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## **Washington High Court Limits Insurers' Jury Trial Rights**

By Daniel R. Bentson

In *Bird v. Best Plumbing Group*, the Washington Supreme Court significantly curtailed insurers' jury trial rights. In the case, a Best Plumbing employee trespassed onto Bird's property, cutting a pressurized sewer pipe, resulting in injury to Bird and his property. Bird later sued Best Plumbing for his injuries and Best Plumbing's insurer, Farmers Insurance Exchange, agreed to defend. During settlement negotiations, Bird demanded the full limits of the Farmers policy and Farmers returned with a counter-offer for less than the policy limits. Best Plumbing, then, used an attorney, independent of the defense counsel retained by Farmers, to negotiate a settlement in excess of the policy limits, reducing the settlement to a covenant judgment. Under this arrangement, Best Plumbing assigned its bad-faith claims against Farmers to Bird, in exchange for a covenant not to execute the judgment against Best Plumbing.

Washington law permits the settling parties to hold a hearing in the trial court to determine if the settlement was reasonable. An insurer with notice of the hearing must intervene if it wants to challenge the reasonableness; otherwise, it will be bound by the result. If the insurer is later found to have acted in bad faith, the settlement amount, as determined to be reasonable, is presumed to be the amount of the damages suffered by the insured as a result of the insurer's bad faith.

The parties gave Farmers notice of a reasonableness hearing, and Farmers intervened. Farmers requested a jury, arguing that, because the purpose of the hearing was to establish damages, it had a right to a jury under the Washington State Constitution. The trial court denied Farmers' request. The Washington Court of Appeals affirmed, holding that the reasonableness hearing was an equitable proceeding as to which the constitutional guarantee did not apply.

The Supreme Court affirmed in a 6-3 opinion. In doing so, the majority held that the reasonableness hearing is specifically authorized by a statute (RCW 4.22.060) that was, by its terms, enacted to determine the amount of a set-off for non-settling tort defendants as a result of the plaintiff's settlement with another defendant. In that situation, the amount of the plaintiff's damages is not determined, only the amount of the set-off. The dissent strongly criticized the majority's reasoning, noting its broad implications: if the legislature could enact any statute that served to convert a damages determination into an equitable proceeding, then the constitutional jury guarantee can be superseded by the legislative branch. In a footnote, the majority denied this implication, stating that the "reasonableness determination in this context is equitable because of its nature, not simply because the procedure is provided for by statute."

In sum, the Supreme Court has endorsed and extended the procedure whereby plaintiffs and insured defendants can have bad faith damages against the insurer determined in an abbreviated procedure, potentially affording little opportunity for the insurer to conduct discovery, and certainly affording the insurer no right to a jury trial on the issue of damages. The Supreme Court once again did not explain why such a procedure serves the legitimate interests of the parties — that is, it did not explain why the question of the amount of damages needs to be decided (and thereby "presumed") before the insurer's liability is determined, and often before the insurer is even sued.