The Section 155 Remedy

By James T. Nyeste

Section 155 of the Illinois Insurance Code (215 ILCS 5/155) creates an extracontractual remedy for "vexatious and unreasonable" conduct by insurers, providing:

> Attorney fees. (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:
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> (a) 25% of the amount by which the court or jury finds such party is entitled to recover against the company, exclusive of 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.

The statute, originally enacted in 1937 and amended on several occasions since, has presented a number of issues for insurers and policyholders to litigate. In Marcheschi v. Illinois Farmers Insurance Co., 298 Ill. App. 3d 306 (1st Dist. 1998), the court considered an issue of first impression under the statute and finally resolved an uninsured motorist claim fifteen years after the accident.

In Marcheschi, the court addressed the question of whether Section 155 constitutes a "statutory penalty" so as to be subject to the two-year period of limitations of Section 13-202 of the Code of Civil Procedure. Although a legion of cases refer to Section 155 as a "penalty," no case had actually decided whether the statute is penal or remedial. The Marcheschi court held that Section 155 is a "remedial" provision, not a penalty, and therefore not subject to the two-year limitations period. The Marcheschi case is also of interest for its rulings affirming the statutory award, prejudgment interest, and attorney's fees.

Plaintiff Marcheschi suffered severe injuries in an automobile accident with an uninsured motorist on December 9, 1983. Illinois Farmers Insurance Company promptly paid Marcheschi $25,000 which was the limit of his uninsured motorist coverage. However, Marcheschi was a member of a class action lawsuit which resulted in his insurance policy being reformed and the uninsured coverage limit being increased from $25,000 to $100,000. Following the class action, Marcheschi demanded $75,000, or the remainder of the increased policy limit. On October 26, 1988, Illinois Farmers offered $40,000, which Marcheschi declined. Following a physical examination of Marcheschi, Illinois Farmers increased its offer to $50,000, which Marcheschi also declined. Shortly thereafter, on June 29, 1989, Illinois Farmers increased its settlement authority on Marcheschi's claim to $75,000 but did not actually offer this amount to him. On

January 3, 1990, Marcheschi's uninsured motorist claim proceeded to arbitration under the terms of the policy. The arbitration panel assessed Marcheschi's damages at $215,000 and found Illinois Farmers liable for the remaining $75,000 on the policy limit. Illinois Farmers promptly paid the $75,000 to Marcheschi.

More than two years later, on December 22, 1992, Marcheschi brought suit against Illinois Farmers under Section 155 alleging that the insurer vexatiously and unreasonably delayed the settlement of his uninsured motorist claim and seeking attorney's fees for the arbitration and for the instant lawsuit, prejudgment interest, and the statutory award for 25% of the difference between the amount Illinois Farmers offered prior to the arbitration and the amount Marcheschi received after the arbitration. Illinois Farmers brought a Section 2-619 motion to dismiss, asserting that the action was barred by the two-year limitations period of Section 13-202 of the Code of Civil Procedure (735 ILCS 5/13-202), providing:

> Actions for damages for an injury to the person, or for false imprisonment, or malicious prosecution, or for a statutory penalty . . . shall be commenced within 2 years next after the cause of action accrued . . .

The trial court denied the motion to dismiss and, ultimately, awarded Marcheschi $18,750 (25% of $75,000) as the statutory award under Section 155, attorney's fees under Section 155 in the amount of $8,075 relating to the arbitration, and $7,968.75 in prejudgment interest.

Illinois Farmers appealed on the issues: (1) whether Section 155 is a statutory penalty to which the two-year statute of limitations should apply; (2) whether the trial court correctly determined that Illinois Farmers vexatiously and unreasonably delayed the settlement of Marcheschi's uninsured motorist claim; and (3) whether the trial court properly awarded prejudgment interest. Marcheschi cross-appealed on the issue of the attorney's fee award being limited to the arbitration proceeding.

On the issue of first impression, whether Section 155 is a statutory penalty, the court relied principally on McDonald's Corp. v. Levine, 108 Ill. App. 3d 732 (2d Dist. 1982), to hold that Section 155 does not constitute a penalty but instead provides for a remedial cause of action. Although noting that the statute involved in McDonald's and the facts involved there were not analogous to the case at bar, the court held that McDonald's set forth the pertinent distinction between a statutory penalty and a remedy:

> A statute is a statutory penalty if it imposes automatic liability for a violation of its terms and the amount of liability is predetermined by the act and imposed without actual damages suffered by the plaintiff. (Hoffman v. Clark (1977), 69 Ill. 2d 402, 429.) A statute is remedial when it gives rise to a cause of action to recover compensation suffered by the injured person. (Schaefer v. H.B. Green Transportation Line, Inc. (7th Cir. 1956), 232 F.2d 415, 418.)

McDonald's Corp. v. Levine, 108 Ill. App. 3d 732, 738 (2d Dist. 1982).

Applying the McDonald's test to Section 155, the court held that Section 155 is a statutory remedy, as opposed to a penalty, for three reasons. First, the court observed that Section 155 by its terms does not impose absolute liability but instead provides that the court "may allow" as taxable costs reasonable attorney's fees and other costs as well as the additional amount provided by paragraphs 1(a), (b, or (c) of the statute. The court held that the permissive language of Section 155 distinguishes it from a statutory penalty. Second, the liability that may be imposed under Section 155 is not a predetermined amount, an indicator of a statutory penalty, but is awarded in an amount determined in the court's discretion. Lastly, the court noted that Section 155 presumes that the plaintiff has suffered actual damages. In particular, the amount which may be awarded under paragraph 1(a), (b, or (c) of the statute depends on the plaintiff being entitled to recover against the insurance company on the policy. The requirement under Section 155 of actual damages, *i.e.*, an amount recoverable under the insurance policy, prevents the statute from being a penalty.

The court buttressed its holding by looking to Section 155's legislative history and purpose as examined in Cramer v. Insurance Exchange Agency, 174 Ill. 2d 513 (1996). In Cramer, the Illinois Supreme Court noted that the statute "provides an extracontractual remedy to policyholders whose insurer's refusal to recognize liability and pay a claim under a policy is vexatious and unreasonable." *Id.* at 520. The Supreme Court further stated that "[t]he purpose of the statute was to provide a remedy for insurer misconduct." Although the Supreme Court in Cramer also used the word "penalty" to describe the additional amount that may be awarded under paragraph 1(a), (b), or (c) of the statute, the Marcheschi court held that the loose use of the word "penalty" in the Cramer decision did not undermine the analysis that Section 155 is instead a remedy.

As a remedy, as opposed to a penalty, Marcheschi's Section 155 claim was not subject to the two-year limitations period of Section 13-202 of the Code of Civil Procedure (735 ILCS 5/13-202). Accordingly, the court affirmed the trial court's denial of Illinois Farmers' motion to dismiss.

Illinois Farmers also appealed the trial court's finding that its refusal to pay Marcheschi the additional $75,000 under the increased limited of liability for uninsured motorist coverage was vexatious and unreasonable. In particular, Illinois Farmers argued that Marcheschi would not have accepted this amount in settlement without also being offered prejudgment interest, pointing to Marcheschi's demands early in the negotiations for prejudgment interest and his failure to offer any testimony at trial that he would have settled for $75,000 without interest. The appellate court rejected the argument, stating:

> [W]hether plaintiff theoretically would have accepted an offer that did not include prejudgment interest is irrelevant because defendant never made the offer of $75,000 to plaintiff before subjecting plaintiff to unreasonable and vexatious delay. In fact, defendant never offered $75,000 to plaintiff, either with or without prejudgment interest, prior to arbitration.

298 Ill. App. 3d at 313. In deciding whether an insurer is guilty of vexatious and unreasonable conduct under Section 155, the court stated that the trial court should consider the totality of the

circumstances, including the insurer's attitude. *Id.* Employing the abuse of discretion standard of review, the appellate court upheld the trial court's finding of vexatious and unreasonable conduct on the part of Illinois Farmers, given the evidence that Illinois Farmers had internally assessed its liability at $75,000 and had established settlement authority in this amount but failed to offer the $75,000 until the claim went through arbitration. The court affirmed the award of $18,750 (25% of $75,000) as part of the statutory remedy under Section 155.

The court also affirmed the trial court's award of $7,968.75 in prejudgment interest under Section 2 of the Interest Act, 815 ILCS 205/2) which provides in relevant part, "Creditors shall be allowed to receive at the rate of five (5) per centum per annum for all moneys after they become due on any bond, bill, promissory note, or other instrument in writing." The court held that awarding prejudgment interest under the statute is a mater within the sound discretion of the trial court and that in this case the trial court did not abuse its discretion because it is well established that an insurance policy is a written instrument covered by the statute and because the $75,000 amount remaining on the coverage limit was a liquidated amount on which interest could be readily calculated, fulfilling the two principle requirements for the award of interest. Illinois Farmers argued that the trial court erred in calculating the interest from January 1, 1988 rather than from June 28, 1989, the date on which, according to the trial court, Illinois Farmers' failure to pay the $75,000 became vexatious and unreasonable. The appellate court held that it was not an abuse of discretion for the trial court to measure the interest from the earlier date even if the amount of liability was still in dispute at the earlier time, citing Central National Chicago Corp. v. Lumbermens Mutual Casualty Co., 45 Ill. App. 3d 401 (1st Dist. 1977).

Finally, on Marcheschi's cross-appeal, the court affirmed the trial court's award of attorney's fees which was limited to the period from June 28, 1989, the date on which the trial court determined that the insurer's delay became vexatious, to the date the arbitration award was recovered. The trial court's denial of fees for the instant lawsuit seeking the Section 155 award and for the early stages of the claim prior to the arbitration was affirmed without significant discussion by the appellate court, other than to say that Section 155 does not mandate any award of fees and that "considerable deference to the judgment and discretion of the [trial] court must be given." 298 Ill. App. 3d 315.