claytor eds., 3d ed. 2015).

3 Reisen v. Aetna Life & Cas. Co., 225 Va. 327, 335, 302 S.E.2d 529, 533 (1983) ("[T]he existence of the [good faith] duty wholly depended upon a condition precedent, that is, coverage under the policy."). This is not true in other states. *See, e.g.*, Kirk v. Mt. Airy Ins. Co., 134 Wash. 2d 558, 564, 951 P.2d 1124, 1128 (Wash. 1998) (en banc) ("Once the insurer breaches an important benefit of the insurance contract, harm is assumed, the insurer is estopped from denying coverage, and the insurer is liable for the judgment.").

4 *See* Va. Code § 38.2-209 (Before attorneys' fees and costs may be awarded, "*the court* [must] determine[ ] that the insurer, not acting in good faith, has either denied coverage or failed or refused to make payment to the insured under the policy.") (emphasis added).

surer acted in bad faith.[5] The reasonableness standard considers: (1) "whether reasonable minds could differ in the interpretation of policy"; (2) whether the insurer reasonably investigated the claim; (3) whether the results of the investigation "reasonably support a denial of liability"; (4) whether "the insurer's refusal to pay was merely" a settlement negotiation tactic; and (5) whether the insurer's defenses "at trial raise[ ] issue[s] of first impression or reasonably debatable questions of law or fact."[6]

Even though the reasonableness factors are reminiscent of what would be considered for claims arising in tort, Virginia's federal courts and many circuit courts have held that bad faith arises only in contract.[7] Thus, as with typical breach-of-contract actions, policyholders are entitled to direct damages arising from breach of the insurance contract.[8] Virginia circuit court case law suggests that consequential damages—such as lost profits,[9] interest,[10] or emotional distress[11]—are available only if the insured proves a distinct, independent tort (such as fraud),[12] or "special circumstances within the contemplation of the parties at the time they made their contract . . . ."[13]

Because recovery of attorneys' fees is rarely provided for in insurance contracts, attorneys' fees are typically unavailable as direct damages; and they are rarely considered "reasonably foreseeable" so as to fall within the consequential damages category.[14] Moreover, Virginia law is well established that attorneys' fees are recoverable only if provided for by contract or statute.[15] Thus, plaintiffs in insurer bad faith actions rely on Virginia Code section 38.2-209, which allows

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5 CUNA Mut. Ins. Soc'y v. Norman, 237 Va. 33, 38, 375 S.E.2d 724, 726-27 (1989).

6 *Id.* at 38, 375 S.E.2d at 727.

7 *See, e.g., A&E Supply*, 798 F.2d at 676; Omega Ltd. P'ship v. First Am. Title Ins. Co., No. 111149, 1992 WL 885026, at *2 (Fairfax Cir. Ct. Nov. 19, 1992); Meccia v. Pioneer Life Ins. Co., 13 Va. Cir. 17, 1987 WL 488659, at *3-4 (Spotsylvania Cir. Ct. 1987). *See also* Radford v. Nationwide Ins., No. 85-1759(L) (Montgomery Cir. Ct. Nov. 13, 1987), *petition for appeal denied* No. 880357 (Va. Dec. 20, 1988) (assignment presented "no reversible error" where trial court determined that Virginia does not recognize the tort of bad faith).

8 *A&E Supply*, 798 F.2d at 677-78.

9 *See, e.g.*, R.K. Chevrolet, Inc. v. Hayden, 253 Va. 50, 56, 480 S.E.2d 477, 481 (1997).

10 *See, e.g.*, Morris v. Mosby, 227 Va. 517, 524, 317 S.E.2d 493, 498 (1984).

11 *See, e.g.,* Samuels v. Marshall Ins. Agency, Inc., 37 Va. Cir. 472, 1996 WL 1065479, at *2 (Spotsylvania Cir. Ct. 1996) (plaintiff claimed "ridicule and embarrassment" as a result of the litigation).

12 *Id.* (insured may recover only direct damages unless there are "special circumstances within the contemplation of the parties at the time they made their contract so as to justify consequential damages").

13 *Id*.; *see, e.g.*, *Meccia*, 1987 WL 488659, at *4 (damages limited to pecuniary loss, but may be entitled to consequential and/or punitive damages if the insured proves an "identifiable, cognizable independent tort").

14 *See, e.g.*, Long v. Abbruzzetti, 254 Va. 122, 128, 487 S.E.2d 217, 220 (1997) (although attorneys' fees may be available where breach of contract has forced a plaintiff to maintain or defend a suit against a third person, plaintiff's attorneys' fees were not "the direct and necessary consequence" of the breach of contract or within contemplation of the parties when the contract was made).

15 *See* Prospect Dev. Co. v. Bershader, 258 Va. 75, 92, 515 S.E.2d 291, 300 (1999) ("The general rule in this Commonwealth is that in the absence of a statute or contract to the contrary, a court may not award attorney's fees to the prevailing party.").

a policyholder to recover attorneys' fees and costs if the court's "reasonableness" analysis turns in its favor.[16] The statute provides, in relevant part:

> Notwithstanding any provision of law to the contrary, in any civil case in which an insured individual sues his insurer to determine what coverage, if any, exists under his present policy or fidelity bond or the extent to which his insurer is liable for compensating a covered loss, the individual insured shall be entitled to recover from the insurer costs and such reasonable attorney fees as the court may award . . . [if] the court determines that the insurer, not acting in good faith, has either denied coverage or failed or refused to make payment to the insured under the policy.[17]

The dispute in the *REVI* appeal is whether the entity making the bad faith determination—"the court," as provided in the statute—was intended to include only the trial judge (as the statute's predecessor provided) or was meant to encompass both the trial judge *and* jury. Fairfax County Circuit Court's judges could not agree. Chief Judge Smith ruled in favor of the latter interpretation, which set the *REVI* case up for a jury trial last year. But, after the jury trial, Judge Kassabian reversed course and set aside the jury's bad faith verdict on the grounds that the issue was one for the trial judge, not for the jury.

So, why the vastly different conclusions? The *REVI* appeal explains.

## II. *REVI, LLC v. CHICAGO TITLE INSURANCE CO.*

### A. BACKGROUND

In 2000, REVI, LLC ("REVI") purchased a five-acre parcel of residential property in Fairfax County in an area referred to as the "gold coast" of the Washington DC metropolitan area. The property was desirable and valuable due in part to its view of the Potomac River. When REVI purchased the property, it obtained title insurance from Chicago Title Insurance Company ("Chicago Title"), which disclosed no easements or encumbrances with respect to the property except for routine utility easements.

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16 Punitive damages also may be available if the policyholder is able to establish an "independent, willful tort[ ]." *A&E Supply*, 798 F.2d at 672. *See also* Kamlar Corp. v. Haley, 224 Va. 699, 707, 299 S.E.2d 514, 518 (1983) ("[P]roof of an independent, wilful tort, beyond the mere breach of a duty imposed by contract, as a predicate for an award of punitive damages, regardless of the motives underlying the breach."). *But see A&E Supply,* 798 F.2d at 672 ("discreditable" conduct by insurer not enough to constitute independent actionable tort); Berryman v. Globe Life Ins. Co., 22 Va. Cir. 211, 1990 WL 10030089, at *2 (Fairfax Cir. Ct. 1990) (relying, in part, on *A&E Supply* to hold that punitive damages are unavailable in the context of a first-party claim where the insurer has exhibited bad faith in refusing to settle a claim, but allowing consequential damages in excess of the policy limits).

17 VA. CODE ANN. § 38.2-209(A). These statutory damages are intended to be "both punitive and remedial in nature. It is designed to punish an insurer guilty of bad faith in denying coverage or withholding payment and to reimburse an insured who has been compelled by the insurer's bad-faith conduct to incur the expense of litigation." *CUNA*, 237 Va. at 38, 375 S.E.2d at 726 (1989).

In 2004, however, when REVI sought to remove trees to widen an existing driveway, the National Park Service ("NPS") notified REVI that NPS had easement rights over the property. The easements included building height restrictions and tree removal restrictions. REVI's later title search confirmed NPS's assertions, which had been part of a 1965 stipulation between the U.S. Government and the property's then-owners.

REVI promptly filed a claim with Chicago Title, which was initially denied. In 2005, however, Chicago Title accepted the claim and commenced nearly seven years of negotiations with NPS in an effort to remove the restrictions. As a result of those negotiations, in September 2011, NPS and REVI entered into a Release and Easement Agreement, which modified rights regarding subdivision of the property and allowed tree removal (but provided that NPS permission was required before removal of trees larger than eight inches in diameter and thirty feet in height).

REVI insisted that the defect in title caused diminution in the property's value that was not fully resolved by the Release and Easement Agreement. Chicago Title disagreed; its appraiser found that the terms of the Agreement did not diminish the value of the property for its "highest and best use" (*i.e.*, the building of a single, high-end mansion). Thus, it refused to pay the claim.

REVI sued in Fairfax County Circuit Court. It alleged that Chicago Title had acted in bad faith when it refused to pay for the diminution in the property's value allegedly caused by the undisclosed easement restrictions. At trial, a key issue was whether, and to what extent, the tree removal restriction affected the "water view premium." The parties also disagreed about the "highest and best use" of the property and, thus, the value of damages, if any.

### B. CHIEF JUDGE SMITH DECIDES THAT REVI'S BAD FAITH CLAIM IS FOR THE JURY

Before trial, Chicago Title moved to bifurcate the case and asked that the issue of bad faith under Virginia Code section 38.2-209 be presented to the trial judge rather than to the jury. Chief Judge Dennis J. Smith granted Chicago Title's motion that the trial be bifurcated but allowed the jury to determine the issue of bad faith. Judge Smith held:

> Before amendment, § 38.2-209 was numbered § 38.1-32.1. In 1986, in addition to changing the section number, the body of the statute was changed from providing that individuals who sue to determine coverage under an insurance policy "shall be entitled to recover from the insurer costs and such reasonable attorney fees as the *trial judge after verdict may award if it is determined by such trial judge in such case that the insurer has not in good faith denied coverage or failed or refused to make payment to the insured under such policy*."
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> The statutory change deleted the italicized portion of the section and replaced it with the phrase "court may award." It also added a sen-

> tence regarding the standards under which attorney fees can be awarded but that sentence is substantially the same as the current standard. The effect was to eliminate the references to the trial judge and the trial judge in the case and change it to "the court." I note that § 8.01-66.1, providing an attorney fees remedy for arbitrary refusal of motor vehicle insurance claim, has retained the "trial judge" language. I must therefore conclude that the General Assembly made the modification to § 38.1-32.1 to authorize a jury, as well as a trial judge to make such awards.[18]

### C. JUDGE KASSABIAN DECIDES THAT BAD FAITH IS NOT A JURY ISSUE AND SETS ASIDE THE JURY'S BAD FAITH VERDICT

Following Chief Judge Smith's ruling, the case was tried before Judge Brett Kassabian. After a five-day trial, the jury awarded $1,241,000 in damages for diminution of the property's value caused by the easement restrictions. Also, after a subsequent trial on bad faith, the jury awarded REVI $442,000 in fees and costs under Virginia Code section 38.2-209.

After the jury's bad faith verdict, Judge Kassabian raised the question previously decided by Chief Judge Smith: whether the issue of bad faith could be decided by the jury. He invited the parties to brief and argue the issue. On August 8, 2014, the parties presented oral argument on the jury-judge dispute and on Chicago Title's motion for a new trial and to set aside the jury's verdicts.

Judge Kassabian denied Chicago Title's motion to set aside the compensatory damages verdict but "with great hesitation" granted the motion to set aside the bad faith claim.[19] He explained:

> The language substituting the word "court" for trial judge in the Court's mind does not indicate a legislative intent to afford the sacred right to a jury trial on this issue, especially considering that the legislature certainly was free to put in "jury" when it changed its amendment and certainly could have put in "trier of fact."[20]

### D. STANDARD OF REVIEW ON APPEAL

In its petition for appeal, REVI argues that Judge Kassabian erred in his interpretation of the statute. In analyzing REVI's appeal, the Court will first con-

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18 May 9, 2014 Order (original emphasis).

19 Aug. 8, 2014 Hrg. Tr. 39:7.

20 *Id.* at 40:4-11. The court also held that REVI failed to meet its burden to establish bad faith. *Id.* at 41:10-45:6. REVI appealed this determination, but the Supreme Court of Virginia declined to review that assignment of error. It seems that the Court may have denied this assignment because of the manner in which Judge Kassabian phrased his ruling. He did not find on the record that the evidence was insufficient as before the jury. Instead, he held that he was not satisfied, in his role as fact-finder, that the evidence was sufficient to prove bad faith. *See, e.g.,* Aug. 8, 2014 Tr. 42:12-14 ("[T]here is not sufficient proof to satisfy me of bad faith . . . ."). Thus, it appears that the options before the Court are to affirm Judge Kassabian's ruling or reinstate the jury verdict.

sider the language used within the statute in the context of the legislative enactment as a whole.[21] "If language is clear and unambiguous, there is no need for construction by the court; the plain meaning and intent of the enactment will be given it."[22] If, on the other hand, the statutory language is ambiguous (*i.e.*, it can be "understood in more than one way," "is difficult to comprehend, . . . or lacks clearness and definiteness"[23]), then the Court "must construe the Statute to ascertain and give effect to the intention of the legislature."[24] Further, in ascertaining legislative intent, the Court must assume that the General Assembly "chose, with care, the words it used" and did not use, and must give effect to that intent.[25]

### E. DISPUTED ISSUES ON APPEAL

REVI's arguments and Chicago Title's opposition create four key points of dispute between the parties on appeal.

#### 1. The General Assembly's Word Choice

Chicago Title contends that the word *court* has a plain meaning that must be enforced. Relying on *Black's Law Dictionary*, it contends that the definition is: "A governmental body consisting of one or more judges who sit to adjudicate disputes and administer justice."[26] Had the General Assembly intended to allow the jury to decide a claim under Virginia Code section 38.2-209(A), it could have used words like *jury*, *fact finder*, or *trier of fact*, as it did elsewhere in the Insurance Code.[27]

REVI contends that the "could have used" argument is illusory because the argument works for both parties. In other words, the General Assembly just as easily could have used the term *trial judge* or *without a jury*, as it does in other parts of the Insurance Code,[28] if it had intended to exclude the jury.

Further, REVI relies on *Beasley v. Bosschemuller*[29] for the argument that the meaning of the word *court* usually includes a jury. *Beasley* was a personal injury action. On appeal, the defendant argued that the circuit court had erred by al-

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21 PKO Ventures, LLC v. Norfolk Redevelopment & Hous. Auth., 286 Va. 174, 182-83, 747 S.E.2d 826, 831 (2013).

22 Brown v. Lukhard, 229 Va. 316, 321, 330 S.E.2d 84, 87 (1985).

23 *Id.*

24 Armstrong v. Erasmo, 220 Va. 883, 890, 263 S.E.2d 655, 659 (1980).

25 *PKO Ventures*, 286 Va. at 182-83, 747 S.E.2d at 831.

26 Opp'n to Pet. for Appeal 7 (quoting BLACK'S LAW DICTIONARY 404 (9th ed. 2009)) (hereinafter referred to as "Opp'n").

27 *See, e.g.*, VA. CODE § 38.2-807 ("[T]he court may allow the plaintiff a reasonable attorney fee . . . . The fee shall not exceed 33 1/3 percent of the amount that the court or jury finds the plaintiff is entitled to recover against the insurer . . . .").

28 REVI cites Virginia Code §§ 15.2-717 and 58.1-3894 as examples of statutes where the General Assembly expressly excluded juries from decision-making.

29 206 Va. 360, 143 S.E.2d 881 (1965).

lowing the jury to consider the statutory speed and stopping distance table then set forth at Virginia Code section 46.1-195 (now Virginia Code section 46.2-880). The relevant statute provided in part: "(a) *All courts* shall take notice of the following tables of speed and stopping distances of motor vehicle[s], which shall not raise a presumption, in actions in which inquiry thereon is pertinent to the issues . . . ."[30] The Supreme Court of Virginia held in *Beasley* that the jury could consider the table because, "in cases triable by a jury[,] the word 'court' employed in a statute includes the jury as a constituent part."[31] With respect to this holding, REVI emphasizes that the Court deemed the jury to be a "constituent part" of the word *court*, whereas Chicago Title insists that the Court limited its holding to cases like *Beasley*, which were already "triable by jury."[32]

2. The Legislative History

REVI argues that the legislative history of Virginia Code section 38.2-209(A) supports its argument that the General Assembly intended to use the word *court* to encompass the judge and jury. The statute's predecessor, Virginia Code section 38.1-32.1, stated in relevant part that an insured was entitled to recover costs and reasonable attorneys' fees "as the *trial judge* after verdict may award if it is determined by such *trial judge* in such case that the insurer has not [acted] in good faith . . . ."[33] In 1986, the General Assembly repealed this section, along with many others, during its wholesale revision of the Virginia Insurance Code. Notably, the replacement statute, Virginia Code section 38.2-209(A), eliminated the words *after verdict* and replaced *trial judge* with *court.* REVI argues that this evinced purposeful legislative intent to make a substantive change to the law.

The General Assembly's intent, REVI claims, is also apparent if one compares the statute's language with other fee-related Code provisions. For example, Chief Judge Smith considered Virginia Code section 8.01-66.1, which makes an insurer liable for punitive damages, attorneys' fees and costs if a "judge of a court of proper jurisdiction" finds that an insurer's refusal to pay an automobile insurance claim was not in good faith. The chief judge found that the difference between the two statutes reflects the General Assembly's intent to allow more than the judge alone to determine fees in the Virginia Code section 38.2-209 context.

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[30] *Id.* at 366, 143 S.E.2d at 886 (original emphasis modified) (quoting former VA. CODE § 46.1-195) (internal quotation marks omitted).

[31] *Id.* (citation omitted).

[32] In *Beasley,* the court relied on the definition of *Court of Justice* found in a book titled *Words and Phrases* to support its conclusion. *Id.* Another court that relied on the identical text noted that *court* meant a "tribunal, authorized to administer justice, with all its essential component parts, which is convened at a time and place appointed by law" but which did not include *prospective* jurors. United States ex rel. May v. American Mach. Co., 116 F. Supp. 160, 163 (E.D. Wash. 1953). This does not appear to be a direct quote from the *Words and Phrases* but provides some insight into the document upon which the Supreme Court of Virginia relied in reaching its decision in *Beasley*.

[33] VA. CODE § 38.1-32.1 (1986) (emphasis added).

Chicago Title disagrees, since Virginia Code section 8.01-66.1 was not part of the recodification of the Insurance Code in 1986. It also argues that the General Assembly had no interest in treating general bad faith claims under Virginia Code section 38.2-209 differently from bad faith claims involving automobile insurance companies under Virginia Code section 8.01-66.1.

Chicago Title's primary argument on this point, however, is that the change in wording of Virginia Code section 38.2-209 did not change its meaning. It relies on *State Farm Mutual Automobile Insurance Co. v. Major*, for the contention that there is a "presumption that revised or recodified statutes are not substantively changed unless a contrary intent plainly appears in the revised statute."[34] Such intent, it claims, is lacking in the legislative history of the recodification that produced the current version of Virginia's bad faith statute. According to Chicago Title, the Code Commission did not identify the proposed statute as containing any "principal" or "substantive" changes that would evince an altered meaning.[35] In fact, there was no discussion of the replacement of the phrase *trial judge* in the legislative history.[36]

### 3. The Common Law[37]

Also on appeal, REVI contends that, since bad faith determinations are factual in nature, the issue is one for the jury to decide. This, it contends, is consistent with the common-law entitlement to trial by jury and the Virginia Constitution.[38]

REVI argues that its interpretation is also consistent with the majority of states that leave bad faith determinations to juries.[39] In fact, an argument similar to REVI's common-law argument was successful in New Jersey when raised by the Insurance Council of New Jersey and the Property Casualty Insurers Association of America *in support of* jury trials for bad faith claims.[40]

However, even though most states treat bad faith as a jury issue, state law is mixed on the issue of whether the court or the jury awards attorneys' fees in bad

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[34] 239 Va. 375, 378, 389 S.E.2d 307, 309 (1990).

[35] Opp'n 12, relying on House Document 17.

[36] *Id.*

[37] Chicago Title did not directly respond to this point in its opposition to the petition for appeal.

[38] VA. CONST. art. 1, § 11 ("That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred."); Edlow v. Arnold, 243 Va. 345, 347, 415 S.E.2d 436, 437 (1992) ("In Virginia, the right to trial by jury extends to civil litigants . . . .").

[39] *See generally* 14 COUCH ON INSURANCE § 204:43 (3d ed. 1997) ("Bad faith generally requires an inquiry into the circumstances underlying the insurer's denial of policy benefits, and, as such, is generally left as a question of fact for the jury, unless specifically provided by statute.") (collecting cases).

[40] Wood v. N.J. Mfrs. Ins. Co., 21 A.3d 1131, 1138 (N.J. 2011) ("Amici the Insurance Council of New Jersey and the Property Casualty Insurers Association of America advances an elegantly simple argument: that a *Rova Farms* bad faith case is a mundane and everyday contract claim to which the right to a jury trial attaches, no more and no less.") (citing Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 323 A.2d 495 (N.J. 1974)).

faith actions.[41] Further, at least one state has interpreted *the court* in a manner contrary to REVI's proposed definition. For example, in the combined case of *Mishoe v. Erie Insurance Co.*,[42] the Pennsylvania Supreme Court held that the word *court* as used in the state's bad faith statute was intended to mean "judge," based on how the term had been defined elsewhere.[43] Further, because there was no legislative history describing a specific intent to provide the right to a jury trial, the court rejected the argument that the statute should allow as much.[44] The court also rejected the plaintiffs' argument that the award of punitive damages allowed by the statute—which would ordinarily fall within the purview of the jury—was enough to establish that the legislature intended a jury for statutory bad faith actions.[45]

4. The Case Law[46]

Finally, REVI distinguishes its case from two cases relied on by Chicago Title in its argument to Judge Kassabian. In *Winston v. State Farm Fire and Casualty Co.*, the Fourth Circuit held (in its unpublished opinion) that the Eastern District of Virginia did not err in refusing to send the issue of bad faith to the jury on the grounds that the word *court* is not interchangeable with *fact-finder* and because "we cannot assume that the Virginia legislature chose the word 'court' lightly."[47] In *Wilson v. State Farm Fire and Casualty Co.*, the Roanoke Circuit Court relied on the *Winston* decision and *Black's Law Dictionary* definition of *court* to reach the same conclusion.[48] Chicago Title relied on both cases as ex-

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41 *Compare* ARIZ. REV. STAT. ANN. § 12-341.01 ("The court and not a jury shall award reasonable attorney fees . . . ."), *and* CONN. GEN. STAT. ANN. § 42-110g(g) ("right to a jury trial except with respect to . . . the award of costs [and] reasonable attorneys' fees . . . ."), *and* 215 ILL. COMP. STAT. ANN. 5/155 ("the court" decides "reasonable attorney fees," as distinguished from "jury" elsewhere in section), *with* IDAHO CODE ANN. § 41-1839 ("the court shall adjudge reasonable . . . attorney's fees" ) *and* Kan. Stat. Ann. § 40-908 ("the court . . . shall allow the plaintiff a reasonable sum as an attorney's fee"), *and* NEB. REV. STAT. § 44-359 ("the court . . . shall allow the plaintiff a reasonable sum as an attorney's fee in addition to the amount of his or her recovery . . . ."), *with* MO. ANN. STAT. §§ 375.296 ("the court or jury may, . . . allow the plaintiff damages for vexatious refusal to pay and attorney's fees"), 375.420 ("the court or jury may . . . allow . . . a reasonable attorney's fee").

42 824 A.2d 1153 (Pa. 2003).

43 *Id.* at 1157. Pennsylvania's bad faith statute reads: "In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, *the court* may . . . [a]ward interest on the amount of the claim . . . [,] [a]ward punitive damages against the insurer[,] . . . [and] [a]ssess court costs and attorney fees against the insurer." 42 PA. CONS. STAT. ANN. § 8371 (emphasis added). During the 2015 legislative session, a state senator proposed amending the statute to replace *the court* with *trier of fact. See* 2015 Pennsylvania Senate Bill No. 277, Pennsylvania 199th General Assembly (Jan. 16, 2015). The bill was referred to committee, and no further action has been taken.

44 *Mishoe*, 824 A.2d at 1162-63.

45 *Id.* at 1158-59.

46 Chicago Title did not directly respond to this point in its opposition to the petition for appeal.

47 97 F.3d 1450, 1996 WL 500943, at *3 (4th Cir. 1996).

48 79 Va. Cir. 591, 2009 WL 7416543, at *3-4 (Roanoke Cir. Ct. Dec. 14, 2009).

amples of existing Virginia precedents that the case should be decided by the judge, not the jury.[49]

REVI, on the other hand, contends that the Supreme Court of Virginia should ignore the *Winston* case and the cases that rely upon it because *Winston* did not consider the statute's words in context or its history. REVI claims that this context shows that the legislature expressly intended to allow jury consideration when it eliminated the words *trial judge* from the statute in the 1986 recodification.

### F. STATUS OF THE APPEAL

At the time of the publication of this article, the parties had filed their appellate briefs, and the case was argued before the Court on June 2, 2015. Justice William C. Mims questioned the parties about the legislative history of the Code, whereas Justice D. Arthur Kelsey explored the right to a jury trial.[50] These are likely to be key issues for the Court's ultimate opinion, expected to be published later this summer.

## III. WHY YOU SHOULD CARE ABOUT REVI

The direct and ancillary effects of the Court's resolution of the *REVI* appeal may be significant.

First, the decision will affect the importance of bifurcation. As Chicago Title argued in its opposition to the petition for appeal, REVI's interpretation of Virginia Code section 38.2-209 could allow the jury to consider evidence of bad faith before the jury even determines whether the insurer is liable under the policy.[51] In that instance, an insurer's motion to bifurcate would be an even more important strategic tool.

Second, the decision is likely to lead to additional legislation. Regardless of how the Court comes down on this issue, expect legislators to propose an opposite interpretation during the next session of the General Assembly. The result is likely to be a point of concern for the plaintiffs' bar and insurance lobby.

Third, the decision may affect the cost and risk of bad faith litigation. A decision in REVI's favor may make bad faith litigation more expensive and riskier for insurance companies because of the cost and emotional volatility of juries.

Last, the decision may affect how other parts of the Virginia Insurance Code are interpreted. Although the Court likely will be cautious and limit its interpretation of the word *court* to Virginia Code section 38.2-209, policyholders and

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[49] *See also* O'Neal v. Planet Ins. Co., 848 F.2d 185, 1988 WL 53228, at *3 (4th Cir. 1988) (unpublished) (interpreting the word *court* to mean "judge"); St. John's African Methodist Episcopal Church v. Guideone Specialty Mut. Ins. Co., 902 F. Supp. 2d 783, 787 (E.D. Va. 2012) (relying on *Winston* and *Wilson* in its interpretation of *court* to mean "judge").

[50] Deborah Elkins, *Court hears judge-or-jury 'bad faith' case*, Virginia Lawyers Weekly (June 2, 2015), *available at* http://valawyersweekly.com/2015/06/02/court-hears-judge-or-jury-bad-faith-case/.

[51] Opp'n 15.

insurers alike may try to use the result to their benefit in other contexts that, in turn, could put other Code provisions in dispute.

For these reasons, Virginia attorneys should be on the lookout for the Virginia Supreme Court's resolution of the *REVI* case and keep it in mind with respect to pending claims and cases.