



---

Volume 99 | Issue 4

Article 9

---

June 1997

# Substantially Prevailed Damages: Fee Shifting in West Virginia Insurance Law

Richard L. Costella

*West Virginia University College of Law*

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>

 Part of the [Insurance Law Commons](#)

---

## Recommended Citation

Richard L. Costella, *Substantially Prevailed Damages: Fee Shifting in West Virginia Insurance Law*, 99 W. Va. L. Rev. (1997).

Available at: <https://researchrepository.wvu.edu/wvlr/vol99/iss4/9>

This Student Note is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact [ian.harmon@mail.wvu.edu](mailto:ian.harmon@mail.wvu.edu).

# SUBSTANTIALLY PREVAILED DAMAGES: FEE SHIFTING IN WEST VIRGINIA INSURANCE LAW

---

I.	INTRODUCTION .....	811
II.	BACKGROUND .....	814
	<i>A. Classifications of Insurance</i> .....	814
	<i>B. The American Rule</i> .....	817
III.	SUBSTANTIALLY PREVAILED DAMAGES .....	819
	<i>A. Hayseeds, Inc. v. State Farm Fire &amp; Casualty</i> .....	819
	<i>B. The Substantially Prevailed Standard</i> .....	823
	<i>C. Substantially Prevailed in the Settlement Context</i> .....	825
	<i>D. Substantially Prevailed Outside of Property Damage         Claims</i> .....	827
	<i>E. A Missed Opportunity</i> .....	828
	<i>F. A Clarification of Annoyance and Inconvenience</i> .....	830
	<i>G. More Discussions on Attorney's Fees</i> .....	831
IV.	PROPOSAL .....	832
	<i>A. Why Not a Purely Mathematical Calculation?</i> .....	832
	<i>B. What are Reasonable Attorney's Fees?</i> .....	834
V.	CONCLUSION .....	836

## I. INTRODUCTION

Beginning in 1986, with *Hayseeds, Inc. v. State Farm Fire & Casualty*,<sup>1</sup> the Supreme Court of Appeals of West Virginia embarked on a course which has radically changed the face of West Virginia first party insurance practice. The decision in *Hayseeds* spawned a line of cases<sup>2</sup> which now serve as a common law framework for regulating insurance company conduct in the settlement of first party

---

<sup>1</sup> 352 S.E.2d 73 (W. Va. 1986).

<sup>2</sup> See *Landmark Baptist Church v. Brotherhood Mut. Ins. Co.*, 484 S.E.2d 195 (1997); *McCormick v. Allstate Ins. Co.*, 475 S.E.2d 507 (W. Va. 1996); *Hadorn v. Shea*, 456 S.E.2d 194 (W. Va. 1995); *Marshall v. Saseen*, 450 S.E.2d 791 (W. Va. 1994); *Jordan v. Nat'l Grange Mut. Ins. Co.*, 393 S.E.2d 647 (W. Va. 1990); *Thomas v. State Farm Mut. Auto. Ins. Co.*, 383 S.E.2d 786 (W. Va. 1989).

insurance claims.<sup>3</sup> The import of these cases is that it is now possible for insurance consumers to receive extra-contractual damages when they fall prey to insurance company misconduct in the claims settlement process. The extra-contractual damages available to the insured under these circumstances include attorney's fees,<sup>4</sup> damages for annoyance and inconvenience,<sup>5</sup> damages for net economic loss,<sup>6</sup> punitive damages,<sup>7</sup> and the amount of a jury verdict in excess of the applicable policy limits.<sup>8</sup> The specific damages awarded will usually be dictated by the form or degree of misconduct the insurance company engaged in when denying or undervaluing the insured's claim. Moreover, there is a strict liability standard, established in *Hayseeds*, to be applied in awarding attorney's fees, damages for annoyance and inconvenience, and damages for net economic loss.<sup>9</sup> Thus, in determining if an insured is entitled to these specific damages, "it [is] of little importance whether an insurer contests an insured's claim in good or bad faith."<sup>10</sup>

Given the significant financial implications presented by *Hayseeds* and its progeny, practicing West Virginia attorneys, whether engaged in representing the insured or the insurer, are well advised to take careful notice of the decisions in these cases. Consequently, the purpose of this Note is to explore the various issues

---

<sup>3</sup> There are two other lines of West Virginia cases dealing with insurance company misconduct in the claims settlement process. For cases dealing with the insured's cause of action against the insurer for failure to settle a third-party claim within policy limits, see *Charles v. State Farm Mut. Auto. Ins. Co.*, 452 S.E.2d 384 (W. Va. 1994); *State ex rel. Allstate Ins. Co. v. Karl*, 437 S.E.2d 749 (W. Va. 1993); *Shamblin v. Nationwide Mut. Ins. Co.*, 396 S.E.2d 766 (W. Va. 1990). For cases discussing insureds' and third party claimants' private causes of action under the West Virginia Unfair Trade Practices Act, see *Maher v. Continental Cas. Co.*, 852 F. Supp. 507 (S.D. W. Va. 1994); *McCormick v. Allstate Ins. Co.*, 475 S.E.2d 507 (W. Va. 1996); *State ex rel. State Farm Fire & Cas. Co. v. Madden*, 451 S.E.2d 721 (W. Va. 1994); *Russell v. Amerisure Ins. Co.*, 433 S.E.2d 532 (W. Va. 1993); *Thompson v. West Virginia Essential Property Ins. Ass'n*, 411 S.E.2d 27 (W. Va. 1991); *Robinson v. Continental Cas. Co.*, 406 S.E.2d 470 (W. Va. 1991); *Grove v. Myers*, 382 S.E.2d 536 (W. Va. 1989); *Jenkins v. J.C. Penney Cas. Ins. Co.*, 280 S.E.2d 252 (W. Va. 1981).

<sup>4</sup> See *Hayseeds*, 352 S.E.2d at 80.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 80-81.

<sup>8</sup> See *Marshall v. Saseen*, 450 S.E.2d 791, 798 (W. Va. 1994).

<sup>9</sup> See *Hayseeds*, 352 S.E.2d at 79. See also *McCormick v. Allstate Ins. Co.*, 475 S.E.2d 507, 514 (W. Va. 1996).

<sup>10</sup> *Hayseeds*, 352 S.E.2d at 79.

presented by *the Hayseeds* line of cases and to examine the Supreme Court of Appeals' unique approach to managing insurance company misconduct in the first party insurance context. This Note will not examine all of the various forms of misconduct an insurance company might engage in,<sup>11</sup> nor will it present an exhaustive discussion of all the various remedies available to the insured when an insurer refuses to settle a claim. Instead, the focus of the Note will be limited to the type of insurance company misconduct that leads to an award of "substantially prevailed" damages.<sup>12</sup>

The Note begins with an overview of the various classifications of insurance. The distinction between first party and third party insurance will be discussed, as well as the impact that such a classification can have on an insured's right to recovery.

In Part II of the Note, the American rule on attorney's fees will be discussed. The American rule provides that each party to a lawsuit is responsible for its respective attorney's fees.<sup>13</sup>

Part III of the Note presents a summary of the leading cases that have developed West Virginia's unique doctrine of substantially prevailed.<sup>14</sup> The summary begins with *Hayseeds, Inc. v. State Farm Fire & Casualty*.<sup>15</sup> *Hayseeds* establishes the substantially prevailed doctrine and sets forth the damages an insured is permitted to recover if he or she is deemed to have substantially prevailed.<sup>16</sup> Because *Hayseeds* involved a property damage claim, the doctrine of substantially prevailed originally applied only to such claims.<sup>17</sup> However, when the

---

<sup>11</sup> For a comprehensive discussion of insurance company misconduct in West Virginia, see Thomas V. Flaherty et al., *Developments in West Virginia's Insurance Bad Faith Law—Where Do We Go From Here?*, 98 W. VA. L. REV. 267 (1995).

<sup>12</sup> These damages are limited to attorney's fees, damages for annoyance and inconvenience, and damages for net economic loss. See *Hayseeds*, 352 S.E.2d at 74.

<sup>13</sup> See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975).

<sup>14</sup> See *Landmark Baptist Church v. Brotherhood Mut. Ins. Co.*, 484 S.E.2d 195 (1997); *McCormick v. Allstate Ins. Co.*, 475 S.E.2d 507 (W. Va. 1996); *Hadorn v. Shea*, 456 S.E.2d 194 (W. Va. 1995); *Marshall v. Saseen*, 450 S.E.2d 791 (W. Va. 1994); *Jordan v. Nat'l Grange Mut. Ins. Co.*, 393 S.E.2d 647 (W. Va. 1990); *Thomas v. State Farm Mut. Auto. Ins. Co.*, 383 S.E.2d 786 (W. Va. 1989); *Hayseeds*, 352 S.E.2d at 74.

<sup>15</sup> 352 S.E.2d 73 (W. Va. 1986).

<sup>16</sup> See *Hayseeds*, 352 S.E.2d at 74; *Thomas*, 383 S.E.2d at 786-87.

<sup>17</sup> See *Hayseeds*, 352 S.E.2d at 74. See also *Jordan*, 393 S.E.2d at 647; *Thomas*, 383 S.E.2d at 786-87.

Supreme Court of Appeals was presented with different types of first party claims, the court extended the concept outside of the property damage realm to all first party insurance claims.<sup>18</sup>

Finally, Part IV of the Note will discuss the major issues and questions presented by the Supreme Court of Appeals development of the substantially prevailed doctrine. The discussion will focus on the Supreme Court of Appeals' failure to adopt a purely mathematical calculation for determining if the insured has substantially prevailed. In addition, the two standards that the Supreme Court of Appeals has enunciated for determining the amount of attorney's fees to be awarded will be analyzed. Finally, Part IV will propose specific solutions to the issues and questions left unanswered by the Supreme Court of Appeals' decisions in *Hayseeds* and its progeny.

## II. BACKGROUND

### A. *Classifications of Insurance*

Insurance law contains a multitude of classifications.<sup>19</sup> Some classifications, such as fire, health, and homeowners insurance, are based on the nature of the risk against which the policyholder is being insured.<sup>20</sup> Insurance can also be classified according to the parties who seek recovery under the policy. Classification based on the parties seeking recovery is referred to as first party or third party insurance.

Many times the classification of insurance impacts the rights or remedies the claimant or the insured has under the insurance policy in question.<sup>21</sup> For example, in West Virginia the insured generally is entitled to recover from his or

---

<sup>18</sup> See *Marshall*, 450 S.E.2d at 797 (extending substantially prevailed damages to uninsured and underinsured motorist claims); *Hadorn*, 456 S.E.2d at 196 (confirming implication in *Marshall* that substantially prevailed damages are available in all first party insurance claims). See also *Jordan*, 393 S.E.2d at 647 (extending substantially prevailed damages to cases where the insured and insurer ultimately settle).

<sup>19</sup> See ROBERT E. KEETON & ALAN I. WIDISS, *INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES* § 1.4, at 16 (Student ed. 1988).

<sup>20</sup> *Id.* § 1.5(a)(1), at 18.

<sup>21</sup> *Id.* § 1.4, at 16-17.

her insurer the actual cash value<sup>22</sup> of damages incurred to his or her property.<sup>23</sup> Accordingly, the insured who has procured collision insurance on his or her automobile is entitled to recover from the insurer the actual cash value of damages incurred to the insured vehicle.<sup>24</sup> However, when an individual purchases fire insurance on real estate located in West Virginia, actual cash value is not used to determine the recovery under the policy. Instead, under West Virginia's valued policy law<sup>25</sup> the insured is entitled to recover the full face value of the insurance policy in the event the real estate is completely destroyed by fire.<sup>26</sup> As an example, an insured with a \$100,000 fire policy on their home recovers the full face value of the policy if the home is completely destroyed by fire. The actual cash value of the damage to the home is irrelevant and the insured recovers the full \$100,000 regardless of the value of the home or the cost to repair it.

The classification relevant to substantially prevailed damages is first party insurance.<sup>27</sup> As the Supreme Court of Appeals of West Virginia noted in *Marshall v. Saseen*, first party insurance occurs when an "insurance carrier has directly contracted with the insured to provide coverage and to reimburse *the insured* for his or her damages up to the policy limits."<sup>28</sup> Therefore, in the first party insurance context, it is the insured, not a third party claimant, who seeks to recover under the policy. Even though first party insurance is a classification unto itself, it can be further classified by the nature of the risk being insured against.<sup>29</sup> The most

---

<sup>22</sup> Generally, the actual cash value is the difference between the fair market value of the property immediately before the damage and the fair market value after the damage. KEETON & WIDISS, *supra* note 19, § 3.9(a), at 208, n.2. In many cases the actual cash value will be the cost necessary to repair the damaged property. See *Checker Leasing, Inc. v. Sorbello*, 382 S.E.2d 36, 37 (W. Va. 1989); *Jarrett v. E.L. Harper & Son, Inc.*, 235 S.E.2d 362 (1977).

<sup>23</sup> See *Board of Educ. of Hancock County v. Hartford Fire Ins. Co.*, 19 S.E.2d 448, 450 (W. Va. 1942).

<sup>24</sup> See *Sorbello*, 382 S.E.2d at 38, n.1.

<sup>25</sup> See W. VA. CODE § 33-17-9 (1996). See also *Filiatreau v. Allstate Ins. Co.*, 358 S.E.2d 829, 832 (W. Va. 1987) (stating that the valued policy statute may result in a windfall for the insured).

<sup>26</sup> If the fire causes only a partial loss to the real estate in question, the insured is entitled to recover for the total amount of the partial loss. See W. VA. CODE § 33-17-9 (1996).

<sup>27</sup> See *Marshall v. Saseen*, 450 S.E.2d 791, 797 (W. Va. 1994); *Hadorn v. Shea*, 456 S.E.2d 194, 196 (W. Va. 1995).

<sup>28</sup> *Marshall*, 450 S.E.2d at 797 (emphasis added).

<sup>29</sup> Third party insurance can also be further classified according to the risk being insured against. One of the most common forms of third party insurance is liability insurance on an automobile.

common forms of first party insurance are disability, homeowners, health, fire, and uninsured/underinsured motorist.<sup>30</sup>

Third party insurance, on the other hand, involves the insurance carrier, the insured, and generally a third party claimant. In contrast to first party insurance where the insured attempts to collect under the policy, in third party insurance a party other than the insured seeks to recover proceeds under the insurance policy. Here, the third party or her property has usually been injured by the insured, and the third party is making a claim for damages under the insurance policy purchased by the insured.

The distinction between first party insurance and third party insurance is readily apparent when the ramifications of insurance company misconduct are observed from both standpoints.<sup>31</sup> For example, in the third party context if the insured's liability carrier refuses to settle with an injured claimant and the claimant sues to collect damages, the possibility arises that the insured may become personally liable to the claimant if a judgment in excess of the applicable policy limits is returned.<sup>32</sup> This occurs because an insurance carrier is only liable up to policy limits for a judgment against its insured, and any verdict in excess of those limits may subject the insured to personal liability for the excess amount.<sup>33</sup> Therefore, in the third party insurance context an insurer's refusal to settle has the potential to expose the insured to personal liability.

As discussed previously, in the first party insurance context it is the insured who seeks to recover damages from the insurer. Therefore, first party insurance does not have the potential to expose the insured to personal liability when the insurer refuses to settle a claim.<sup>34</sup> However, when an insurer refuses to settle with its insured and the insured must file suit to enforce his or her rights under the

---

<sup>30</sup> Uninsured and underinsured motorist coverage is frequently referred to as a hybrid of first party and third party insurance. See KEETON & WIDISS, *supra* note 19, § 4.9(e), at 399. For purposes of substantially prevailed damages, however, the Supreme Court of Appeals of West Virginia has stated that uninsured and underinsured motorist coverages are first party insurance. See *Marshall*, 450 S.E.2d at 797.

<sup>31</sup> See KEETON & WIDISS, *supra* note 19, § 7.9, at 906.

<sup>32</sup> *Id.* See also 2 ROWLAND H. LONG, THE LAW OF LIABILITY INSURANCE § 5A.01, at 5A-2 (1997).

<sup>33</sup> *But see* Shamblin v. Nationwide Mut. Ins. Co., 396 S.E.2d 766, 776 (W. Va. 1990) (adopting a negligence-strict liability standard for allowing the insured to recover from the insurer the amount of a jury verdict which is in excess of the applicable policy limits).

<sup>34</sup> See KEETON & WIDISS, *supra* note 19, § 7.9, at 906-07.

policy, the insured still suffers harm.<sup>35</sup> For example, the insured must hire an attorney in order to receive the benefits of the insurance contract and, even when the attorney is successful in achieving recovery for the insured, the insured's net proceeds are reduced by the amount paid to the attorney.<sup>36</sup> In these situations, the insured suffers a financial loss equal to the amount of the attorney's fees.<sup>37</sup> In addition, the insured may suffer other economic harm associated with the delay in receiving the policy proceeds from the insurer. For instance, if a shop owner's store is destroyed and the store cannot be rebuilt immediately because the insurer has refused to pay, the shop owner loses not only the sales she would have had during the period the insurer refused to pay, but she may also suffer irreparable harm to her reputation and goodwill.

### B. *The American Rule*

In the United States, the general rule is that each party to a civil action bears its respective attorney's fees regardless of the outcome of the litigation.<sup>38</sup> The premise underlying this American rule<sup>39</sup> is that a party should not be deterred from enforcing her legal rights because of the possibility that the opponents' attorney's fees will be levied against her.<sup>40</sup> The routine awarding of attorney's fees to a prevailing party could have the chilling effect of limiting access to the judicial system to those parties best able to afford the imposition of the opposing party's attorney's fees.<sup>41</sup>

Although the general rule is that attorney's fees are not awarded to the prevailing party, there are exceptions to this rule. For example, there are numerous federal statutes that specifically allow an award of attorney's fees to the prevailing

---

<sup>35</sup> *Id.* at 907.

<sup>36</sup> *See Aetna Cas. & Sur. Co. v. Pitrolo*, 342 S.E.2d 156, 160 (W. Va. 1986).

<sup>37</sup> *Id.*

<sup>38</sup> *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975).

<sup>39</sup> This is referred to as the American rule because it is in direct contrast to the practice in England where the prevailing litigant is routinely awarded his or her attorney's fees. *See Alyeska*, 421 U.S. at 247; *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967).

<sup>40</sup> *See Fleischmann Distilling*, 386 U.S. at 718; *Sally-Mike Properties v. Yokum*, 365 S.E.2d 246, 249-50 (W. Va. 1986); *Daily Gazette Company, Inc. v. Canady*, 332 S.E.2d 262, 265 (W. Va. 1985).

<sup>41</sup> *See Fleischmann Distilling*, 386 U.S. at 718; *Yokum*, 365 S.E.2d at 249-50; *Daily Gazette*, 332 S.E.2d at 265.



party.<sup>42</sup> In addition, the United States Supreme Court has carved out its own exceptions to the American rule: a litigant may recover attorney's fees from the opposing party when the opponent has deliberately acted in violation of a court order,<sup>43</sup> when the opponent has proceeded in bad faith,<sup>44</sup> and when the prevailing party's success creates a common fund for a class.<sup>45</sup>

For many years, the American rule equally applied in insurance law.<sup>46</sup> Therefore, when an insurer refused to settle with its insured and the insured subsequently prevailed at trial, the insured could not recover his or her attorney's fees.<sup>47</sup> In response to this inequity, many state legislatures enacted statutes that allow the insured to recover attorney's fees when the insurer wrongfully or unreasonably refuses to pay an insured's claim.<sup>48</sup> In addition, the courts in many jurisdictions have carved out their own exceptions to the American rule, and the insured may now recover attorney's fees when the insurance company has refused payment in bad faith or has acted in an oppressive manner.<sup>49</sup>

Generally, West Virginia has followed the American rule and not allowed

<sup>42</sup> See generally Packers & Stockyards Act, 7 U.S.C. § 210(f) (1994); Perishable Agricultural Commodities Act, 7 U.S.C. § 499(g)(b) (1994); Clayton Act, 15 U.S.C. § 15(a) (1994); Securities Exchange Act of 1934, 15 U.S.C. § 78i(e) (1994); Truth in Lending Act, 15 U.S.C. § 1640(a) (1994); Organized Crime Control Act of 1970, 18 U.S.C. § 1964(c) (Supp. I 1995); Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b) (1994); Norris-LaGuardia Act, 29 U.S.C. § 107(e) (1994); Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1365(d) (1994); Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b) (1994); Noise Control Act of 1972, 42 U.S.C. § 4911(d) (1994); Fair Housing Act of 1968, 42 U.S.C. § 3612(p) (1994); Merchant Marine Act of 1936, 46 U.S.C. app. § 1227 (1994); FED. R. CIV. P. 37(a)(4); FED. R. CIV. P. 37(c)(2).

<sup>43</sup> See *Fleischmann Distilling*, 386 U.S. at 718; *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399 (1923).

<sup>44</sup> See *F.D. Rich Co., Inc. v. United States ex rel. Indus. Lumber Co.*, 417 U.S. 116, 129 (1974); *Vaughan v. Atkinson*, 369 U.S. 527 (1962).

<sup>45</sup> See *Hall v. Cole*, 412 U.S. 1, 13 (1973).

<sup>46</sup> See *KEETON & WIDISS*, *supra* note 19, § 7.7(a), at 866.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* § 7.7(b), at 868. See generally ARK. CODE ANN. § 23-79-208 (Michie 1997); FLA. STAT. ANN. § 626.911 (West 1996); IDAHO CODE § 41-1839(1) (1991 & Supp 1996); MO. ANN. STAT. § 375.420 (West 1991); NEB. REV. STAT. § 44-359 (1993); S.C. CODE ANN. § 38-59-40 (Law Co-op. 1997).

<sup>49</sup> See generally *Montgomery Ward & Co., Inc. v. Pacific Indem. Co.*, 557 F.2d 51 (3rd Cir. 1977); *Mustachio v. Ohio Farmers Ins. Co.*, 118 Cal. Rptr. 581 (Cal. Ct. App. 1975); *Christian v. American Home Assurance Co.*, 577 P.2d 899 (Okla. 1977).

prevailing parties in a civil action to recover their attorney's fees. More specifically, the rule in West Virginia is that in the absence of a statute or judicially created rule, the prevailing party is not entitled to collect attorney's fees from the other party.<sup>50</sup> However, the Supreme Court of Appeals of West Virginia has carved out various exceptions that allow the prevailing party to recover their attorney's fees from the other side. For example, in *Nelson v. West Virginia Public Employees Insurance Board*, the Supreme Court of Appeals held that a prevailing party is entitled to recover attorney's fees when the losing party "has acted in bad faith, vexatiously, wantonly, or for oppressive reasons."<sup>51</sup> Moreover, in *Aetna Casualty & Surety Co. v. Pitrolo*,<sup>52</sup> the Supreme Court of Appeals allowed an insured to recover attorney's fees from an insurer when the insurer filed a declaratory judgment action to determine its duty to defend the insured.<sup>53</sup> Finally, the Supreme Court of Appeals' decision in *Hayseeds, Inc. v. State Farm Fire & Casualty* creates another exception to the American rule: under certain circumstances, an insured may recover attorney's fees, as well as extra-contractual damages, that result from the insurer's failure to pay a claim.<sup>54</sup>

### III. SUBSTANTIALLY PREVAILED DAMAGES

#### A. *Hayseeds, Inc. v. State Farm Fire & Casualty*

The landmark West Virginia case which established the substantially prevailed doctrine is *Hayseeds, Inc. v. State Farm Fire & Casualty*.<sup>55</sup> Substantially prevailed damages, sometimes called "*Hayseeds* damages," are restricted to first

---

<sup>50</sup> See *Yost v. Fuscaldo*, 408 S.E.2d 72, 78 (W. Va. 1991); *Old Nat'l Bank of Martinsburg v. Hendricks*, 383 S.E.2d 502, 507 (W. Va. 1989); *Sally-Mike Properties v. Yokum*, 365 S.E.2d 246, 248 (W. Va. 1986); *Hechler v. Casey*, 333 S.E.2d 799, 815 (W. Va. 1985); *Daily Gazette Co., Inc. v. Canady*, 332 S.E.2d 262, 263 (W. Va. 1985); *Nelson v. West Virginia Pub. Employees Ins. Bd.*, 300 S.E.2d 86, 91 (W. Va. 1982).

<sup>51</sup> *Nelson*, 300 S.E.2d at 92.

<sup>52</sup> 342 S.E.2d 156 (W. Va. 1986).

<sup>53</sup> The impact *Pitrolo* had on West Virginia's version of the American rule is discussed in more detail in Part III of the Note.

<sup>54</sup> See *Hayseeds*, 352 S.E.2d 73 (W. Va. 1986).

<sup>55</sup> *Id.* at 73.

party<sup>56</sup> insurance claims<sup>57</sup> in which an insurance company has denied or undervalued an insured's claim and as a result the insured is forced to institute a lawsuit.<sup>58</sup> If an insured is deemed to have substantially prevailed under the guidelines set forth in *Hayseeds* and its progeny, he or she is entitled to recover from the insurer his or her attorney's fees, as well as the other consequential damages<sup>59</sup> incurred in vindicating his or her claim.

Although *Hayseeds* established the substantially prevailed doctrine, and made it possible for the insured to recover his or her attorney's fees, this was not the first time the Supreme Court of Appeals of West Virginia had held that an award of attorney's fees was appropriate in an insurance action.<sup>60</sup> For example, in *Aetna Casualty & Surety Co. v. Pitrolo*, the Supreme Court of Appeals held: "Where a declaratory judgment action is filed to determine whether an insurer has a duty to defend its insured under its policy, if the insurer is found to have such a duty, its insured is entitled to recover reasonable attorney's fees arising from the declaratory judgment litigation."<sup>61</sup> Although the *Pitrolo* holding was limited by its facts to declaratory judgment actions, the *Hayseeds* court relied heavily on the reasoning of that opinion in extending the recovery of attorney's fees to the first party insurance context.<sup>62</sup>

In *Hayseeds*, the insureds sued their insurance carrier to recover the proceeds of a fire policy they had procured on their restaurant.<sup>63</sup> The carrier refused payment on the policy because the insureds were suspected of starting the fire that

---

<sup>56</sup> See *supra* Part II.A for a discussion on insurance classifications.

<sup>57</sup> Because the facts of *Hayseeds* only dealt with a property damage claim, the principle of substantially prevailed damages originally applied only to such damage claims. See *Hayseeds*, 352 S.E.2d at 74. The Supreme Court of Appeals later extended substantially prevailed damages to all first party insurance. See *infra* Part III.D for the discussion on *Marshall v. Saseen*, 450 S.E.2d 791 (W. Va. 1994).

<sup>58</sup> See *Marshall*, 450 S.E.2d at 797; *Hadorn v. Shea*, 456 S.E.2d 194, 196 (W. Va. 1995).

<sup>59</sup> The consequential damages allowed are damages for annoyance and inconvenience and damages for net economic loss. See *Hayseeds*, 352 S.E.2d at 80.

<sup>60</sup> See *Aetna Cas. & Sur. Co. v. Pitrolo*, 342 S.E.2d 156 (W. Va. 1986).

<sup>61</sup> *Id.* at 159-60.

<sup>62</sup> See *Hayseeds*, 352 S.E.2d at 79.

<sup>63</sup> *Id.* at 74.

had destroyed the restaurant.<sup>64</sup> The insureds brought suit in the Circuit Court of Mason County and the jury awarded \$150,000 in compensatory damages, \$69,000 in attorney's fees and consequential damages, and \$50,000 in punitive damages.<sup>65</sup> On appeal, the Supreme Court of Appeals of West Virginia held: "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."<sup>66</sup>

In affirming the jury verdict for compensatory damages, attorney's fees, and consequential damages,<sup>67</sup> the court discussed numerous factors in support of its decision. First, the court noted that insurance contracts are "substantially different" in form than contracts between two parties of equal bargaining power.<sup>68</sup> Second, the court noted that many other organizations and individuals, such as lenders and suppliers, also rely on the insured's agreement with the insurer to provide protection in the case of a fire or other damage to the insured's property.<sup>69</sup> Third, the court acknowledged that the use of the American rule was appropriate in many circumstances, but in the insurance context it was not applicable because third parties rely on the insured's policy and the insured is usually in an unequal bargaining position with the insurer.<sup>70</sup>

It should also be noted that the *Hayseeds* court adopted a strict liability approach to awarding substantially prevailed damages.<sup>71</sup> Bad faith or good faith on the part of the insurer, in denying or undervaluing the insured's claim, is irrelevant to an award of substantially prevailed damages.<sup>72</sup> Again relying on *Aetna Casualty*

---

<sup>64</sup> *Id.* at 75.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 74, Syl. Pt. 1.

<sup>67</sup> The jury award for punitive damages was reversed, but the Supreme Court of Appeals did espouse a standard for determining when such damages are appropriate in a first party insurance claim. See *Hayseeds*, 352 S.E.2d at 80-81.

<sup>68</sup> *Id.* at 78.

<sup>69</sup> *Id.* at 77.

<sup>70</sup> *Id.* at 78-79.

<sup>71</sup> *Id.* at 79.

<sup>72</sup> See *Hayseeds*, 352 S.E.2d at 79.

& *Surety Co. v. Pitrolo*<sup>73</sup>, the *Hayseeds* court stated “it [is] of little importance whether an insurer contests an insured’s claim in good or bad faith. In either case, the insured is out his consequential damages and attorney’s fees.”<sup>74</sup>

The *Hayseeds* court also discussed the amount of attorney’s fees the insured may recover when he or she substantially prevails. Accordingly, the *Hayseeds* court held:

Presumptively, reasonable attorneys’ fees in this type of case are one-third of the face amount of the policy, unless the policy is either extremely small or enormously large. This follows from the contingent nature of most representation of this sort and the fact that the standard contingent fee is 33 percent. But when a claim is for under \$20,000 or for over \$1,000,000 (to take numbers that are applicable in 1986) the court should then inquire concerning what “reasonable attorneys’ fees” are.<sup>75</sup>

Although the court did not specifically state the standard for what reasonable attorney’s fees are when the claim is under \$20,000 or over \$1,000,000, *Pitrolo* again gives some guidance in this inquiry. *Pitrolo* provides twelve factors<sup>76</sup> for a

---

<sup>73</sup> *Aetna Cas. & Sur. Co. v. Pitrolo*, 342 S.E.2d 156 (W. Va. 1986).

<sup>74</sup> *Hayseeds*, 352 S.E.2d at 79.

<sup>75</sup> *Id.* at 80.

<sup>76</sup> *Pitrolo* provides in pertinent part:

Where attorney’s fees are sought against a third party, the test of what should be considered a reasonable fee is determined not solely by the fee arrangement between the attorney and his client. The reasonableness of attorney’s fees is generally based on broader factors such as: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

*Pitrolo*, 342 S.E.2d at 157, Syl. Pt. 4.

court to consider in determining an appropriate award of attorney's fees.<sup>77</sup>

*B. The Substantially Prevailed Standard*

The second significant case in the substantially prevailed line is *Thomas v. State Farm Mutual Automobile Insurance Co.*<sup>78</sup> In *Thomas*, the Supreme Court of Appeals of West Virginia reiterated the damages available to an insured who has substantially prevailed, while also enunciating what appears to be a standard for determining if the insured has substantially prevailed.

In *Thomas*, the insured was involved in an automobile accident that resulted in damage to a truck used in her business.<sup>79</sup> After the accident, the insured submitted damage estimates to the insurer in the amount of \$10,231.05.<sup>80</sup> The insurer countered with a damage estimate of \$4,960.72 and offered to settle for that amount.<sup>81</sup> The insured refused this offer and filed suit in the Circuit Court of Mercer County asking for \$10,465.50 in property damage as well as \$359 for towing charges.<sup>82</sup> At trial, the jury awarded the insured \$10,168 for property damages and towing and storage, as well as \$3,045 for economic loss.<sup>83</sup> In addition, the circuit court awarded attorney's fees equal to one-third of the jury verdict.<sup>84</sup>

On appeal, the Supreme Court of Appeals of West Virginia upheld the circuit court's award of attorney's fees while also giving some indication of what constitutes substantially prevailed. The Supreme Court of Appeals held that "[t]he

---

<sup>77</sup> See also *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974); *Farley v. Zapata Coal Corp.*, 281 S.E.2d 238, 244 (W. Va. 1981); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(B) (1981).

<sup>78</sup> 383 S.E.2d 786 (W. Va. 1989).

<sup>79</sup> See *Id.* at 787.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 787-88.

<sup>83</sup> See *Thomas*, 383 S.E.2d at 787-88.

<sup>84</sup> *Id.* at 787-88. In a footnote to the *Thomas* opinion the Supreme Court of Appeals acknowledged that the circuit court had awarded attorney's fees equal to one-third of the jury verdict instead of one-third of the policy amount. See *Thomas*, 383 S.E.2d at 788, n.2. It appears from the language of the footnote that the *Thomas* court was holding, *sub silentio*, that when a jury verdict less than the policy limits is returned, the appropriate attorney's fees to be awarded are one-third of such verdict.

phrase ‘substantially prevails’ relates to the status of the property damage claim at the time the negotiations broke down.’<sup>85</sup> The *Thomas* court elaborated on this statement by further holding:

The question of whether an insured has substantially prevailed against his insurance company on a property damage claim is determined by the status of the negotiations between the insured and the insurer *prior* to the institution of the lawsuit. Where the insurance company has offered an amount materially below the damage estimates submitted by the insured, and the jury awards the insured an amount approximating the insured’s damage estimates, the insured has substantially prevailed.<sup>86</sup>

Taking these two statements together, it is apparent that the last demand by the insured and the last offer by the insurer, prior to suit being instituted, are key in determining if the insured has substantially prevailed. Furthermore, once the last demand and offer have been identified, it must be determined if the insurer’s last offer was materially below the damage estimates of the insured and if the jury verdict approximates such damage estimates.

Given the amounts offered by the insurer and the damage estimates of the insured, it was clear that the insured in *Thomas* had substantially prevailed.<sup>87</sup> However, as discussed in more detail in Part IV of this Note, the standard espoused by the *Thomas* court is too vague and elastic for efficient application in many cases. The facts of every case may not always be as clear-cut as those presented in *Thomas*, and it may not be so readily apparent that the insured has substantially prevailed. For example, when the jury verdict is in a middle range between the insured’s damage estimates and the insurer’s last offer, the standard espoused in *Thomas* is not easily applied and it is not clear if the insured has substantially prevailed. In these situations, it can be argued that the verdict approximates the insurer’s last offer, not the insured’s last demand. Moreover, the standard set forth in *Thomas* creates an all or nothing proposition for the insurer and insured. The insured receives either all of the attorney’s fees or nothing at all. Likewise, the insurer either pays no attorney’s fees or it pays the full amount. When there is a

---

<sup>85</sup> *Thomas*, 383 S.E.2d at 790.

<sup>86</sup> *Id.* at 787, Syl. Pt. 2 (emphasis added).

<sup>87</sup> The damage estimates of the insured were only one hundred dollars more than the jury verdict so it would appear clear that the verdict approximated the insured’s damage estimates. See *Thomas*, 383 S.E.2d at 788.

close call as to whether the insured substantially prevailed, it does not appear equitable that one party is declared the clear winner and the other party is declared the clear loser.

### C. *Substantially Prevailed in the Settlement Context*

The third important case in the substantially prevailed line is *Jordan v. National Grange Mutual Insurance Co.*<sup>88</sup> The decision in *Jordan* represented the most significant extension of the substantially prevailed doctrine up to this point. In *Jordan*, the insureds sought recovery under an insurance policy covering their business.<sup>89</sup> After the business was destroyed by fire, the insureds demanded payment of the policy limits of \$40,000.<sup>90</sup> The insurer rejected the demand and denied any recovery under the policy based on the insured's alleged concealment and misrepresentation of material facts surrounding the fire.<sup>91</sup> The insureds then filed suit seeking the policy limits.<sup>92</sup> Before going to trial, however, a settlement was reached for the policy limits of \$40,000. After settlement, the insureds refused to cash the settlement check and insisted that the insurer pay their attorney's fees.<sup>93</sup> The insurer moved to have the settlement enforced, claiming that the \$40,000 was full satisfaction of all claims.<sup>94</sup> The trial court agreed with the insurer and held that the insureds were required to "accept the \$40,000 settlement as full satisfaction of all claims, including reasonable attorney's fees."<sup>95</sup>

On appeal, the Supreme Court of Appeals of West Virginia reversed the trial court and held that the insureds were entitled to attorney's fees even though the parties ultimately settled. In extending the substantially prevailed doctrine to cases where the insurer and insured ultimately settle, the *Jordan* court held:

---

<sup>88</sup> 393 S.E.2d 647 (W. Va. 1990).

<sup>89</sup> *See id.* at 648.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 548.

<sup>92</sup> *Id.*

<sup>93</sup> *See Jordan*, 393 S.E.2d at 648.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 649.



An insured “substantially prevails” in a property damage action against his or her insurer when the action is *settled* for an amount equal to or approximating the amount claimed by the insured immediately prior to the commencement of the action, as well as when the action is concluded by a jury verdict for such an amount. In either of these situations, the insured is entitled to recover reasonable attorney’s fees from his or her insurer, as long as the attorney’s services were necessary to obtain payment of the insurance proceeds.<sup>96</sup>

After *Jordan*, it is no longer necessary for the insured to proceed to trial and receive a jury verdict in order to recover substantially prevailed damages. It should be noted, however, that unlike the insured who substantially prevails at trial, the insured who ultimately settles his or her claim must meet two additional requirements before attorney’s fees can be awarded. First, the settlement must not contain an express waiver of the insured’s right to seek attorney’s fees. More specifically, “[t]he recovery of reasonable attorney’s fees must be explicitly waived by the parties to bar the court from awarding such fees in those types of cases where reasonable attorney’s fees are otherwise recoverable.”<sup>97</sup> Second, the insured must show that the attorney’s services were necessary in achieving the settlement.<sup>98</sup> The fact that an attorney was hired and a settlement was reached is not dispositive in the settlement context.<sup>99</sup> “[T]he insured must show that but for his or her attorney’s services such settlement would not have been reached, in light of the undue delay in investigating the claim.”<sup>100</sup>

In addition to the issues discussed above, the *Jordan* court also set forth “the guidelines for the recovery of reasonable attorney’s fees in the context of a *settlement* with one’s own insurer.”<sup>101</sup> These guidelines are the twelve factors set out in *Aetna Casualty & Surety Co. v. Pitrolo*.<sup>102</sup> After the decision in *Jordan*, there

---

<sup>96</sup> *Id.* at 647-48, Syl. Pt. 1 (emphasis added).

<sup>97</sup> *Id.* at 651, n.3.

<sup>98</sup> *Jordan*, 393 S.E.2d at 652.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 652.

<sup>101</sup> *Id.* at 648 (emphasis added).

<sup>102</sup> 342 S.E.2d 156 (W. Va. 1986). *See also supra* note 76.

are two standards for determining attorney's fees in a substantially prevailed case. If the case results in a jury verdict, the one-third presumption enunciated in *Hayseeds, Inc. v. State Farm Fire & Casualty*<sup>103</sup> applies. If the case is ultimately settled, however, the twelve factors espoused in *Pitrolo* determine the amount of attorney's fees to be awarded.<sup>104</sup>

#### D. Substantially Prevailed Outside of Property Damage Claims

The next significant extension of the substantially prevailed doctrine occurred in *Marshall v. Saseen*.<sup>105</sup> The significance of *Marshall*, in the substantially prevailed context,<sup>106</sup> is that the Supreme Court of Appeals of West Virginia transported the principles espoused in *Hayseeds* to uninsured and underinsured motorist claims. Moreover, the court's detailed discussion of first party insurance contained strong implications that the substantially prevailed doctrine applied to all such first party claims.<sup>107</sup>

In *Marshall*, the insureds were injured in an automobile accident with another driver.<sup>108</sup> The insureds filed suit against the other driver, but before the case went to trial the other driver's liability carrier settled for the policy limits of \$50,000.<sup>109</sup> The insureds then demanded policy limits of \$100,000 from their underinsured motorist carrier.<sup>110</sup> The insurer responded with a \$10,000 counter-offer which was rejected.<sup>111</sup> The case went to trial on the underinsured motorist

---

<sup>103</sup> 352 S.E.2d 73 (W. Va. 1986).

<sup>104</sup> See *Jordan*, 393 S.E.2d at 652.

<sup>105</sup> 450 S.E.2d 791 (W. Va. 1994).

<sup>106</sup> Although beyond the scope of this article, it should be noted that the Supreme Court of Appeals also used *Marshall* to hold that the third-party "bad faith" principles enunciated in *Shamblin v. Nationwide Insurance Co.*, 396 S.E.2d 766 (W. Va. 1990), applied to first party insurance cases. See *Marshall*, 450 S.E.2d at 798. See also Flaherty et al., *supra* note 11, at 291.

<sup>107</sup> See *Marshall*, 450 S.E.2d at 796-97. See also *Hadorn v. Shea*, 456 S.E.2d 194, 196 (W. Va. 1995).

<sup>108</sup> *Id.* at 793.

<sup>109</sup> *Id.* at 793-94.

<sup>110</sup> *Id.* at 794.

<sup>111</sup> *Id.*

claim and the jury awarded the plaintiffs \$226,711.80.<sup>112</sup>

Prior to being presented with the facts of *Marshall*, the Supreme Court of Appeals only had applied the substantially prevailed doctrine to property damage cases.<sup>113</sup> When presented with the facts of *Marshall*, however, the court did not hesitate to extend the substantially prevailed doctrine to uninsured and underinsured motorist coverage. Although the *Marshall* court “recognized” that the substantially prevailed doctrine only had been applied in property damage cases, the court went on to state that there was “no reason why these principles should not apply to uninsured and underinsured motorist coverage.”<sup>114</sup> The court’s rationale was that uninsured and underinsured motorist coverage, as with property damage coverage, is first party insurance in which “the insurance carrier has directly contracted with the insured to provide coverage and to reimburse the insured for his or her damages up to the policy limits.”<sup>115</sup>

#### E. *A Missed Opportunity*

The next significant case in the substantially prevailed line is *Hadorn v. Shea*.<sup>116</sup> The facts in *Hadorn* are similar to those of *Marshall* in that the insured was involved in an automobile accident with a second vehicle and subsequently sued the other driver.<sup>117</sup> As in *Marshall*, the insured settled with the liability carrier prior to trial and began to negotiate with the underinsured motorist carrier.<sup>118</sup> During the course of negotiations, the insurer offered \$15,000 and then \$22,500 to settle the claim. The insured rejected the two offers and both times demanded the policy limits of \$300,000. The insurer refused to pay policy limits, and the insured proceeded to trial where she was awarded \$90,000 by the jury.<sup>119</sup> The insured then

---

<sup>112</sup> *Id.*

<sup>113</sup> See *Hayseeds*, 352 S.E.2d 73; *Thomas*, 383 S.E.2d 786; *Jordan*, 393 S.E.2d 647.

<sup>114</sup> *Marshall*, 450 S.E.2d at 797.

<sup>115</sup> *Id.*

<sup>116</sup> 456 S.E.2d 194 (W. Va. 1995).

<sup>117</sup> *Id.* at 196.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

moved for attorney's fees, but the circuit court denied the motion.<sup>120</sup>

The decision of the Supreme Court of Appeals in *Hadorn* stands for three distinct propositions. First, the *Hadorn* court reaffirmed the applicability of the substantially prevailed doctrine to uninsured and underinsured motorist coverage.<sup>121</sup> The Supreme Court of Appeals also confirmed the implication in *Marshall* that the substantially prevailed doctrine applied to all first party insurance claims.<sup>122</sup>

Second, the *Hadorn* court transported the "but for" test, first enunciated in *Jordan v. National Grange Mutual Insurance Co.*<sup>123</sup> to the jury verdict context. After restating the "but for" test set forth in *Jordan*, the *Hadorn* court held:

It is not clear that "but for" Ms. Hadorn's attorney's services she would not have been able to get State Farm to settle for \$90,000 without proceeding to trial. It is upon this basis that we affirm the ruling of the Circuit Court and decline to award costs and expenses, including attorneys' fees against State Farm.<sup>124</sup>

In support of this holding, the court noted that had the insured actively participated in negotiations with the insurer, it may not have been necessary to proceed to trial.<sup>125</sup> Although it is not entirely clear after *Hadorn* if the insured must actively participate in negotiations to preserve his or her claim for substantially prevailed damages, it is clear that the insured must make some showing that the attorney's services were necessary in ultimately vindicating the claim.

Finally, and most importantly, the *Hadorn* court gave some guidance on the standard to be used in determining if the insured has substantially prevailed. More specifically, the court held that "[t]o determine if a plaintiff has substantially prevailed, we compare the plaintiff's last settlement demand before filing suit to the amount awarded by the jury."<sup>126</sup> The *Hadorn* court added that if the jury verdict is closer to the insurer's last settlement offer than it is to the insured's last demand,

---

<sup>120</sup> *Id.*

<sup>121</sup> See *Hadorn*, 456 S.E.2d at 196. See also *Marshall*, 450 S.E.2d at 791.

<sup>122</sup> See *Hadorn*, 456 S.E.2d at 196.

<sup>123</sup> 393 S.E.2d 647 (W. Va. 1990).

<sup>124</sup> 456 S.E.2d at 197-98.

<sup>125</sup> See *id.* at 199.

<sup>126</sup> *Id.* at 197.

this highly favors the insurer.<sup>127</sup> In giving this guidance, however, the Supreme Court of Appeals stressed that “[w]e are not basing this decision on a purely mathematical calculation . . . .”<sup>128</sup> The court noted that even when the jury verdict is closer to the insurer’s last settlement offer than it is to the insured’s last demand, “the insurer does not automatically prevail,” and the insured can still “show other circumstances justifying a contrary result.”<sup>129</sup> The court did not elaborate as to what those other circumstances might be.

*F. A Clarification of Annoyance and Inconvenience*

The next important case in the substantially prevailed line is *McCormick v. Allstate Insurance Co.*<sup>130</sup> In *McCormick*, the insured was involved in a collision with another vehicle and sought to recover damages under his own insurance policy.<sup>131</sup> The insurer valued the insured’s vehicle, a total loss, at \$3100, and, after making certain adjustments, the insured was sent a check for \$1429.50.<sup>132</sup> Unhappy with the settlement, the insured filed suit to collect additional damages under the policy.<sup>133</sup> At trial, the insured was awarded \$595.00 for the insurer’s underpayment of his damages and \$400 for the loss of use of the automobile.<sup>134</sup> The insured filed a post-trial motion for attorney’s fees,<sup>135</sup> but the circuit court denied the motion.<sup>136</sup>

The significance of *McCormick* is found in the clarification by the Supreme Court of Appeals of what damages an insured may collect for aggravation and inconvenience. Without much discussion on the issue, the *McCormick* court held:

---

<sup>127</sup> *Id.* at 198.

<sup>128</sup> *Id.*

<sup>129</sup> *Hadorn*, 456 S.E.2d at 198.

<sup>130</sup> 475 S.E.2d 507 (W. Va. 1996).

<sup>131</sup> *Id.* at 511.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 512.

<sup>135</sup> The insured also moved the court to present a punitive damage claim to the jury. *See Hadorn*, 456 S.E.2d at 512.

<sup>136</sup> *Id.*

Damages for aggravation and inconvenience in a claim under *Hayseeds, Inc. v. State Farm Fire & Casualty*, 177 W. Va. 323, 352 S.E.2d 73 (1986), 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.<sup>137</sup>

What the Supreme Court of Appeals made clear in *McCormick* is that the insured's damages for aggravation and inconvenience are not limited to the loss of use of their property during the period in which the insurer refuses to pay the claim. Instead, the insured may also recover for the aggravation and inconvenience that results from negotiating with a recalcitrant insurer.<sup>138</sup>

It should also be noted that the *McCormick* court drew a sharp distinction between the cause of action established in *Hayseeds, Inc. v. State Farm Fire & Casualty*<sup>139</sup> and the insured's private cause of action under the West Virginia Unfair Trade Practices Act.<sup>140</sup> The court made it clear that the failure of one cause of action did not necessarily mean the failure of the other.<sup>141</sup> The court's basis for the distinction was that the *Hayseeds* cause of action was based on common law and the Unfair Trade Practices Act cause of action was based on statute.<sup>142</sup>

#### G. *More Discussions on Attorney's Fees*

The final case in the substantially prevailed line is *Landmark Baptist Church v. Brotherhood Mutual Insurance Co.*<sup>143</sup> In *Landmark Baptist*, the insured brought suit against its insurer when the two parties were unable to negotiate a settlement regarding storm damage to the insured's church building.<sup>144</sup> At trial, the

---

<sup>137</sup> *Id.* at 509, Syl. Pt. 4.

<sup>138</sup> *Id.*

<sup>139</sup> 352 S.E.2d 73 (W. Va. 1986).

<sup>140</sup> See W. VA. CODE § 33-11-4 (1996). See also *Jenkins v. J.C. Penney Cas. Ins. Co.*, 280 S.E.2d 252 (W. Va. 1981).

<sup>141</sup> See *McCormick*, 475 S.E.2d at 514.

<sup>142</sup> See *id.* at 519.

<sup>143</sup> 484 S.E.2d 195 (W. Va. 1997).

<sup>144</sup> *Id.* at 197.

jury returned a verdict for the insured in the amount of \$83,400.<sup>145</sup> The insured filed a post-trial motion for attorney's fees, and the circuit court awarded the insured \$49,357.20.<sup>146</sup> The insurer appealed to the Supreme Court of Appeals of West Virginia on the sole issue of the reasonableness of the attorney's fees awarded.<sup>147</sup>

The Supreme Court of Appeals decision in *Landmark Baptist* is noteworthy both for what was stated in the court's opinion and what was left out of the opinion. After reiterating the holding of *Hayseeds*, the court stated that the standard for determining reasonable attorney's fees is the twelve factors set forth in *Pitrolo*.<sup>148</sup> Even though the case had concluded in the circuit court with a jury verdict, the Supreme Court of Appeals made no mention of the one-third presumption that was enunciated in *Hayseeds*. It would appear that after the decision in *Landmark Baptist*, either the one-third presumption or the twelve factors may be used to determine the insured's reasonable attorney's fees in a case culminating with a jury verdict. Which standard is used will likely be dictated by how the insured chooses to present his or her request for attorney's fees.

The *Landmark Baptist* court also discussed the trial court's discretion in determining the amount of attorney's fees to be awarded the insured. More specifically, the Court held that the trial court is endowed with wide discretion in determining the amount of attorney's fees to be awarded to the insured.<sup>149</sup> The court added that on appeal the trial court's determination on attorney's fees will be overturned only if it is clear that the trial court has abused its discretion.<sup>150</sup>

#### IV. PROPOSAL

##### A. *Why Not a Purely Mathematical Calculation?*

In *Thomas v. State Farm Mutual Automobile Insurance Co.*,<sup>151</sup> the Supreme

---

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 196.

<sup>148</sup> 484 S.E.2d at 198.

<sup>149</sup> *Id.* at 199.

<sup>150</sup> *Id.*

<sup>151</sup> 383 S.E.2d 786 (W. Va. 1989).

Court of Appeals of West Virginia first set forth the standard for determining if the insured has substantially prevailed.<sup>152</sup> In *Hadorn v. Shea*,<sup>153</sup> the Supreme Court of Appeals took the opportunity to elaborate on the standard enunciated in *Thomas*.<sup>154</sup> In discussing this standard, however, the *Hadorn* court expressly rejected the use of a purely mathematical calculation for determining if the insured has substantially prevailed.<sup>155</sup> Moreover, the Supreme Court of Appeals introduced additional uncertainty to the standard by stating that when “an insurer offers a nominal amount that ends up being closer to the amount awarded by the jury than that demanded by the plaintiff, the insurer does not automatically prevail, but such a circumstance highly favors the insurer and the insured must show other circumstances justifying a contrary result.”<sup>156</sup>

In refusing to adopt a purely mathematical calculation for determining if the insured has substantially prevailed, the Supreme Court of Appeals of West Virginia missed the perfect opportunity to introduce consistency, impartiality, and fairness in to the substantially prevailed doctrine. Therefore, it is submitted that the Supreme Court of Appeals of West Virginia adopt a purely mathematical calculation for determining if the insured has substantially prevailed. More specifically, a relative, sliding-scale model should be adopted for determining if the insured has substantially prevailed.

As with the current substantially prevailed standard, a relative model would award attorney’s fees to the insured based on the amount offered by the insurer, the amount demanded by the insured, and the amount recovered at trial or in settlement. A relative model, however, would award the insured a percentage of his or her attorney’s fees based on the relationship between the insurer’s offer, the insured’s demand, and the amount ultimately recovered by the insured. Using these three figures, a percentage would be calculated to determine what portion of the insured’s attorney’s fees are to be awarded. A hypothetical example illustrates the implementation of this relative model. On January 1, 1998, insured’s building is damaged by a hurricane. After lengthy negotiations, the insurer and insured are unable to settle the matter, so the insured files suit to recover her damages. At trial, the jury awards the insured \$150,000 in damages. After a post-trial motion for attorney’s fees is filed, the circuit court determines that the insurer’s last offer, prior

---

<sup>152</sup> See *supra* Part III.B for discussion on *Thomas*.

<sup>153</sup> 456 S.E.2d 194 (W. Va. 1995).

<sup>154</sup> See *supra* Part III.E for discussion on *Hadorn*.

<sup>155</sup> See *Hadorn*, 456 S.E.2d at 198

<sup>156</sup> *Id.*



to suit being filed, was \$100,000, and the insured's last demand was \$200,000. Based on these figures, the circuit court takes the difference between the jury verdict and the insurer's last offer, \$50,000, and divides that figure by the amount of the insurer's last offer, \$100,000. The court would then apply the percentage arrived at in performing this calculation, in this case fifty percent, to the amount of attorney's fees the insured incurred. In the hypothetical, the insured would receive half of the attorney's fees she incurred in litigating the matter.<sup>157</sup> In circumstances in which the jury verdict is below the last offer by the insurer, no attorney's fees would be awarded. Similarly, when the jury verdict is above the insured's last demand, the insured would be entitled to all of her attorney's fees.<sup>158</sup>

The use of a relative model provides several benefits. First, a relative model eliminates the winner takes all proposition associated with the current standard. The insured is awarded a percentage of his or her attorney's fees relative to the degree of vindication received at trial or in settlement. Second, the model provides a concrete standard that is open to little interpretation. At the conclusion of the litigation, the parties to the suit clearly know the outcome of the attorney's fees issue and there is a reduced need for review of the circuit court's decision. Finally, the model promotes predictability in the application of the substantially prevailed standard. The insurer and insured can estimate the amount they have at risk more accurately prior to deciding whether to proceed to trial and make better informed decisions concerning the insurance claim.

#### B. *What are Reasonable Attorney's Fees?*

Once it is determined that the insured has substantially prevailed, the focus turns to the proper amount of attorney's fees to be awarded. As discussed previously, there are currently two standards for determining the amount of attorney's fees to be awarded. If the insured has substantially prevailed in the settlement context, the twelve factors set forth in *Aetna Casualty & Surety Co. v. Pitrolo*,<sup>159</sup> are utilized.<sup>160</sup> When the insured substantially prevails at trial, however,

---

<sup>157</sup> See *infra* Part IV.B for discussion on determining the amount of reasonable attorney's fees.

<sup>158</sup> The relative model would be equally applicable in situations where the insured and insurer ultimately settle before going to trial.

<sup>159</sup> 342 S.E.2d 156 (W. Va. 1986).

<sup>160</sup> See *Jordan v. Nat'l Grange Mut. Ins. Co.*, 393 S.E.2d 647, 652 (W. Va. 1990). The use of the twelve factors is also mandated in the jury verdict context when the insurance policy in question is below \$20,000 or above \$1,000,000. See *Hayseeds, Inc. v. State Farm Fire & Cas.*, 352 S.E.2d 73, 80 (W. Va. 1986).

either the one-third presumption enunciated in *Hayseeds, Inc. v. State Farm Fire & Casualty*<sup>161</sup> may be used or the twelve factors of *Pitrolo* may be used.<sup>162</sup>

The use of the one-third presumption raises some concerns which should be addressed. Chief among these concerns is the fact that the use of the one-third presumption is directly contrary to most West Virginia case law on the subject of awarding attorney's fees. In *Hayseeds*, Justice Neely expressly founded the one-third presumption on the fact that most property damage claims are taken on a contingency fee basis and the standard contingency fee is thirty-three percent.<sup>163</sup> In *Pitrolo*, however, the Supreme Court of Appeals expressly held that "the test of what should be considered a reasonable fee is determined not *solely* by the fee arrangement between the attorney and his client. The reasonableness of attorney's fees is generally based on broader factors . . ." <sup>164</sup> The Supreme Court of Appeals reiterated these principles when it adopted the twelve factors of *Pitrolo* for substantially prevailed cases in which the insured settles with the insurer.<sup>165</sup>

It is submitted that the better rule for determining attorney's fees, in both the jury verdict and settlement context, is the *Pitrolo* standard. This conclusion is based on several factors. First, the twelve factors permit the trial court to award attorney's fees based on the insured's actual damages, as well as the type and amount of work actually performed by the attorney. The insured and the attorney should be made to substantiate the time and effort expended on the case so that an accurate assessment of the insured's damages is determined. Moreover, the face value of the insured's policy is irrelevant to the actual damages sustained and, in many cases, creates the potential for a windfall to the insured and attorney.

Second, the use of the twelve factors in all substantially prevailed cases provides a fair and uniform framework for awarding reasonable attorney's fees. Once it is determined that the insured has substantially prevailed, the inquiry proposed by the *Pitrolo* standard is begun, and the court can determine a fair and reasonable amount of attorney's fees. Although the fee arrangement between the insured and the attorney is part of the inquiry, it is not the sole determining factor. The court must consider numerous other factors in awarding the insured his or her attorney's fees. Moreover, the use of one standard, the *Pitrolo* standard, provides uniformity and consistency in the awarding of attorney's fees. The same standard,

---

<sup>161</sup> *Hayseeds*, 352 S.E.2d at 80.

<sup>162</sup> *See supra* Part III.G.

<sup>163</sup> *See id.*

<sup>164</sup> *Pitrolo*, 342 S.E.2d at 161 (emphasis added) (citation omitted).

<sup>165</sup> *See Jordan*, 393 S.E.2d at 652.

and the same twelve factors, are used to determine the insured's recovery, and it is irrelevant whether he or she went to trial or ultimately settled.

## V. CONCLUSION

The Supreme Court of Appeals of West Virginia has taken a major step toward leveling the playing field between insurers and insureds. The development of the substantially prevailed doctrine provides serious financial ramifications for insurance companies that do not proceed fairly in the claims settlement process. It is suggested, however, that certain refinements are needed to provide a more consistent, uniform, and even-handed application of the doctrine. A purely mathematical calculation for determining if the insured has substantially prevailed is one such refinement for providing consistency, uniformity, and fairness. Adopting the twelve factors of *Aetna Casualty & Surety Co. v. Pitrolo*,<sup>166</sup> for use in all substantially prevailed cases, will also increase uniformity and consistency as well as provide a more rational basis for awarding attorney's fees. Taken together, these suggestions preserve the underlying premise of the substantially prevailed doctrine, to protect insureds from recalcitrant insurers, while also ensuring fair and consistent outcomes for all parties involved.

*Richard L. Costella\**

---

<sup>166</sup> 342 S.E.2d 156 (W. Va. 1986).

\* The author would like to thank the attorneys at Martin & Seibert, L.C., Martinsburg, West Virginia and Professor Thomas C. Cady, of the West Virginia University College of Law, for their assistance in the preparation of this Note. A special thanks also is given to my family, especially Lawrence, for all their love and support.