

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 33898

**CERTAIN UNDERWRITERS AT LLOYD'S, LONDON AS SUBSCRIBING
POLICY NO.: B0711, Plaintiffs Below,**

v.

**PINNOAK RESOURCES, LLC AND PINNACLE MINING CO., LLC,
Defendants Below.**

**CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, AS SUBSCRIBING
POLICY NO.: B0711, Appellants**

APPELLANTS' REPLY BRIEF

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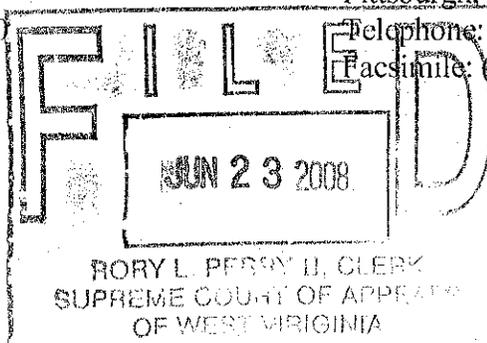


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Introduction

Heritage and Talbot file this Reply Brief to respond to PinnOak's central argument, that the Settlement Agreement "was intended to fully and finally resolve all dealings between the parties."¹ A cursory examination of the Settlement Agreement shows that this statement concerning its scope reflects PinnOak's wishful thinking.

In contrast to PinnOak's wishful thinking, the actual terms of the Settlement Agreement state that it applies to all claims arising out of a series of methane intentions that began in the Pinnacle Mine on August 31, 2003 **and** were asserted in a specific lawsuit (i.e. Docket Number 04-C-30). This means that the Settlement Agreement is **not** a general release of "all dealings between the parties," as PinnOak wishes.

Heritage and Talbot agree that West Virginia law favors the enforcement of settlement agreements. But such law cannot be stretched to encompass matters totally outside the Settlement Agreement's stated scope.

I. The Standard of Review is *De Novo* (not Abuse of Discretion)

PinnOak argues that this Court should employ an abuse of discretion standard when reviewing a Circuit Court's order granting summary judgment for enforcing a settlement agreement.² In particular, PinnOak relies on two cases: Berardi v. Meadowbrook Mall Co., 212 W.Va. 377, 572 S.E.2d 900 (2002), and Devane v. Kennedy, 205 W.Va. 519, 519 S.E.2d 622 (1999). But PinnOak fails to mention that, in each of those two cases, the Circuit Court was asked to **set aside** a settlement agreement (on either grounds of duress in Berardi or on the grounds of insolvency of the original settling carrier in DeVane).

¹ See Appellee Brief, p.3.

² See Appellee Brief, p.9.

In contrast with the above, the instant case does not concern an effort to set aside the settlement agreement. Rather, the parties asked the Circuit Court to *interpret* the Settlement Agreement (i.e. does it cover Heritage and Talbot's claim for premium under Policy B0711?). Thus, the issue before the Court is the Circuit Court's interpretation of the Settlement Agreement and its grant of summary judgment. These are both matters of law, which are reviewed *de novo*. See, e.g., Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994), citing Drewitt v. Pratt, 999 F.2d 774 (4th Cir. 1993) ("The sole issue in this appeal is whether summary judgment was appropriate. A circuit court's entry of summary judgment is reviewed *de novo*.").

II. PinnOak Cannot Stretch West Virginia's Public Policy Beyond the Settlement Agreement's Express Terms

There is no question that West Virginia law encourages the settlement of disputes. See, e.g., Sanders v. Roselawn Memorial Gardens, 152 W.Va. 91, 159 S.E.2d 784 (1986); McDowell County Bd. Of Educ. v. Stephens, 191 W.Va. 711, 447 S.E.2d 912 (1994). West Virginia's public policy upholds the settlement of disputes if the settlement agreement was fairly made and not in violation of a law or public policy. See, e.g., Board of Educ. Of McDowell Co. v. Zando, Martin & Milstead, Inc., 182 W. Va. 597, 390 S.E.2d 796 (1990).

Heritage and Talbot do **not** dispute the above law. Heritage and Talbot also agree that the Settlement Agreement is enforceable, and thus did **not** ask the Circuit Court to overturn or set aside the Settlement Agreement.

The only dispute concerns the Settlement Agreement's scope. Heritage and Talbot seek an interpretation of the Settlement Agreement's plain terms. In contrast, PinnOak seeks an interpretation that ignores the Agreement's plain terms and expands its scope to resolve "all dealings between the parties."

III. The Parties Limited the Settlement Agreement to All Claims Arising out of the “Loss”—a Defined Term

A cursory review of the Settlement Agreement shows that it was **not** a general release of “all dealings between the parties.” Rather, the parties limited the Settlement Agreement’s scope to claims arising out of the “Loss” **and** asserted in PinnOak’s “Coverage Action.”

The Settlement Agreement does not apply to Heritage and Talbot’s claim for premium under Policy B0711 for two reasons. First, the premium claim arose out of PinnOak’s failure to pay premium—not out of the “Loss.” Second, Heritage and Talbot’s claim for premium was **not** asserted in the Coverage Action.

The Settlement Agreement’s plain terms did not extend to Heritage and Talbot’s right to the premium for Policy B0711. Thus, the Circuit Court should not have granted PinnOak summary judgment.

A. The Settlement Agreement Defined “Loss” to Only Include PinnOak’s Insurance Claim Under Policies AN0300337 and AN0300338, as well as PinnOak’s Claims of Bad Faith, Arising Out of the Methane Ignitions at the Pinnacle Mine Beginning on August 31, 2003

The Settlement Agreement’s definition of the word “Loss” in Recital 6, quoted below, shows that it only applied to PinnOak’s insurance and bad faith claims related to one or more methane ignitions beginning on August 31, 2003 and subsequent claim handling and investigation:

6. WHEREAS, a dispute exists over **PinnOak’s claim for business interruption and other losses under the aforementioned policies of insurance**, as well as **PinnOak’s claims of bad faith** by Insurers and VeriClaim relating to and/or arising out of one or more methane ignitions/explosions at the Pinnacle Mine beginning on August

31, 2003 (hereinafter referred to as the “Loss”) and the subsequent claim handling and investigation.³ [emphasis added]

Review of the above shows that the Settlement Agreement defined “Loss” as PinnOak’s “claim for business interruption and other losses... as well as PinnOak’s claims of bad faith...” Nothing in the Settlement Agreement referred to any dispute or controversy arising concerning the premium due for Policy B0711.

In Recital Paragraphs 9 and 10, the Settlement Agreement memorialized the parties’ intentions in executing the Settlement Agreement:

9. WHEREAS, PinnOak desires to fully and globally release Insurers and VeriClaim from all of PinnOak’s claims relating to the Loss **and** asserted in the lawsuit styled *PinnOak Resources, LLC et al. v. Certain Underwriters at Lloyd’s, London, et al.*, Case No. 5:04-CV-0192 (the “Coverage Action”), and Insurers and VeriClaim agree to the same, including a release for any and all causes of action arising out of the subsequent claim handling and investigation.

10. WHEREAS, Insurers and VeriClaim desire to release PinnOak from all of Insurers’ claims relating to the **Loss and** asserted in the Coverage Action, and PinnOak agrees to the same.⁴ [emphasis supplied]

Review of Recitals 9 and 10 shows that the Settlement Agreement applied to PinnOak and any Insurer claims relating to the August 31, 2003 loss **and** asserted in PinnOak’s coverage action. But Heritage and Talbot’s claims for the premium due under Policy B0711 was **not** a claim asserted in the Coverage Action.

Lastly, PinnOak relies on several of the Settlement Agreement’s operative provisions, *i.e.* the “Merger,” “Anti-reimbursement and Contribution,” “General Release,” and “Indemnification” clauses. Heritage and Talbot do **not** dispute the validity of these clauses. But each of the clauses only apply to the agreed definition of “Loss” in

³ See White Aff., Ex. 3. Settlement Agreement, ¶6.

⁴ See Ex. 3 to White Aff., Settlement Agreement, ¶¶1-10.

the Settlement Agreement. And, the definition of “Loss” does **not** mention, refer to, incorporate, or even allude to the payment of premiums under Policy B0711.

B. The Settlement Agreement did not Mention Policy B0711

PinnOak argues that it is of no significance that the Settlement Agreement mentions other policies (i.e. Policies AN0300337 and AN0300338), but not Policy B0711.⁵ But nothing could be further from the truth.

The agreed definition of “Loss” in the Settlement Agreement states that a dispute existed under the “**aforementioned** policies of insurance.” The Settlement Agreement, in Recitals Paragraphs 4 and 5, quoted below, identifies the “aforementioned policies of insurance” as the policies that were in effect during **2003-2004** (i.e. Policies AN0300337 and AN0300338—but not Policy B0711):

4. WHEREAS, Broker Policy No. AN0300337 insured PinnOak for fifty five percent of \$30,000,000 excess of \$20,000,000, and Broker Policy No. AN0300338 insured PinnOak for one-hundred percent of \$25,000,000 in excess of \$50,000,000, pursuant to the terms and conditions stated in the policies and endorsements thereto.

5. WHEREAS, Certain Underwriters at Lloyd’s, London (specifically, the members of Syndicate Nos. 2020, 1183 [i.e. Talbot], 1200 [i.e. Heritage], 3000, 102, 609, 510, 435, 623 and 2623,) subscribed to Broker Policy No. AN0300337, and Certain Underwriters at Lloyd’s, London (specifically, the members of Syndicate Nos. 33, 1200, 1183, 1414, 2020, 623 and 2623) subscribed to Broker Policy No. AN0300338 (these subscribing syndicate members being collectively referred to herein as the “Insurers”), and VeriClaim, Inc. (“VeriClaim”) was the designated loss adjuster under the Policies.

The “aforementioned policies” did **not** include Policy B0711, which was in effect from 2004-2009.⁶ Thus, the Settlement Agreement does **not** refer to Policy B0711, or any claims arising out of Policy B0711.

⁵ See Appellee Brief, at pp.27-29.

The parties should be allowed to continue a business relationship, and enforce subsequent contracts resulting from that business relationship, while still settling an existing dispute such as the August 31, 2003 loss. The parties executing the Settlement Agreement did nothing more than release claims arising out of the August 31, 2003 loss and which were asserted in the Coverage Action. It therefore follows that Heritage and Talbot kept their right to collect premium under a separate contract of insurance.

C. PinnOak Failed to Submit Any Evidence as to the Settlement Agreement's Intended Scope

In addressing a settlement agreement's scope, this Court has held that "[a] release ordinarily covers only such matters as may fairly be said to have been within the contemplation of the parties at the time of its execution." Woodrum v. Johnson, 210 W.Va. 762, 769, 559 S.E.2d 908, 915 (2001) (quoting Syl. pt. 2, Conley v. Hill, 115 W.Va. 175, 174 S.E. 883 (1934), overruled on other grounds, Thornton v. Charleston Area Med. Center, 158 W.Va. 504, 213 S.E.2d 102 (1975)). Here, PinnOak failed to submit any evidence as to what they contemplated. In fact, there is not one affidavit from a PinnOak employee.

PinnOak could have submitted evidence that they contemplated Policy B0711 during settlement, but did not. Thus, PinnOak can only attack the evidence submitted by Heritage and Talbot. First, PinnOak argues that Simon White's affidavit was inadequate because of his lack of personal knowledge.⁷ But Simon White's affidavit stated that he was "**personally familiar** with the Slip [Policy B0711]."⁸ The Affidavit provided, in detail by detail, how the premium was to be paid under Policy B0711. White's Affidavit also attested to how the Settlement Agreement did **not** resolve the premium claim. Nevertheless,

⁶ Subject to whether PinnOak renewed it each year.

⁷ See Appellee Brief, pp.22-23.

⁸ See White Aff., ¶2.

PinnOak attacked White's affidavit on the basis that he lacked personal knowledge. The Circuit Court agreed with PinnOak, but this was precipitous in light of White's representation that he was personally familiar with Policy B0711 and because his deposition had not occurred.

Second, PinnOak attacks Les Rock's Affidavit for being late. But this Court will appreciate that Heritage and Talbot pointed out to the Circuit Court that Rock testified that he did not work for Heritage at the time of the Court's consideration of summary judgment.⁹ What's more, Rock's affidavit was still submitted to the Court *before* the Court held a hearing on Heritage and Talbot's motion to reargue, and *before* the Court issued a ruling on that motion.

In summary, PinnOak failed to submit any evidence that the Settlement Agreement contemplated the premiums due for Policy B0711. Thus, PinnOak can only attack Heritage and Talbot's evidence. But this attack does not change either the fact that White's affidavit was based on personal knowledge or that Rock's affidavit was submitted before the Circuit Court's ruling.

1. Heritage and Talbot's Evidence that they Contemplated the Premium Claim

Here, the parties specifically defined the matters that were contemplated as part of the Settlement Agreement that resolved the prior litigation arising out of the August 31, 2003 methane ignitions. But the Settlement Agreement makes no mention of Policy No. B0711 and there is nothing within the language of the Settlement Agreement to support the idea that the agreement intended to resolve claims arising under that policy. In contrast with the forgoing, the existence of a specific definition for the **Loss** combined with a specific

⁹ See Hearing Transcript, pp.14-16; and see Rock Aff., ¶1.

omission of any reference to Policy B0711 reflects careful draftsmanship. This Court should consider that draftsmanship because it reflects Heritage and Talbot's contemplation/understanding that they were **not** agreeing to a resolution of "all dealing between the parties"—as PinnOak now wishes.

In summary, PinnOak did not submit any evidence that they contemplated that the Settlement Agreement resolved claims under Policy B0711. In contrast, this Court should consider the Settlement Agreement's careful draftsmanship as evidence that Heritage and Talbot did contemplate their claim under Policy B0711. And, having contemplated that claim, the Settlement Agreement was drafted to specifically identify the policies at issue (i.e. not Policy B0711) and then limit the release to a defined term—**Loss**. In view of the forgoing, it was clear error for the Circuit Court to conclude otherwise and this error should now be reversed.

**D. If PinnOak Wanted to Resolve "All Dealings between the Parties,"
then they Could Have Used a Standard General Release**

This Court will appreciate that the parties did **not** execute a settlement agreement with a standard general release. Instead, the parties limited the release to claims arising out of the "Loss" **and** asserted in the Coverage Action. In contrast, a standard general release would have used the language PinnOak used in its brief (i.e. that the Settlement Agreement "fully and finally resolve[s] all dealings between the parties...."¹⁰).

If the parties wanted to resolve all dealings between them then, simply put, the Settlement Agreement would have said so. There are many stock general release forms that could accomplish such a resolution. Instead, PinnOak, Heritage and Talbot artfully crafted a Settlement Agreement using ten (10) recital paragraphs. These ten recital paragraphs:

¹⁰ See Appellee Brief, p.3.

- described PinnOak's insurance claim,
- identified specific insurance policies,
- omitted any reference to Policy B0711,
- defined the scope of the release, and
- identified the parties' intentions concerning settlement.

The above recital paragraphs do not support PinnOak's argument that the Settlement Agreement "was intended to fully and finally resolve all dealings between the parties."¹¹

The Settlement Agreement says no such thing.

CONCLUSION

PinnOak's arguments on appeal are erroneous for the following two central reasons:

- The issue before the Court is the Circuit Court's interpretation of the Settlement agreement and its grant of summary judgment. These are both matters of law, which are reviewed *de novo*.
- PinnOak's central argument, that the Settlement Agreement "was intended to fully finally resolve all dealings between the parties,"¹² reflects PinnOak's wishful thinking. The Settlement Agreement's express language states that it applies to all claims arising out of a series of methane intentions in the Pinnacle Mine that began on August 31, 2003 **and** were asserted in a specific lawsuit (i.e. Docket Number 04-C-30). This means that the Settlement Agreement did **not** constitute a general release of "all dealings between the parties"—as PinnOak wishes.

¹¹ See Appellee Brief, p.3.

¹² See Appellee Brief, p.3.

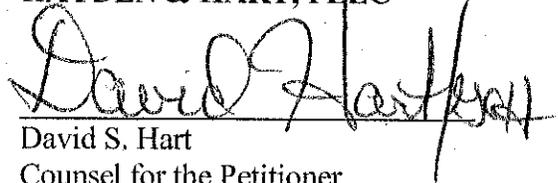
WHEREFORE, the Plaintiffs below and Appellants herein, Certain Underwriters at Lloyd's, London, subscribing to Policy B0711, pray for the following:

- That the April 11, 2007 and June 21, 2007 Orders entered by the Circuit Court of Wyoming County be overturned on the basis that the Settlement Agreement does not extend to premium obligations in Policy B0711; or, in the alternative,
- That this matter be remanded to the Circuit Court of Wyoming County for further proceedings as deemed necessary based upon the relief awarded to the Appellants; and
- For such other and further relief as the Court may deem just.

**CERTAIN UNDERWRITERS AT
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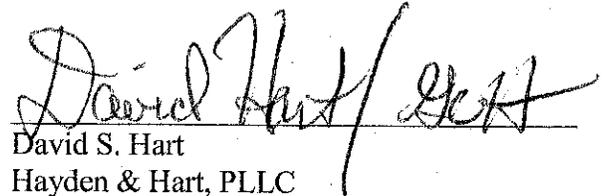
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CERTIFICATE OF SERVICE

I, David S. Hart, hereby certify that I have served a true and correct copy of the foregoing Appellants' Reply Brief upon the following parties or their counsel, by United States mail, first-class, postage prepaid, on the June 23, 2008, to the following addresses:

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