Appellate Court Reiterates Cap on Section 155 Penalties

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Section 155 of the Illinois Insurance Code (215 ILCS 5/155(1)) provides in pertinent part as follows:

> 215 ILCS 5/155(1)
> (1) In any action by or against a company wherein there is in issue the liability of a company on a policy or policies 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) 25% of the amount which the court or jury finds such party is entitled to recover against the company, exclusive of all costs;
>
> (b) $25,000;
>
> (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.

Consider this factual scenario. On September 1, 1992, Plaintiff is involved in an automobile accident which results in serious injuries. Plaintiff settles with the other driver's liability carrier for its policy limits of $100,000.00. Plaintiff then submits a claim for uninsured motorist benefits with his own carrier. Plaintiff's carrier offers $20,000.00 which Plaintiff refuses. The case proceeds to arbitration and Plaintiff receives an award of $674,000.00. Plaintiff then files a suit against his insurance carrier seeking attorney's fees, costs, and statutory penalties pursuant to Section 155. Plaintiff requests penalties totaling $654,000.00, the difference between the arbitration award and what his carrier offered prior to the arbitration hearing. The insurer files a Motion to Strike Plaintiff's Complaint, alleging that Section 155 caps statutory penalties at $25,000.00. You are the trial court - how do you rule on the Motion?

These are essentially the facts of the case of Thomas Nelles v. State Farm Fire & Casualty Company (No. 1--00--1159), in which the First District Appellate Court was called upon to address the issue of whether Section 155 caps statutory penalties at $25,000.00, or whether a trial judge, in his discretion, may utilize sections (a) or (c) of Section 155 to justify an award in excess of the $25,000.00 allowed under Section (b) of the Act.

The trial judge denied State Farm's motion finding that Section 155 did not cap the statutory penalty at $25,000.00 and that a trial court does have discretionary authority to award penalties under any of the three options provided in the statute. State Farm then filed a Motion to Certify the question for an interlocutory appeal and the Court agreed to review the issue.

On appeal, Nelles argued that had the Illinois Legislature wished to cap the statutory penalty, it could have added language specifically doing so at the time the Act was initially drafted, or at the time of the three amendments to the statute: in 1967 (increasing the cap on attorney's fees to

$1,000.00), in 1977 (removing the cap on attorney's fees completely), or in 1986 (when the Legislature increased the statutory penalty to $25,000.00). Nelles further argued that since no case had specifically addressed the issue of whether Section 155 imposes a cap on statutory penalties, the trial court was within its discretion in interpreting the statute.

Refreshingly, in a unanimous opinion authored by Justice Burke, the First District Appellate Court categorically rejected Nelles' position and ruled that Section 155 does cap the statutory penalty at $25,000.00. In reaching its decision, the Appellate Court relied not only on the unambiguous language of the statute itself, but also upon the legislative history of the statute and the Illinois Supreme Court decision in Cramer v. Insurance Exchange Agency, 174 Ill.2d 513, 675 N.E.2d 897 (1996). In Cramer, the Illinois Supreme Court, in dicta, stated that the remedy outlined in Section 155 defined the "limits of this award". As an aside, the court also noted that the lack of case authority addressing the issue was not supportive of the trial court's discretionary authority but, rather, indicative of the fact that litigants and courts had unanimously interpreted the statute as limiting Section 155 penalties to $25,000.00.

Of some interest, the Court agreed that a trial court is free to choose any of the formulas in a computing statutory penalty under Section 155. The Court specifically ruled, however, that whichever method of computation the trial court selects, it may not render an award in excess of the maximum of $25,000.00 provided in section (b). To rule otherwise would render section (b) entirely superfluous. As such, the Appellate Court agreed with State Farm's argument that if paragraph (b) was not intended to be a maximum, the Legislature would have no reason to include a static or fixed figure in the statute.

Also of interest, the court stated as follows:

> We believe that paragraphs (a) and (c) still serve a viable purpose and are not rendered superfluous by our decision. Trial courts may employ, based on the specific facts of the case before them, either of the formulas to fix the amount of a penalty where, for example, the court has determined that a penalty of $25,000.00 is excessive. Thus, our interpretation does not render any of the three options void.

This language raises the issue of whether a trial court does or does not have discretion to award up to $25,000.00 where the penalties calculated under sections (a) or (c) of the statute would be substantially less than $25,000.00. For example, in a first party case which results in an award of $10,000.00 and the trial court subsequently determines that the company acted vexatiously or in bad faith, would the trial court's award of a statutory penalty under section (a) be limited to $2,500.00 (i.e., 25% of $10,000.00), or could the court award up to a maximum of $25,000.00?

This issue was tangently addressed in the Fifth District Appellate Court of Millers Mutual Insurance Association of Illinois v. House, 675 N.E.2d, 286 Ill.App.3d 378 (1997). In House, the Plaintiff made a settlement demand of $100,000.00, the amount she deemed the limits of her uninsured motorist coverage with Millers Mutual. Millers, on the other hand, offered $40,000.00, the amount it deemed to be the limits of the policy. (This discrepancy was due to a dispute which developed concerning whether the Plaintiff had been notified of her right to increase her uninsured motorist coverage prior to the accident out of which the claim arose). House rejected the offer and Millers filed a Complaint for Declaratory Judgment seeking a judicial declaration as to the amount of

the uninsured motorist coverage provided by the policy. House counterclaimed, seeking $100,000.00 plus additional penalties under Section 155. The trial court ordered reformation of the policy, increasing the uninsured motorist coverage limits to $100,000.00 and, in a separate hearing, entered an order finding that Millers had unreasonably delayed payment of the $40,000.00 which it initially contended was the policy limit. The court also assessed a statutory penalty of $25,000.00. Millers appealed arguing that the maximum amount recoverable under Section 155 was $10,000.00, the lesser of the three alternative computations available under the statute. In rejecting this argument, the Fifth District Appellate Court held that since the statute does not contain language suggesting that the court is required to choose damages in the least amount possible, it was not inclined to disturb the trial court award of the statutory maximum of $25,000.00.

We submit, however, that the holding of the Fifth District Appellate Court in the House decision (like the Plaintiff's argument in Nelles) flies in the face of the explicit wording and intent of the statute itself. Specifically, Section 155 clearly states that the trial court may assess a statutory penalty in "an amount not to exceed any one of the following amounts:". The fact that the Illinois Legislature then provided three alternative computations clearly expresses its intention of limiting the trial court to the computation which will result in the least award to the Plaintiff. If, in fact, the Legislature intended to empower the trial court with the authority to award a maximum of $25,000.00 in any case, regardless of the amount at issue, it would have drafted the statute to simply allow the trial court discretionary authority to enter an award in any amount not exceeding $25,000.00. There would be no need to include the alternative computations provided in sections (a) and (c).

Although the First District Appellate Court did not specifically address this issue in the Nelles case, it is our belief that if presented with this issue, both the First District Appellate Court and the Illinois Supreme Court would interpret Section 155 to require the trial court to select a computation which results in the least award possible under the Act.

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