

# Premature to dismiss stalled coverage issue: court

Today's case involves section 155 of the Illinois Insurance Code, 215 ILCS 5/155, which allows an award of attorney fees, costs, and \$60,000 or 60 percent of the amount recoverable under the insurance policy where the insurance company has unreasonably and vexatiously delayed settling a claim. *P&M/Mercury Mechanical Corp. v. West Bend Mutual Insurance Co.*, 483 F.Supp.2d 601 (N.D.Ill. 2006).

The case arose when P&M/Mercury Mechanical Corporation, working as a subcontractor on a construction project at a hospital, broke a water line. The hospital claimed the water damaged its fire alarm system to the extent of \$120,000. P&M turned the claim into its general liability insurance company, West Bend Mutual Insurance Co., who offered to settle the hospital's claim for \$9,000.

The hospital replaced the firm alarm system at a cost of \$120,000 and backcharged the general contractor who, in turn, withheld the \$120,000 in payments due to P&M.

P&M brought a declaratory judgment action against West Bend, suing on three theories: failure to resolve the hospital's claim in full under the policy (Count I); breach of the insurance contract by failure to settle the claim (Count II); and section 155 damages for "vexatious and unreasonable" failure to pay the hospital's claim (Count III).

West Bend filed a motion to dismiss the Count III section 155 claim under Rule 12(b)(6), contending P&M's first amended complaint failed to state a claim. U.S. District Judge Elaine Bucklo of the Northern District of Illinois denied the motion to dismiss, finding Count III sufficient to state a claim and it premature to decide the merits of the claim on a motion to dismiss.

Noting the test for resolution of a motion to dismiss, Bucklo began her discussion of the motion.

"In assessing West Bend's motions to dismiss," she wrote, "I must accept all well-pled facts in P&M's complaint as true. *Thompson v. Illinois Dep't of Prof'l Regulation*, 300 F.3d 750, 753 (7th Cir. 2002). I must view the allegations in the light most favorable to P&M. Dismissal of Count III is proper only if P&M can prove no set of facts to support that count. *First Ins. Funding Corp. v. Fed. Ins. Co.*, 284 F.3d 799, 804 (7th Cir. 2002). My review is limited to the pleadings on file, so I must exclude from my analysis any factual assertions either party made in their papers related to the motion to dismiss. Written instruments attached to the complaint are considered to be part of the complaint. See *Moranski v. Gen. Motors Corp.*, 433 F.3d 537, 539 (7th Cir. 2005). Here, P&M has attached several documents to its complaint, including a copy of the policy at issue as well as a copy of the report issued by West Bend's consultant, so I may consider these documents in ruling on West Bend's motion to dismiss."

Bucklo set out section 155 and the test for determining its applicability to a claim.



## Federal Courts

By Jay S. Judge

Judge, a name partner of Judge, James & Kujawa LLC in Park Ridge, is a defense attorney who specializes in trials, appeals and insurance coverage. Judge graduated with honors from The John Marshall Law School and served as editor-in-chief of the school's law review.

Bucklo wrote: "Section 155 of the Illinois Insurance Code, codified as 215 Ill. Comp. Stat. Ann. 5/155, provides: 'In any action by or against a company wherein there is in issue the liability of a company on a policy ... of insurance or the amount of the loss payable thereunder, or for an unreasonable delay in settling a claim, and it appears to the court that such action or delay is vexatious and unreasonable, the court may allow as part of the taxable costs in the action reasonable attorney fees, other costs, plus an amount not to exceed any one of the following amounts:

"(a) 60 percent of the amount which the court or jury finds such party is entitled to recover against the company, exclusive of all costs; (b) \$60,000; (c) the excess of the amount which the court or jury finds such party is entitled to recover, exclusive of costs, over the amount, if any, which the company offered to pay in settlement of the claim prior to the action. 215 Ill. Comp. Stat. Ann. 5/155(1)."

"This provision allows a party to recover attorneys' fees, other costs and sanctions where an insurer has unreasonably delayed in settling a claim and where that delay is 'vexatious and unreasonable.' This is precisely what P&M has alleged West Bend did. The [7th U.S. Circuit Court of Appeals] has held that an insurer's conduct is vexatious and unreasonable when 'the evidence shows that the insurer's behavior was willful and without reasonable cause.' *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 200 F.3d 1102, 1110 (2000) (internal citation omitted). An insurer does not act vexatiously and unreasonably when (1) there is a bona fide dispute concerning the scope and application of insurance coverage; (2) the insurer asserts a legitimate policy defense; (3) the claim presents a genuine legal or factual issue regarding coverage; or (4) the insurer takes a reasonable legal position on an unsettled issue of law. (internal citations omitted). The Illinois Supreme Court has also emphasized that where there is a 'bona fide dispute concerning coverage,' costs and sanctions are inappropriate. See *State Farm Mut. Auto. Ins. Co. v. Smith*, 197 Ill.2d 369, 380, 757 N.E.2d 881, 887 (2001) (emphasis in original).

West Bend contended that it had a good faith basis for its \$9,000 offer:

"West Bend contends that the complaint and the consultant's report and policy, both attached to the complaint, demonstrate that West Bend refused to resolve the hospital's claim because it had a bona fide dispute concerning whether the damage to the fire alarm system was covered under the policy."

P&M contended that West Bend's motion to dismiss was insufficient to warrant dismissal and should have been pleaded, instead, as an affirmative defense.

Bucklo found it was properly pleaded as a motion to dismiss and not as an affirmative defense:

"P&M argues that whether West Bend had a 'bona fide dispute' is an affirmative defense that is not appropriate for disposition on a motion to dismiss. However, P&M has cited no precedent that this is an affirmative defense, and the 7th Circuit's opinion in *Citizens First Nat'l Bank* does not support this argument. See 200 F.3d at 1110. Whether an insurer had a bona fide coverage dispute with an insured shows whether the insurer acted unreasonably or vexatiously; this showing goes to the merits of the claim and is not a separate affirmative defense."

However, the court found that P&M's complaint did state a claim:

"P&M alleges that West Bend had a duty to pay the claim, that it breached this duty by failing to settle the claim, and that its acts and omissions were vexatious and unreasonable. Despite West Bend's arguments, the report from West Bend's consultant attached to the complaint does not conclusively establish that West Bend had a bona fide dispute. Although this report does, as West Bend argues, contest the hospital's conclusion that it needed a new fire alarm system, this does not prove that West Bend's delay was not vexatious and unreasonable. See, e.g., *Butler v. Econ. Fire & Cas. Co.*, 199 Ill.App.3d 1015, 1023-24, 557 N.E.2d 1281, 1287 (Ill.App.Ct. 1990). P&M alleges that, following the issuance of the report, West Bend unreasonably refused to make any efforts to resolve the matter with the hospital, so the allegations that West Bend prepared a report, investigated the claim, and made a settlement offer to the hospital does not conclusively show that it had a bona fide dispute or that it was not unreasonable in ultimately failing to settle the claim. Further, whether the report is accurate and whether it was the sole information that West Bend relied upon in not resolving the hospital's claim are also questions that cannot be decided on a motion to dismiss."

Bucklo acknowledged, in footnote 2, that under certain circumstances a motion to dismiss can require dismissal of a section 155 claim:

"West Bend cites two cases that demonstrate that, under certain circumstances, claims for attorneys'

fees can be resolved at the motion to dismiss stage. See *First Magnus Fin. Corp. v. Dobrowski*, 387 F.Supp.2d 786 (N.D.Ill. 2005); *Minutemen Int'l Inc. v. Great Am. Ins. Co.*, No. 03 C 6067, 2004 WL 603482 (N.D.Ill.) Mar. 22, 2004). However, in both of these cases the court concluded that the facts as alleged in the complaint precluded a finding that the defendant unreasonably delayed in resolving the claim at issue. See *First Magnus Fin. Corp.*, 387 F.Supp.2d at 793 (finding no unreasonable delay because complaint's allegations about the amount of time the insurer had notice of the claim were inconsistent with a delay); *Minutemen Int'l*, 2004 WL 603482, at 9 (finding, where complaint alleged that the insurer did not cover costs of an SEC investigation because that investigation was not a 'claim' under the policy that the insurer had a duty to defend, this position was not unreasonable under the language of the policy and therefore the insurer's conduct was not vexatious or unreasonable). Here, the facts as alleged in the complaint do not preclude a finding that West Bend's delay was vexatious and unreasonable."

West Bend's contention that its offer of \$9,000 on the \$120,000 claim was based upon the policy wording and, therefore, could not be unreasonable and vexatious, was found by Bucklo to be unwarranted based upon the pleadings before her:

"West Bend further contends that its conduct is not vexatious and unreasonable because its denial was based on the wording of the policy, and 'denials based on a policy's express wording are inappropriate for invoking [Section 155].' West Bend cites the language of its policy defining 'property damage' and argues that its denial was based on this definition. However, whether this is true, P&M has not alleged, nor do the documents attached to the complaint establish, that West Bend's denial was based on the wording of the policy. Further, West Bend's argument is that it concluded that the fire alarm system was not physically injured to the extent claimed by the hospital and that there was no loss of use of the fire alarm system, so that the hospital had not suffered the extent of 'property damage' it claimed under the policy. Whether West Bend reasonably concluded this, and whether it reasonably delayed resolution of the claim, cannot be decided on a motion to dismiss."

The court, therefore, denied West Bend's motion to dismiss.