Court Watch

A report prepared for members of the West Virginia Chamber of Commerce 2014

The Impact Of the West Virginia Supreme Court of Appeals On Our State's Economy

West Virginia Chamber

WEST VIRGINIA CHAMBER

Legal Review Team 2014

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Board of Trustees of the Weirton Policemen's Pension and Relief Fund v. The Jones Financial Companies, LLP, et al.
Case No. 12-0959 (November 21, 2013), 2013 W.Va. Lexis 1349

What the Court was asked to Decide:

The Circuit Court of Hancock County granted a Motion to Compel Arbitration filed by The Jones Financial Companies, LLP and other defendants ("Edward Jones") and the decision was appealed to the Supreme Court of Appeals of West Virginia. The West Virginia Supreme Court was asked by Board of Trustees of the Weirton Policemen's Pension and Relief Fund ("Board of Trustees") to reverse the Circuit Court decision and to conclude that the Circuit Court had not properly considered the issue of whether the arbitration clause was unconscionable under *Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 724 S.E.2d 250 (2011) ("*Brown I*") and *Brown v. Genesis Healthcare Corp*., 229 W. Va. 382, 729 S.E.2d 217 (2012) ("*Brown II*"). The Board of Trustees argued that the Circuit Court erred in ordering arbitration in this case because it did not consider the ambiguity of the arbitration agreement, nor did it consider whether the agreement was procedurally and substantively unconscionable.

What the Court Decided:

The West Virginia Supreme Court issued a memorandum decision that upheld the Board of Trustee's arguments that the Circuit Court did not properly consider the issue of unconscionability prior to granting the Motion to Compel Arbitration. The West Virginia Supreme Court recognized that the Circuit Court's decision was rendered after *Brown I* was reversed by the United States Supreme Court in *Marmet Health Care Ctr v. Brown*, 132 S.Ct. 1201 (2012) but prior to the West Virginia Supreme Court's decision in *Brown II*. The West Virginia Supreme Court reversed and remanded the case with instructions that the Circuit Court should allow the parties to present evidence regarding procedural and substantive unconscionability and then the Circuit Court must make findings of fact and conclusions of law regarding that issue.

Facts:

The Weirton Policemen's Pension and Relief Fund was created pursuant to W. Va. Code §§ 8-22-16, *et seq*. On April 13, 2006, the Board of Trustees entered into three different brokerage accounts with Edward Jones. When the accounts were opened, they contained an Account Agreement and Disclosure Statement that contained a provision for binding arbitration. The Supreme Court noted that these documents were signed and renewed annually and that more than ten separate authorizations were signed by the Board of Trustees. In 2010 the Board of Trustees sued Edward Jones alleging that it had made improper investments in violation of W. Va. Code § 8-22-22. The Board of Trustees also made claims of negligence per se, breach of fiduciary duty and breach of implied covenant of good faith and fair dealing. In response, Edward Jones filed a Motion to Compel Arbitration and stay the case. The matter sat for approximately two years and then the Board of Trustees brought the motion on for a hearing.

The Circuit Court stated a strong dislike for arbitration agreements, but it felt that it had no choice but to order the matter to arbitration in light of the United States Supreme Court's decision in *Marmet, supra*. At the time the Circuit Court considered the matter, the West Virginia Supreme Court had not yet issued its decision in *Brown II* and therefore, determined that it had no alternative but to compel arbitration. Counsel for the Board of Trustees argued that the Circuit Court still had the ability to consider the issues of procedural and substantive unconscionability after the *Marmet* decision. The Board of Trustees appealed the order compelling arbitration in this case.

Holding:

The West Virginia Supreme Court recognized that the Circuit Court's decision was rendered after *Brown I* was reversed by the United States Supreme Court in *Marmet* but prior to the West Virginia Supreme Court's decision in *Brown II*. The Court concluded that the Circuit Court did not have the benefit of their opinion in *Brown II* and therefore it discussed that decision and remanded the case. With regard to *Brown II*, the Court stated:

> In accordance with the Supreme Court's mandate, we overrule Syllabus Point 21 of *Brown I*. We otherwise find that the Supreme Court's decision does not counsel us to alter our original analysis of West Virginia's common law of contracts. The doctrine of unconscionability that we explicated in *Brown I* is a general, state, common-law, contract-law principle that is not specific to arbitration, and does not implicate the FAA.
>
> 229 W. Va. at 388, 729 S.E.2d. at 222-223.

It went on to cite Syllabus Point 20 of *Brown I*, wherein it held:

> [a] contract term is unenforceable if it is both procedurally and substantively unconscionable. However, both need not be present to the same degree. Courts should apply a 'sliding scale' in making this determination: the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the clause is unenforceable, and vice versa.

The West Virginia Supreme Court then went on to cite other provisions of *Brown I* and *Brown II* related to the standards for procedural and substantive unconscionability. It then concluded that the Circuit Court erred in not allowing the parties to develop the evidence in this regard and it remanded the case with instructions that the Circuit Court was to allow the parties to develop this area and the Circuit Court was required to render findings of fact and conclusions of law regarding the issue of procedural and substantive unconscionability.

Impact on Business:

This decision, remanding the case to determine if the arbitration agreement is procedurally or substantively unconscionable, does not seem to be a good one for West Virginia businesses. The West Virginia Supreme Court's decision in favor of the Board of Trustees shows the Court continues to cling to the one area left to be litigated, the enforceability of arbitration clauses and the doctrine of unconscionablity. This decision is one of two since last year wherein the Court remanded the enforcement of an arbitration clause because the Circuit Court did not make detailed findings of fact and conclusions of law regarding the issue of procedural and substantive unconscionability. Arbitration in the securities industry is a standard practice required in all brokerage agreements. It is hard to imagine how any standard agreement for the arbitration of a securities dispute would be procedurally or substantively unconscionable and, therefore, the remand seems questionable under the facts in this case.

CDS Family Trust, LLC v. ICG, Inc., et al.
Case No. 13-0375 (January 15, 2014), 2014 W.Va. Lexis 1

What the Court was asked to Decide:

The Circuit Court of Grant County granted a Motion for Summary Judgment upholding an arbitration award in favor of ICG, Inc. and the decision was appealed to the Supreme Court of Appeals of West Virginia. The Supreme Court was asked by CDS Family Trust, LLC to reverse the Circuit Court decision and to vacate the arbitration award. CDS Family Trust, LLC agued that the Circuit Court erred in upholding the arbitration decision because the lease had expired and therefore, the arbitration panel had no jurisdiction to consider the dispute. It also argued the arbitration panel's decision was clearly wrong as a matter of law that necessitated the court stepping in to correct clear legal error. Finally, CDS Family Trust, LLC argued that the Circuit Court erred in not concluding that the arbitration panel's decision exceeded the scope of the issues submitted to it.

What the Court Decided:

The West Virginia Supreme Court issued a memorandum decision that completely rejected all of CDS Family Trust, LLC's arguments in favor of vacating the arbitration decision. Significantly, the Supreme Court concluded that this case was governed by the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.* ("FAA") because: "(1) there was an agreement in writing providing for arbitration; and (2) the contract evidences a transaction involving interstate commerce considering the parties' different states of residence. *Am. Home Assur. Co. v. Vecco Concrete Const. Co., Inc.,* 629 F.2d 961, 963 (4th Cir. 1980)." *Id.* at Fn. 8.

The Court rejected the arguments that the Circuit Court or the West Virginia Supreme Court were to review the substance of the arbitration award for reasonableness. It held that a very limited standard of review applied to set aside an arbitration decision under the FAA. The Court stated: "We recognize that 'the scope of judicial review for an arbitrator's decision is among the narrowest known at law.' *MCI Constructors, LLC v. City of Greensboro*, 610 F.3d 849, 857 (4th Cir. 2010). *Id.* at p. 4. The Court also held that, under the FAA, "courts may vacate an arbitrator's decision 'only in very unusual circumstances.' *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995)."

The Court also rejected CDS Family Trust, LLC's argument that the arbitration panel had no authority to act because the lease containing the arbitration provision had expired prior to the arbitration panel rendering its decision. The Court concluded that this argument had been waived because CDS Family Trust, LLC submitted the dispute to the arbitration panel and never raised this issue before the arbitration panel.

Facts:

This case arose from a January 30, 2007 Master Lease Agreement for the removal of coal on certain leased premises in Grant County, West Virginia. CDS Family Trust, LLC, a Delaware limited liability company, entered into the lease with Vindex Energy Corporation, a West Virginia Corporation and a subsidiary of ICG, Inc. Under the lease, Vindex was to pay certain advanced pre-paid minimum royalties through November, 2008, that had not been paid by a prior tenant Buffalo Coal Company. In addition, Vindex had to pay certain advanced royalties from December, 2008 to November, 2009. During this time period, Vindex paid over $3.2 million to CDS Family Trust, LLC.

By 2010, Vindex had not started to mine on the property and CDS Family Trust, LLC sent a notice of default as a result of Vindex failing to start mining within two years, as required by the lease. CDS Family Trust, LLC advised Vindex that the lease was terminated by its own terms and that Vindex had forfeited and abandoned its rights to mine the property. Vindex filed a demand for arbitration and the parties selected an arbitration panel that held a full day hearing. The arbitration panel rendered a decision that concluded that "Vindex is not in violation of the Lease; has not breached, abandoned, or forfeited the Lease; did not fraudulently induce CDS to enter the Lease; and that the Lease continues in full force and effect as written." *Id.* at p. 2. The arbitration panel concluded that Vindex's actions were not unreasonable nor an abandonment of the lease. The Court noted that the arbitration panel reached its result through equitable principles:

> Because the Lease does not specify circumstances giving rise to forfeiture, the panel rested its decision on equitable principles: Vindex had paid $3.2 million to CDS in advanced royalties, but, with reason, had yet to begin mining operations and, therefore, had not reaped its benefits of the Lease. Forfeiture would provide CDS with a windfall of $3.2 million but leave Vindex with nothing to show for the consideration it paid. *Id.* at pp. 5-6.

CDS Family Trust, LLC did not agree with the arbitration panel's decision and it filed for a Writ of Prohibition with the Circuit Court of Grant County. ICG, Inc. and Vindex answered and argued the matter was governed by the FAA and the action of CDS Family Trust, LLC was untimely since it was not filed within three months as required by the FAA. It also filed a counterclaim seeking affirmance of the arbitration award. Vindex moved for judgment on the pleadings.

The Circuit Court determined that it had no jurisdiction to consider a Writ of Prohibition since the arbitration panel was not an inferior tribunal to the Circuit Court. It considered the CDS Family Trust, LLC's action as one to vacate the arbitration award, even though it was not timely filed. It also found that the Motion for Judgment on the Pleadings should be considered as one for summary judgment and it granted that motion and it entered an order upholding the arbitration panel's award. CDS Family Trust, LLC appealed the order upholding the arbitration award.

Holding:

The West Virginia Supreme Court's decision in favor of ICG, Inc. and Vindex shows a continued willingness to follow the United States Supreme Court's precedents upholding arbitration awards under the FAA. The Supreme Court fully considered the arguments of CDS Family Trust, LLC that the arbitration award should be vacated and it rejected each one of them.

At the outset, in footnote 5, the Court decided that it did not need to consider whether CDS Family Trust, LLC's action was timely under the three month statute of limitations in the FAA, 9 U.S.C. § 12, as it found that the Circuit Court rendered a decision on the merits notwithstanding the fact that the lawsuit was not timely filed. The Court next rejected the argument of CDS Family Trust, LLC that the arbitration panel had no jurisdiction to render its decision because the lease had already expired by its own terms. The Court recognized that the Circuit Court had rejected this argument because CDS Family Trust, LLC did not raise this argument until after the arbitration panel had rendered its decision. The Court stated: "CDS cannot 'voluntarily engage in the arbitration of the issues submitted to the arbitrator and then attack the award on grounds not raised before the arbitrator.' *Int'l Chem. Workers Union, Local No. 566 v. Mobay Chem Corp*., 755 F.2d 1107, 1112 (4th Cir. 1985) (quoting *United Steelworkers v. Smoke-Craft, Inc.,* 652 F.2d 1356, 1360 (9th Cir. 1981))." *Id.* at p. 4.

Next, the West Virginia Supreme Court considered the standard of review of an arbitration award under the FAA and as discussed above, concluded that it was very limited. At footnote seven, the Court recognized that under the FAA, 9 U.S.C. § 10(a), an arbitration award may only be set aside when: "(1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators . . .; (3) where the arbitrators were guilty of misconduct . . .; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."

Finally, the Court rejected CDS Family Trust, LLC's argument that the arbitrations panel's decision exceeded the scope of the issues submitted to arbitration. The Supreme Court found that the issues presented to the arbitrators included "[w]hether Lessee is in default of any obligation under the Lease in respect of the 'commence[ment], develop[ment] and mining [of] the demised property within a reasonable time' and, if so, the cure or remedy for any such default." *Id.* at p. 5. The Court found that the arbitration panel could properly rely upon equitable principles in concluding that no forfeiture had occurred and that, to conclude otherwise would allow CDS Family Trust, LLC to reap a windfall.

Impact on Business:

This decision upholding an arbitration award in a commercial dispute is a very good one for West Virginia businesses. The West Virginia Supreme Court has been hesitant in some decisions to follow federal precedent with regard to the arbitration of consumer disputes. This decision shows a continued willingness of the Court to follow the FAA and federal precedents in considering arbitration issues. The Circuit Courts of this State should see this memorandum decision as a signal from the West Virginia Supreme Court that it is proper to apply the FAA and federal precedents when considering arbitration awards in business disputes that arise in interstate commerce.

WEST VIRGINIA CHAMBER
ARBITRATION

Green Tree Servicing, LLC v. Figgatt
Case No. 12-1143 (October 22, 2013), 2013 W.Va. Lexis 1147

What the Court was asked to Decide:

The Circuit Court of Raleigh County entered an order on June 9, 2011, refusing to grant Green Tree Servicing, LLC's Motion to Compel Arbitration and thereafter on August 23, 2012, entered an order following a bench trial awarding Ms. Figgatt statutory penalties. Green Tree appealed to the Supreme Court of Appeals of West Virginia and it asked the Supreme Court to consider whether the Circuit Court erred in concluding that the arbitration agreement was unenforceable based upon the unavailability of the arbitration forums named in the arbitration agreement. The Supreme Court had considered this same issue in the recent decision of *Credit Acceptance Corp. v. Front*, 231 W.Va. 518, 745 S.E.2d 556 (2013) and the parties agreed that it was controlling in this case.

What the Court Decided:

The Supreme Court's memorandum decision agreed with Green Tree that the decision in *Credit Acceptance Corp.* was controlling and therefore, it concluded that the Circuit Court had improperly refused to order arbitration in this instance. In footnote 5, the Supreme Court referenced its decision in *Credit Acceptance Corp.* wherein it concluded that the AAA arbitration forum named in the agreement was still available to the parties for arbitration. On this basis, the West Virginia Supreme Court rejected the Circuit Court's order finding that the arbitration provision was unenforceable. Based on that decision, the Court also set aside the Circuit Court's order awarding statutory penalties.

Facts:

In 2000, Aimee Adkins (the former name of Ms. Figgatt) and her then husband Robert Adkins purchased a mobile home financed by Greenpoint Credit, LLC. At that time, the Adkins signed a Note, Disclosure and Security Agreement that contained an arbitration agreement. Under the agreement, the arbitration was to be conducted before the American Arbitration Association. At a later point in time, Greenpoint assigned its interests in the note to Green Tree. At some later point in time, the American Arbitration Association announced that it was imposing a moratorium on consumer arbitrations if the company and the consumer did not consent to arbitration.

Thereafter, Ms. Figgatt commenced a civil action against Green Tree in the Circuit Court of Raleigh County in 2011, alleging four causes of action: 1) violations of the West Virginia Consumer Credit and Protection Act; 2) negligence; 3) intentional infliction of emotional distress; and 4) invasion of privacy. Green Tree filed a Motion to Compel Arbitration and the Circuit Court entered an order denying the Motion to Compel Arbitration finding that the arbitration provision was unenforceable since the AAA moratorium was imposed. A bench trial was held and the Circuit Court awarded Ms. Figgatt statutory penalties. Green Tree appealed the order denying arbitration and the order setting statutory penalties.

Holding:

The West Virginia Supreme Court's decision to follow *Credit Acceptance Corp.* shows a continued willingness to follow the United States Supreme Court's precedents upholding arbitration agreements. At footnote five, the Court recognized that it concluded in *Credit Acceptance Corp.* that the American Arbitration Association was clearly still available to the parties for arbitration since the cases were filed by the consumers and the American Arbitration Association was willing to handle arbitration cases filed by consumers. On this basis, the Court rejected the Circuit Court's orders finding that the arbitration provision was unenforceable.

Impact on Business:

This decision ordering arbitration is a very good one for West Virginia businesses. The West Virginia Supreme Court has been hesitant in recent years to follow federal precedent and require consumers or other parties to comply with arbitration agreements. This decision marks a continued willingness of the Court to follow federal precedent and to order parties to meet their legal obligations under consumer and other types of arbitration agreements in certain circumstances. The Circuit Courts of this State should see this decision as a signal from the West Virginia Supreme Court that they should continue to enforce consumer arbitration agreements in appropriate cases.

WEST VIRGINIA CHAMBER ARBITRATION

Kirby v. Lion Enterprises, Inc.
Case No. 13-0379 (March 7, 2014), 756 S.E.2d 493, 2014 W.Va. Lexis 166

What the Court was asked to Decide:

The Circuit Court of Marion County granted the Defendants Lion Enterprises, Inc. and T/A Bastian Homes' Motion to Dismiss and to Compel Arbitration and the home owners Wayne and Joyce Kirby appealed to the Supreme Court of Appeals of West Virginia. The Supreme Court was asked by the Kirbys to consider whether the Circuit Court erred in concluding that the arbitration agreement was "bargained for;" the arbitration provision was "fairly negotiated;" and the Kirbys' claims were within the arbitration provision.

What the Court Decided:

The West Virginia Supreme Court's decision clarified that the "bargained for" language in *Board of Education v. W. Harley Miller, Inc., ("Harley Miller II"),* 160 W.Va. 473, 236 S.E.2d 439 (1977) is no longer controlling in West Virginia. The Court found that this prior decision was preempted by the Federal Arbitration Act, 9 U.S.C. §§ 1 to 16 and the Court's more recent decisions in *State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders,* 228 W. Va. 125, 717 S.E.2d 909 (2011) and *Dan Ryan Builders, Inc. v. Nelson,* 230 W. Va. 281, 737 S.E.2d 550 (2012). The Court concluded "so long as the construction contract in its entirety is well supported by an offer, acceptance and sufficient consideration, there is no requirement that the arbitration clause be independently 'bargained for' in order for a contract to be formed." *Id.* at pp. 12-13.

The Court ultimately remanded the case back to the Circuit Court because it had made the decision that the written agreement with the arbitration clause was not unconscionable based on the arguments of counsel without any development of the factual record regarding unconscionability. The Court cited to *Brown ex rel. Brown v. Genesis Healthcare Corp.*, 229 W. Va. 382, 729 S.E.2d 217 (2012) ("*Brown II*") on the issues of procedural and substantive unconscionability and concluded that this "necessarily involves a fact-intensive analysis into a range of factors." *Id.* at 16.

Facts:

On March 16, 2009, the Kirbys entered into a written agreement with Bastian Homes for the construction of a new home in Fairmont, West Virginia. That agreement contained an arbitration provision that called for each party to select an arbitrator and then the two arbitrators would select a third neutral arbitrator. Bastian Homes hired a plumbing subcontractor, Dwire Plumbing, and it was alleged that during construction a water leak occurred that damaged major portions of the house. On February 3, 2012, the Kirbys filed a complaint against Bastian Homes and Dwire Plumbing. Bastian Homes moved to dismiss the complaint based on the arbitration clause in the written agreement.

Thereafter, the Circuit Court entered an order dismissing the Complaint finding that the Kirbys' claims were subject to arbitration. The Circuit Court relied upon *Harley Miller II* and concluded that the "arbitration provision was fairly negotiated and is not unconscionable, having not been presented with evidence sufficient for overcoming the general presumption that all arbitration provisions are bargained for."

Holding:

The West Virginia Supreme Court's decision examined the language in *Harley Miller II* that required that in order for an arbitration clause to be enforceable, it must be "bargained for." The Kirbys argued that the arbitration agreement in the written contract with Bastian Homes was not agreed to by them and they had objected to this provision when they signed the written agreement. The Supreme Court clarified that *Harley Miller II* was decided in the 1970s before the United States Supreme Court had recognized that the Federal Arbitration Act, 9 U.S.C. §§ 1 to 16 preempted many provisions of state law regarding arbitration. The Court cited to *State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders,* 228 W. Va. 125, 717 S.E.2d 909 (2011) and *Dan Ryan Builders, Inc. v. Nelson,* 230 W. Va. 281, 737 S.E.2d 550 (2012) to conclude that contracts with arbitration provisions must be treated the same as any other contracts, and they suggest in *Harley Miller II* that an arbitration provision had to be specifically "bargained for" was no longer the law in West Virginia. The Court concluded "so long as the construction contract in its entirety is well supported by an offer, acceptance and sufficient consideration, there is no requirement that the arbitration clause be independently 'bargained for' in order for a contract to be formed." *Id.* at 12-13.

The Court ultimately remanded the case back to the Circuit Court because it had made the decision that the written agreement with the arbitration clause was not unconscionable based on the arguments of counsel without any development of the factual record regarding unconscionability. The Court cited to *Brown II* on the issues of procedural and substantive unconscionability and concluded that this "necessarily involves a fact-intensive analysis into a range of factors." *Id.* at 16.

Impact on Business:

The part of the decision upholding arbitration and finding that the "bargained for" language in *Harley Miller II* is no longer controlling is a good one for West Virginia businesses. Given the inadequate record on unconscionability, it is not surprising that this case was remanded to the Circuit Court for a more complete factual development of that issue. However, this decision is one of two since last year wherein the West Virginia Supreme Court remanded the enforcement of an arbitration clause because the Circuit Court did not make detailed findings of fact and conclusions of law regarding the issue of procedural and substantive unconscionability. The business community will have to hope the Court is not overly clinging to the one area left to be litigated, the enforceability of arbitration clauses and the doctrine of unconscionablity. We will have to examine further decisions of the West Virginia Supreme Court in this regard to make a final determination.

WEST VIRGINIA CHAMBER ARBITRATION

State ex rel. Ocwen Loan Servicing, LLC v. Webster, 752 S.E.2d 372 (W.Va. 2013)
New v. GameStop, Inc., 753 S.E.2d 62 (W.Va. 2013)

The Issue:

How far will the Court go in upholding arbitration agreements under the Federal Arbitration Act in the residential mortgage and employment areas against charges of unconscionability?

The Decisions:

Pretty far. The Court found that the arbitration agreement in a residential mortgage agreement in *State ex. rel. Ocwen* and in an employment agreement in *New* to be both valid and binding under both the Federal Arbitration Act and State law.

State ex rel. Ocwen Loan Servicing, LLC v. Webster,
752 S.E.2d 372 (W.Va. 2013) (per curiam)

The Facts:

In *State ex. rel. Ocwen*, the Currys entered into a mortgage agreement with Saxon Mortgage in 2006, at which time they also executed both a deed of trust and a separate "arbitration rider" that incorporated an arbitration agreement into the mortgage agreement and the deed of trust. Shortly thereafter, Ocwen Loan Servicing ("Ocwen") began to service the Currys' mortgage.

The Currys filed a purported class action complaint against Ocwen that alleged various violations of the West Virginia Consumer Credit and Protection Act ("WVCCPA") based on various fees charged by Ocwen after both late payments and non-payments by the Currys. Ocwen moved to dismiss the complaint and compel arbitration based upon the arbitration rider, but Judge Carrie Webster in Kanawha County denied the motion. Thereafter, Ocwen filed a petition for a writ of prohibition to prevent Judge Webster from enforcing the order that denied Ocwen's motion to dismiss.

The Holding:

The West Virginia Supreme Court found the arbitration agreement contained in the arbitration rider to be both procedurally and substantively conscionable, and therefore valid and binding under the Federal Arbitration Act ("FAA"). In addition, the Court reiterated that arbitration agreements are "primarily a contractual matter" that must be construed under state contract law.

Under the FAA, arbitration agreements must be enforced unless the arbitration agreement itself violates state contract law. Here, the Court examined the arbitration agreement and found it to be both procedurally and substantively conscionable.

Under West Virginia law, "[p]rocedural unconscionability is concerned with inequities, improprieties, or unfairness in the bargaining process and formation of the contract. Procedural unconscionability involves a variety of inadequacies that results in the lack of a real and voluntary meeting of the minds of the parties, considering all the circumstances surrounding the transaction." *Brown v. Genesis Healthcare Corp.,* 228 W. Va. 646, 724 S.E.2d 250, Syl. Pt. 17 (W. Va. 2011). The Court found the arbitration agreement to be procedurally conscionable because (1) the "arbitration agreement contained a plainly worded statement, placed conspicuously above the signature line in all caps, that advised the Currys that they could reject the arbitration agreement and the lender would not refuse to complete their loan due to such refusal"; (2) the Currys presented no evidence that "they lacked sophistication and financial knowledge to a degree that rendered the contract unenforceable"; and (3) no authority exists to support the notion that a consumer must be represented by an attorney before the contract in which the arbitration agreement is located can be enforced. *State ex rel. Ocwen,* 752 S.E.2d at 389.

"Substantive unconscionability" under West Virginia law, on the other hand, "involves unfairness in the contract itself and whether a contract term is one-sided and will have an overly harsh effect on the disadvantaged party. The factors to be weighed in assessing substantive unconscionability vary with the content of the agreement. Generally, courts should consider the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and public policy concerns." *State ex rel. Ocwen*, 752 S.E.2d at 389 (quotation omitted). The Court found the presence of a class action waiver (i.e., the consumer agreed to not bring a class action claim in arbitration) did not render the arbitration agreement invalid. *Id.* at 392-393. Likewise, the Court held that the arbitration agreement's limitation on attorney fees, "where the contractual provision does not deprive a party of a mandatory right to receive attorney's fees, where the provision applies equally to both parties in making them responsible for their own attorney's fees, and where the contract was not one of adhesion," did not render the agreement substantively unconscionable. *Id.* at 394. The Court also refused to find the arbitration agreement unconscionable because Ocwen carved out some of its potential claims against the Currys, including the right to foreclose on the property and enforce that foreclosure through a civil action, from the arbitration agreement, finding that the Currys could force Ocwen to arbitrate some claims. Finally, the Court refused to invalidate the arbitration agreement based on limitation of discovery in arbitration as opposed to the discovery available in a civil action, finding that any limitations (assuming there would be any) would apply equally to both the Currys and to Ocwen and that there was no evidence that discovery limitations would prevent the Currys from adequately presenting their claim to an arbitration panel.

New v. GameStop, Inc.
753 S.E.2d 62 (W. Va. 2013) (per curiam)

The Facts:

In *New*, an employee/assistant manager received both a "Store Associate Handbook" and a 14-page "Rules of Dispute Resolution Including Arbitration" (the "arbitration agreement") that was included within the Handbook. Under the arbitration agreement, both the employee and GameStop agreed to arbitrate "all workplace disputes or claims" before filing such claims in court. Shortly after her termination from employment at GameStop, the employee filed a civil action that contained claims for wrongful discharge, sexual harassment, hostile work environment, intentional and negligent infliction of emotional distress, and violations of the West Virginia Wage Payment and Collection Act. The employer moved to dismiss the complaint and compel arbitration, and Judge Perry in Logan County granted that motion. The employee appealed.

WEST VIRGINIA CHAMBER
ARBITRATION

The Holding:

First, the Court found that the parties both entered into the arbitration agreement despite the fact that the Handbook explicitly stated that "[y]ou do not have, nor does this Handbook constitute, an employment contract, express or implied." *New,* 753 F.2d at 70. Notwithstanding this language, the Court found a "clear and unequivocal intent by both parties to arbitrate" because the employee signed the acknowledgement of receipt of the arbitration agreement, which "unequivocally states that [the arbitration agreement's] provisions 'set forth GameStop's procedure for resolving workplace disputes ending in final and binding arbitration[.]" *Id.* at 72-73. The acknowledgement signed by the employee also clearly indicated that "GameStop offered the arbitration agreement to the petitioner as a condition of her employment and the [employee] accepted the agreement by accepting employment." *Id.* at 73.

The Court also found the arbitration agreement to be both procedurally and substantively conscionable. First, the Court noted that the employee "failed to offer any evidence that the arbitration agreement's terms were hidden from her or were couched in unduly complex terms." *Id.* at 76. In addition, the "language of the Acknowledgement was abundantly clear" that the employee was "agreeing that all workplace disputes or claims" would be submitted to arbitration. *Id*. Under these circumstances, the Court found the arbitration agreement to be procedurally conscionable.

Likewise, the Court also found the arbitration agreement to be substantively conscionable. The employee argued that, under the terms of the arbitration agreement, GameStop could unilaterally modify or discontinue the "Rules of Dispute Resolution Including Arbitration" at any time, which meant that the arbitration agreement lacked mutuality, which is a cornerstone of any substantive conscionability analysis: "If a provision creates a disparity in the rights of the contracting parties such that it is one-sided and unreasonably favorable to one party, then a court may find the provision is substantively unconscionable." *Dan Ryan Builders, Inc. v. Nelson*, 230 W. Va. 281, 283, 737 S.E.2d 550, 552 (2012). Here, the Court noted that any changes to the "Rules of Dispute Resolution Including Arbitration" made by GameStop would have prospective application only, and would only take effect 30 days after notice of the changes. Under these circumstances, the Court found that "this arbitration provision and its effects are not overly harsh and in no way 'create[] a disparity in the rights of the contracting parties such that it is one-sided and reasonably favorable to' GameStop." *New*, 753 F.2d at 79.

Impact on Business:

Both *State ex rel. Ocwen* and *New* reflect that the West Virginia Supreme Court has learned that it cannot carve out public interest exceptions to the FAA's validation of arbitration agreements across a broad array business, consumer and employment relationships. For businesses and employers that believe arbitration offers a more predictable and cost-effective method of dealing with legal claims, arbitration agreements may be a method to better ensure that claims are referred to the arbitration process.

Nonetheless, businesses and employers should pay attention to the arbitration agreement that they seek to formulate and enforce. The Court will still submit such agreements to a rigorous analysis under state law, and if the agreement appears to be fundamentally unfair or one-sided, either in the way it was obtained or in its substantive terms, the Court will have no hesitation finding such arbitration agreement to be invalid.

State ex rel. U-Haul Co. of West Virginia v. Zakaib
Case No. 13-0181 (November 26, 2013), 752 S.E.2d 586, 2013 W.Va. Lexis 1390

What the Court was asked to Decide:

The Circuit Court of Kanawha County, Judge Paul Zakaib, Jr. refused to compel arbitration of three plaintiffs' consumer claims and U-Haul Co. of West Virginia ("U-Haul") filed a Writ of Prohibition with the Supreme Court of Appeals of West Virginia. The Supreme Court was asked by U-Haul to determine that a Rental Contract Addendum with an arbitration clause, was incorporated by reference into a Rental Contract and therefore, the Plaintiffs were required to arbitrate their consumer claims.

What the Court Decided:

The West Virginia Supreme Court's decision rejected U-Haul's arguments as it concluded that the Circuit Court had properly refused to order arbitration in these instances. The Court concluded that the Circuit Court had properly weighed the evidence and concluded that the arbitration provision in the Rental Contract Addendum had not been properly incorporated by reference into the Rental Contract.

In rendering its decision, the Court recognized that the doctrine of incorporation by reference had not been thoroughly discussed by it before. It issued one new significant Syllabus Point regarding the doctrine of incorporation by reference:

> 2. In the law of contracts, parties may incorporate by reference separate writings together into one agreement. However, a general reference in one writing to another document is not sufficient to incorporate that other document into a final agreement. To uphold the validity of terms in a document incorporated by reference, (1) the writing must make a clear reference to the other document so that the parties' assent to the reference is unmistakable; (2) the writing must describe the other document in such terms that its identity may be ascertained beyond doubt; and (3) it must be certain that the parties to the agreement had knowledge of and assented to the incorporated document so that the incorporation will not result in surprise or hardship.

It is significant to note that while the Supreme Court discussed in passing the common law and statutory law related to arbitration, this decision is primarily based on general principles of contract law and not arbitration law. The Supreme Court found in this case that U-Haul had not properly incorporated by reference the arbitration provisions in the Rental Contract Addendum and therefore, the Plaintiffs were not obligated to arbitrate their consumer dispute with U-Haul.

Facts:

In this case, the three plaintiffs had rented U-Haul equipment on numerous occasions. Plaintiff John Stigall had rented equipment eleven times between 2006 and 2010. Plaintiff Amanda Ferrell had rented equipment four times between 2007 and 2009. Plaintiff Misty Evans had rented equipment twice between 2010 and 2011. The Plaintiffs filed a class action suit under West Virginia consumer laws alleging that they had been improperly and surreptitiously charged between $1.00 and $5.00 for an "environmental charge." U-Haul moved to compel arbitration under the Rental Contract Addendum.

The facts regarding the formation of the contract were not in dispute. The rental agreements were entered into through U-Haul owned locations or through independent dealers. The contracts were entered into either in a paper format or in an electronic format. When signing the paper format, a customer would receive a one page form that stated, "I acknowledge that I have received and agree to the terms and conditions of this Rental Contract and the Rental Contract Addendum." At footnote three, the Supreme Court notes that the Circuit Court made a critical finding regarding the execution of this Rental Contract:

> Each of the plaintiffs has filed an affidavit stating that the RCA [Addendum] was not provided to them prior to signing the RC [Rental Contract]. U-Haul has not contested these affidavits. Indeed, its affidavits seemingly confirm the plaintiffs' testimony by stating that the "routine business practice" of U-Haul was to provide the [Addendum] to customers only "prior to receiving possession of any rental property. . . ." Based upon the record herein, the Court finds that the [Addendum] was not provided to the plaintiffs prior to their signing the rental agreement.

The Court went on to discuss the electronic format utilized by U-Haul at its owned locations. A customer would go to an electronic terminal and be presented with the terms of the Rental Contract only. They would click a button that they accepted the terms of the Rental Contract and electronically sign the screen. The Plaintiffs acknowledged that they had accepted the terms of the Rental Contract, but not the Rental Contract Addendum and the arbitration provision because it was not presented to them until afterwards.

The Court discussed that the Rental Contract Addendum was a "multicolor pamphlet made of rectangular cardstock, but folded into five sections and shaped like an envelope or narrow folder. . . The Addendum must be opened to reveal the arbitration clause contained inside." *Id.* at pp. 5-6. The Court also discussed that other services offered by U-Haul were advertised on this folder. U-Haul argued that the Rental Contract Addendum was incorporated by reference and the Plaintiffs argued that it was not because there was nothing in the Rental Contract that informed the Plaintiffs that the arbitration clause was contained inside the Rental Contract Addendum. The Circuit Court rejected U-Haul's arguments and found that the arbitration provision was unenforceable because the arbitration provision was not communicated to the Plaintiffs, they never accepted the terms of the arbitration provision and therefore no contract to arbitrate had ever been formed.

Holding:

The West Virginia Supreme Court's decision in favor of the Plaintiffs was based on general contract law principles. In rendering its decision, the Court recognized that the doctrine of incorporation by reference had not been thoroughly discussed by it before and it examined that doctrine in detail. Since many of the agreements were entered into electronically at U-Haul owned locations, the Court also discussed modern contract formats such as "shrinkwrap," "clickwrap," and "browsewrap" agreements. In this case, the Court concluded that this U-Haul agreement most nearly resembled a "clickwrap" agreement, even though it was not entered into on the internet, describing that type of agreement as follows: A "clickwrap" or "click-through" agreement usually "appears on an internet webpage and requires that a user consent to any terms or conditions by clicking on a dialog box on the screen in order to proceed with the internet transaction." *Id.* at p. 14. The Court went on to conclude that even though this agreement was entered into electronically, it is still enforceable as a matter of law the same as any written agreement.

In this case however, the West Virginia Supreme Court found that the Rental Contract Addendum with the arbitration clause was not enforceable because the Rental Contract did not specifically reference the arbitration provision nor did it provide a detailed description of those arbitration obligations. The Court also concluded that the Rental Contract Addendum was designed to look more like an advertising folder then a legally binding contractual agreement. Finally, the Court stated that it was "most troubling to this Court" that the Rental Contract Addendum was not provided until after the Rental Contract was executed. Based on these findings, the Court concluded that the plaintiffs did not have the requisite knowledge of the terms of the arbitration agreement at the time they executed the Rental Agreement and therefore, U-Haul could not enforce the arbitration provisions.

Impact on Business:

This decision refusing to order arbitration is not a good one for West Virginia businesses. It is common to have multiple sets of documents as a part of a contract and each business that tries to enforce arbitration agreements in a separate document will have to examine their agreements to make sure that they comply with this new incorporation by reference standard adopted by the West Virginia Supreme Court. To meet this standard, the main agreement presented to a consumer will have to specifically reference and describe any arbitration provision contained in another agreement and the arbitration agreement should preferably be presented prior to signing the master agreement. Absent a specific reference to an arbitration provision and contemporaneous presentation of the arbitration provision, a party runs the risk of having the arbitration provision declared unenforceable under this decision.

Manor Care, Inc. v. Douglas
Case No. 13-0470 (June 18, 2014)

What the Court was asked to Decide:

Whether an $11.5 million verdict for compensatory loss accompanied by an $80 million verdict for punitive damages was reversible based on errors in the trial court.

What the Court Decided:

The Supreme Court of Appeals of West Virginia reduced both the compensatory and punitive damages verdict and remanded the case to the Circuit Court on "remittitur." This is a proceeding where the plaintiff has the option to accept the reduced award or submit to a new trial on damages only.

Facts:

This case arose from the death of Mrs. Douglas after she spent nineteen days in the defendants' nursing home. Her estate claimed her death was the result of malnourishment and dehydration due to the defendants' negligence and wilful, wanton and reckless actions. The defendants included the nursing home and the entire corporate structure.

The jury awarded $1.5 million in damages for violations of the Nursing Home Act, $5 million damage for breach of fiduciary duty and $5 million in damages for negligence. The Court allowed the jury to apportion by percentage between ordinary and medical negligence and then applied the caps of the Medical Professional Liability Act to the medical negligence portion of the verdict.

Reviewing the compensatory damage award, the Court held that there is no cause of action in West Virginia for breach of fiduciary duty. Therefore, the Court vacated the jury's $5 million damage award. Reviewing the claim of damages under the Nursing Home Act, the Court found the verdict form was too confusing to determine the basis for the award and therefore vacated the award. Reviewing the $5 million award for negligence, the Court held that trial courts must rule as a matter of law whether there are claims that are covered and not covered by the MPLA. Finding the trial judge "impliedly" made such a ruling, the Court affirmed the $5 million negligence award as reduced pursuant to the jury's allocations of percentage.

As to punitive damages, the Court used the same ratio between the original $11.5 million compensatory and $80 million punitive award, approximately 7:1, and concluded that a punitive damage award of approximately $32 million was appropriate. The Court gave the plaintiff the option of either accepting the new award or a new trial on punitive damages.

Impact on Business:

This case has three primary impacts. First, the recognition by the Court and in separate opinions that the jury verdict form was confusing should have led to a reversal of the entire verdict as urged by Justice Loughery. Second, the Court's recognition of a distinction of "ordinary" and "medical" negligence is a significant issue for hospitals and other healthcare providers with respect to activities considered "ordinary" negligence and not subject to the Medical Professional Liability Act. Third, the Court's assumption that a 7:1 ratio for punitive damages based on the original verdict could simply be applied to its reduced verdict ignores the principal that the punitive damages must be based on and bear relationship to the harm.

John N. Kenney v. Samuel C. Liston
Case No. 13-0427 (June 4, 2014), 2014 WL 2565563

What the Court was asked to Decide:

Does the collateral source rule allow a plaintiff to recover from a tortfeasor defendant the amounts discounted from the Plaintiff's medical bills or written off by his medical providers?

What the Court Decided:

Facts:

On April 6, 2010, Plaintiff, Samuel C. Liston, was a passenger in a vehicle sitting at a stoplight. Defendant, John N. Kenney, slammed his car into the rear end of the Plaintiff's vehicle. The Defendant did not apply his brakes before the accident, and the force of the impact broke the seat in which the Plaintiff was sitting. Prior to the accident, the Defendant had consumed a number of alcoholic beverages. An hour after the accident, the Defendant's blood alcohol content was measured at .328, over four times the legal limit. The Defendant subsequently pleaded no contest to first-offense driving under the influence.

The Plaintiff brought suit against the Defendant, alleging that he suffered serious, permanent, and painful injuries to his spine as a result of the accident. The Defendant admitted that he was solely liable for the accident, and the case was split into a two-phase damages trial. The first phase was to determine the amount of the Plaintiff's compensatory damages and the second phase was to determine whether and to what extent the Defendant should pay punitive damages.

The Plaintiff incurred medical bills in excess of $70,000 related to the injuries he suffered in the accident. However, Plaintiff's medical providers and his health insurance carrier agreed that his medical bills would be discounted, reduced, or adjusted downward. Pursuant to this agreement, the Plaintiff's health insurance carrier paid the reduced amount (minus co-pays and deductibles paid by the Plaintiff) and the remaining unpaid portions of the medical bills were "written off" by the Plaintiff's medical providers.

West Virginia law allows a Plaintiff to recover the necessary and reasonable medical expenses for an injury from the person who caused the injury. Proof that the medical bills were incurred is evidence that the expense was necessary and reasonable; so, the Plaintiff sought to recover the entire billed amount as his necessary and reasonable medical expenses. Since only a portion of each medical bill had been paid, either by the Plaintiff as co-pays or deductibles or by the Plaintiff's health insurance carrier (Blue Cross/Blue Shield), the Defendant argued that the Plaintiff's damages "'should be limited to the amounts actually paid by Plaintiff…and amounts paid on the Plaintiff's behalf by any collateral source,' such as the plaintiff's health insurance carrier." *Id.* at *2. The Defendant contended "that since the full bills were neither paid nor actually incurred by the plaintiff or the plaintiff's health insurance carrier, the plaintiff should not be allowed to introduce evidence of those written-off amounts at trial." *Id.*

The Monongalia County Circuit Court disagreed with the Defendant, reasoning that "under the collateral source rule, the plaintiff was entitled to recover damages for the value of reasonable and necessary medical services he received, 'whether such services are rendered gratuitously or paid for by another.'" *Id.* at *3. The Circuit Court further reasoned that "the plaintiff was entitled to recover the

value of services rendered to the plaintiff, irrespective of 'the expenditures actually made or obligations incurred.'" *Id.* Thus, the Circuit Court "prevented the defendant from offering any evidence that the bills for the plaintiff's medical services were either reduced by the provider or paid by the health insurer at a discounted rate." *Id.* On September 21, 2012, the jury returned a verdict in Plaintiff's favor in the sum of $325,272.92, including $74,061.00 for medical expenses.

The Defendant appealed, arguing primarily that the Circuit Court "erred in applying the collateral source rule to exclude evidence, testimony, and argument relating to medical expenses that were discounted or written off by the plaintiff's medical providers." *Id.* The Defendant also argued that the Circuit Court erred during the punitive damages phase of the trial by allowing the Plaintiff's counsel to ask questions suggesting that the Defendant may have additional coverage to pay an excess verdict and that it was error for the Circuit Court to instruct the jury that such excess liability coverage might be available.[1]

The Supreme Court of Appeals of West Virginia affirmed the Circuit Court's rulings, but spent some time discussing the collateral source rule and how it applied to the issue presented. Generally speaking, the collateral source rule "precludes the defendant in a personal injury or wrongful death case from introducing evidence that some of the plaintiff's damages have been paid by a collateral source." *Id.* at *5. The "rationale for this rule is that the party at fault should not be able to minimize his damages by offsetting payments received by the injured party through his own independent arrangements." *Id.*

Holding:

The West Virginia Supreme Court held that the collateral source rule permits an injured party to recover all of his or her reasonable medical costs that were necessarily required by the injury, even if a health care provider agrees to reduce, discount, or write off a portion of the medical costs.

Impact on Business:

The impact of this case on the business community is that "compensation" for injured plaintiffs has been broadened to include sums for which the plaintiff was never liable. Allowing a plaintiff to recover funds that were never paid by anyone inflates recoveries from defendants, which in many cases are being defended by liability insurers. As noted by Justice Loughry in his dissent, the likely result of the majority's holding in this case, passing "written-off" costs to defendants and their insurers, is that insurance premiums will increase. Unfortunately, as insurance premiums increase, so does the cost of doing business in West Virginia.

1 *The Supreme Court of Appeals of West Virginia held that the Defendant opened the door to the introduction of his liability insurance when he testified that he did not have sufficient assets to pay a punitive damages verdict.*

DeBias v. Coastal Lumber Co.
Case No. 13-0929 (June 13, 2014), 2014 WL 2682162 (Memorandum Decision)

***What the Court was asked to Decide*:**

Whether an employer's alleged failure to train its employees on forklift operation satisfied two of the required elements of a deliberate intent claim -- actual knowledge and intentional exposure.

What the Court Decided:

The Circuit Court properly granted summary judgment to the employer because the employee did not prove that the employer had actual knowledge that its forklift operators were not properly trained, further there was no evidence that any improper forklift training created a high degree of risk and strong probability of serious injury or death, and further that the employer did not intentionally expose the employee to the alleged specific unsafe working condition.

Facts:

Richard DeBias was employed by Coastal Lumber Company since 1993. In 2007, he began working as a truck driver for Coastal. Part of his duties as truck driver required that he pick up green lumber and transport to a nearby lumber yard. On February 11, 2010, as he was driving his truck from the sawmill to the lumber yard, his stack of green lumber shifted. However, he didn't stop to adjust the load, but drove on to the lumber yard. After he arrived at the lumber yard, a forklift operator pushed the load in place and because to off-load the stacks of lumber. Mr. DeBias was in the process of rolling up load stabilizing straps on the back of the truck. As the forklift operator removed the middle stack of lumber, the rear stack shifted and fell back on Mr. DeBias, injuring him.

Mr. DeBias brought a deliberate intent action against Coastal, alleging that Coastal failed to properly train its forklift operators Specifically, DeBias alleged that Coastal should have trained its operators to wait until the truck driver had completed his responsibilities and moved away from the truck before the forklift operators began to offload lumber. Coastal produced evidence that it had properly trained its forklift operators, and that the training complied with OSHA requirements.

The Circuit Court granted summary judgment finding that Coastal had no actual knowledge that its forklift operators were not properly trained, or that the alleged failure to train presented a high degree of risk and strong probability of serious injury or death. The Circuit Court also found that Coastal did not intentionally expose DeBias to a specific unsafe working condition.

Holding:

The Court upheld summary judgment. The Court found that the Circuit Court correctly ruled that DeBias could not satisfy either the actual knowledge or intentional exposure requirements of a deliberate intent claim. The Court pointed out that there were no prior injuries and that there was no evidence that Coastal directed DeBias to work in that particular area with actual knowledge of the probability that lumber would fall on him.

Impact on Business:

Even though this is a memorandum decision, it is an important win for employers. In deliberate intent actions, employees often allege failure to train as a specific unsafe working condition. This ruling will help an employer argue that the training of its employees was adequate and that the employer did not have actual knowledge of the alleged specific unsafe working condition. Also, the Court's ruling on intentional exposure clarifies that for an employee to meet the high burden to prove this element, the employee must show that the employer had actual knowledge of the alleged specific unsafe working condition and yet directed the employee to work around that specific condition.

Johnson v. Brayman Construction Corporation
Case No. 13-0598 (March 28, 2014), 2014 WL 1272534

***What the Court was asked to Decide*:**

In this case brought under West Virginia's deliberate intent statute, the issue is whether the applicability of a "specific state or federal safety statue, rule or regulation, or commonly accepted and well-known safety standard within the industry or business of the employer" [see W.Va. Code §23-402(d)(2)(h)(C)] to be determined solely by the trial court, or can such be offered through expert opinion testimony?

Does a finding by the jury that the employer did not have "actual knowledge of the existence of the specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by the specific unsafe working condition" [see W.Va. Code §23-4-2(d)(2)(h)(B)] support a finding for the employer notwithstanding improper expert testimony regarding employer's "intent to injure" the worker?

What the Court Decided:

The West Virginia Supreme Court determined that it was appropriate for each party's expert to testify about, in this case, the applicability of specific OSHA standards to the facts of the case. The Court reasoned that, since each party could present its own expert testimony, such would allow the jury to determine applicability of the required "specific state or federal safety statute, rule or regulation, or commonly accepted and well-known safety standard within the industry or business of the employer."

In addition, the Court ruled that a jury's finding that an employer did not have "actual knowledge of the existence of the specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by the specific unsafe working condition" abrogated the need for further deliberation, and any error presented in testimony related to the remaining requirements of the deliberate intent statute was of no effect.

Facts:

On August 6, 2008, the plaintiff's right eye was seriously injured while he was working on his employer's 'grout crew' during the construction of a bridge on Interstate 64. The plaintiff's injury occurred while he was handling a high-pressure grout hose, on his first day with that crew. He filed suit on July 29, 2010, alleging that his employer violated the West Virginia deliberate intent statute [W.Va. Code §23-4-2(d)(2)(h)], specifically alleging that he was required to handle the hose with no job safety training; without face or eye protection; without supervision; and without the benefit of a safety inspection by respondent's management to determine whether the hose would be pressurized with grout.

In order for an employer to lose its immunity under our State's worker's compensation system, the employee must establish each of the following five elements:

> (A) That a specific unsafe working condition existed in the workplace which presented a high degree of risk and a strong probability of serious injury or death;
>
> (B) That the employer, prior to the injury, had actual knowledge of the existence of the specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by the specific unsafe working condition;
>
> (C) That the specific unsafe working condition was a violation of a state or federal safety statute, rule or regulation, whether cited or not, or of a commonly accepted and well-known safety standard within the industry or business of the employer, as demonstrated by competent evidence of written standards or guidelines which reflect a consensus safety standard in the industry or business, which statute, rule, regulation or standard was specifically applicable to the particular work and working condition involved, as contrasted with a statute, rule, regulation or standard generally requiring safe workplaces, equipment or working conditions;
>
> (D) That notwithstanding the existence of the facts set forth in subparagraphs (A) through (C), inclusive, of this paragraph, the employer nevertheless intentionally thereafter exposed an employee to the specific unsafe working condition; and
>
> (E) That the employee exposed suffered serious compensable injury or compensable death as defined in section one [§ 23–4–1], article four, chapter twenty-three whether a claim for benefits under this chapter is filed or not as a direct and proximate result of the specific unsafe working condition.

W.Va.Code § 23–4–2(d)(2)(h).

In this case, the employer's expert offered testimony regarding the application of certain OSHA regulations to the deliberate intent statute. Plaintiff's counsel moved to exclude this testimony, and argued that the OSHA regulations cited by the employer's expert were not applicable.

Ultimately, the jury found that the plaintiff proved the first requirement of the Deliberate Intent Statute; namely, that "a specific unsafe working condition existed in the workplace which presented a high degree of risk and a strong probability of serious injury or death." However, the jury then determined that the plaintiff failed to establish the second element, that "the employer, prior to the injury, had actual knowledge of the existence of the specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by the specific unsafe working condition."

Holding:

The Court held that it was perfectly within the purview of expert witness testimony to offer opinions about the applicability of statutes, rules, regulations or industry standards to the facts of the case. In addition, the Court held that a finding by the jury that the employer did not have "actual knowledge" of the specific unsafe working condition abrogated the need for further deliberations.

Impact on Business:

The West Virginia deliberate intent statute has, since its inception, been a thorn in the side of business – allowing injuries that arguably should be covered under the West Virginia Workers' Compensation Act to be compensated through a much less predictable civil action. This opinion of the West Virginia Supreme Court does little to reduce the number of cases brought under the deliberate intent statute, but it does help even the proverbial playing field between the employee plaintiff and his employer in actions brought under that statute.

WEST VIRGINIA CHAMBER
DELIBERATE INTENT

Redman v. The Federal Group, Inc.
Case No. 13-0377 (November 22, 2013), 2013 WL 6153158

***What the Court was asked to Decide*:**

In this case brought under West Virginia's deliberate intent statute, the West Virginia Supreme Court was asked to evaluate whether the trial court's granting of the employer's motion for summary judgment was proper. Specifically, the Court was asked to reverse the trial court's ruling that the employee's Estate had presented no evidence that the employer had a "conscious awareness" of the alleged specific unsafe working condition, or that such unsafe working condition violated a state or federal safety statute, rule or regulation, or commonly accepted and well-known safety standard within the employer's business as required by the statute [see W.Va. Code §23-4-2(d)(2)(h)].

What the Court Decided:

The Court determined that the evidence presented by the employee's Estate was insufficient to establish that the employer "had actual knowledge of the specific unsafe working condition" as required by the second element of the deliberate intent statute. In addition, the Court found that the employee's Estate had failed to establish that the alleged specific unsafe condition violated a state or federal safety statute, rule or regulation, or commonly accepted and well-known safety standard within the employer's business. The Court affirmed the trial court's granting of the employer's motion for summary judgment.

Facts:

On January 17, 2010, while employed in the kitchen of the Clarion Hotel in Shepherdstown, West Virginia, Ms. McCreath suffered ultimately fatal burns as a result of a deep fryer tipping over and spilling hot cooking oil onto her body. On the day of the injury, Ms. McCreath was making shells for taco salads in the deep fryer. Multiple employees witnessed Ms. McCreath standing in front of the fryer making the shells with no apparent problems approximately five to ten minutes before the incident. At some point, the fryer flipped forward, spilling 350 degree oil onto Ms. McCreath. No one was present in the kitchen with Ms. McCreath at the time of the incident. She suffered severe burns over 40 percent of her body and, after undergoing several surgeries at the Johns Hopkins Bayview Burn Center, died of her injuries on February 17, 2010.

Ms. McCreath's Estate filed the action against Clarion, as well as the manufacturer and installer of the fryer. Following discovery, the Estate settled with the other defendants, and Clarion filed a motion for summary judgment on the pending claim brought under the West Virginia Deliberate Intent Statute [W.Va. Code §23-4-2(d)(2)(h)].

In order for an employer to lose its immunity under our State's worker's compensation system, the employee must establish each of the following five elements:

> (A) That a specific unsafe working condition existed in the workplace which presented a high degree of risk and a strong probability of serious injury or death;
>
> (B) That the employer, prior to the injury, had actual knowledge of the existence of the specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by the specific unsafe working condition;
>
> (C) That the specific unsafe working condition was a violation of a state or federal safety statute, rule or regulation, whether cited or not, or of a commonly accepted and well-known safety standard within the industry or business of the employer, as demonstrated by competent evidence of written standards or guidelines which reflect a consensus safety standard in the industry or business, which statute, rule, regulation or standard was specifically applicable to the particular work and working condition involved, as contrasted with a statute, rule, regulation or standard generally requiring safe workplaces, equipment or working conditions;
>
> (D) That notwithstanding the existence of the facts set forth in subparagraphs (A) through (C), inclusive, of this paragraph, the employer nevertheless intentionally thereafter exposed an employee to the specific unsafe working condition; and
>
> (E) That the employee exposed suffered serious compensable injury or compensable death as defined in section one [§ 23–4–1], article four, chapter twenty-three whether a claim for benefits under this chapter is filed or not as a direct and proximate result of the specific unsafe working condition.

W.Va.Code § 23–4–2(d)(2)(h).

In this case, the trial court found that the employee's Estate could not establish, as a matter of law, at least three of the five required elements of the statute. Summary judgment was, therefor, granted.

Holding:

The West Virginia Supreme Court reviewed the trial court's granting of the motion for summary judgment de novo; that is, providing the parties a new review of the evidence presented, rather than limiting itself to a determination of whether the trial court abused its discretion in rendering its decision. Notwithstanding this standard of review, the Court determined that the trial court was correct in granting summary judgment. It painstakingly reviewed the evidence presented by the employee's Estate, and agreed that it had not offered sufficient evidence to establish that the employer had "actual knowledge" of the alleged unsafe working condition. There were no prior complaints or maintenance issues relating to the fryer's stability, nor were there any prior injuries from the fryer. The Court also determined that the employee's Estate had not presented sufficient evidence that the alleged specific unsafe working condition violated a state or federal safety statute, rule or regulation, or commonly accepted and well-known safety standard within Clarion's business. The Court particularly noted that OSHA failed to cite Clarion with a violation of a safety regulation as a result of the incident.

Impact on Business:

West Virginia's deliberate intent statute has, since its inception, been a thorn in the side of business – allowing injuries that arguably should be covered under the West Virginia Workers' Compensation Act to be compensated through a much less predictable civil action. This opinion of the Supreme Court informs the parties to deliberate intent actions that the statute's requirements are exactly that – ***requirements*** that are mandatory to maintain the action. This ruling enhances the predictability in the application of the statute's provisions.

WEST VIRGINIA CHAMBER
DELIBERATE INTENT

Young v. Apogee Coal. Co., LLC
753 S.E.2d 52 (W.Va. 2013), Case No. 12-0835 (November 6, 2013)

What the Court Decided:

This case answered a certified question from the United States District Court for the Southern District of West Virginia as to whether W.Va. Code §23-4-2(d)(2)(ii) provides a "deliberate intent" cause of action against a non-employer or person, such as a supervisor, in addition to the employer.

Facts:

The plaintiff in *Young* was an employee of Apogee Coal Co, LLC when his supervisor allegedly instructed him to remove a counterweight from a front-end loader. While Young was removing the counterweight, it fell on top of him resulting in his death. His widow filed suit in the Circuit Court of Boone County against Apogee and Patriot Coal Company. The widow also named as a defendant James Browning, the maintenance supervisor. The defendants removed the case to the United States District Court for the Southern District of West Virginia on the basis of diversity jurisdiction. In effecting removal, the defendants alleged that the diversity defeating defendant, Browning, had been fraudulently joined because W.Va. Code §23-4-2(d)(2)(ii) provides a cause of action against an employer only and that an individual, such as supervisor, was not a proper party defendant. Noting a split of authority between the federal district courts on the issue, Judge Joseph R. Goodwin certified the following question to the Supreme Court of Appeals:

> Does the "deliberate intention" exception to the exclusivity of Workers' Compensation benefits outlined in W.Va. Code § 23-4-2(d)(2)(ii) apply to "persons" (supervisors and co-employees) as well as employers?

Holding:

The West Virginia Supreme Court held that W.Va. Code § 23-4-2(d)(2)(ii) provides for a deliberate intent cause of action against an employer only. A non-employer or person, such as a supervisor, may not be made a defendant in such a case.

In reaching this decision, the Court found that the Legislature's express reference to "person against whom liability may be asserted" in W.Va. Code § 23-4-2(d)(2)(i) and the omission of such language in (ii) evidenced an unmistakable intent not to include a non-employer or person as someone who could be liable for a claim brought under (ii). The Court also noted that the five elements set forth in the (ii) did not mention person, but were limited to the employer. Finally, the Court rejected several policy-based arguments made by Young which included asserting that if supervisors were not subject to liability for specific unsafe working conditions, there would be no incentive to enforce safety rules. Young also argued that employers would simply hide assets with high-ranking officers and supervisors to deplete the corporate funds from which a judgment could be collected.

In rejecting the policy arguments, the Court noted that it was not the place of the Court to opine as to the wisdom of those concerns in an area where the Legislature has unmistakably acted. The Court specifically noted that while it frequently looks to legislative intent to interpret an ambiguous statute, it is not at liberty to substitute its policy judgments for those of the Legislature whenever it deems a particular statute unwise.

Impact on Business:

The impact of this decision on out-of-state employers is significant. For many years, plaintiffs would join supervisors as defendants in cases in order to prevent removal to federal court. Now, there is no question that cases brought under W.Va. Code § 23-4-2(d)(2)(ii)(the five-factor test) can be removed to federal court. This allows employers to escape some counties which are seen as bad venues for businesses.

WEST VIRGINIA CHAMBER
DELIBERATE INTENT

Buracker v. The Berkeley County Council
Case No. 12-1264 (September 3, 2013) (Memorandum Decision)

What the Court Reviewed:

The West Virginia Supreme Court reviewed the circuit court's order granting defendant-employer's motion to dismiss a former employee's claim for violation of his right to privacy resulting from a non-random drug screen.

What the Court Decided:

The West Virginia Supreme Court affirmed the circuit court's ruling that the employee's right to privacy was not violated.

Facts:

Michael L. Buracker worked as a deputy for the Berkeley County Sheriff's Office. On April 14, 2011, he was required to submit to a non-random drug screen. Buracker questioned why he was required to submit to a drug screen, and the Sheriff allegedly replied that he heard a rumor that Buracker was abusing illegal drugs.

In June of 2011, Buracker filed a complaint against respondent, Berkeley County Council, alleging invasion of privacy. Berkeley County filed a motion to dismiss in October of 2011, arguing that Buracker's right to privacy was not violated because his job involved public safety and the safety of others. The circuit court granted the motion to dismiss, and Buracker appealed.

Holding:

The West Virginia Supreme Court affirmed the circuit court's dismissal of Buracker's claim, holding that requiring an employee to submit to a drug test is not a violation of privacy if the employee's job involves public safety and welfare. Furthermore, neither reasonable good faith objective suspicion of drug use nor random testing is required when the employee's job involves public safety or the safety of others.

Impact on Business:

This decision is a good one for employers. The employer's act of drug testing an employee in a safety sensitive position was upheld. Such drug testing need not be done in a random fashion. That point – whether drug testing of safety sensitive positions has to be random – has been debated in the human resources and legal communities since the seminal *Twigg* decision on drug testing. Accordingly, it is a bit odd that the Court chose to issue this guidance in a memorandum decision.

Brown v. The City of Montgomery
Case No. 12-1534 (February 20, 2014)

What the Court Reviewed:

The West Virginia Supreme Court reviewed the circuit court's order granting defendant-employers' motion to dismiss a former employee's wrongful discharge action.

What the Court Decided:

The West Virginia Supreme Court reversed the circuit court's ruling and remanded for further proceedings, finding that the former employee stated a claim for discharge in contravention of a substantial public policy.

Facts:

Jackie L. Brown, II, served as Chief of Police of the Montgomery Police Department. During his tenure, another officer, Lieutenant James Ivy, brought a legal action against the City of Montgomery ("the City") for racial discrimination. Brown alleged that the City ordered him to retaliate against Ivy, and when Brown refused, Mayor Higgins became enraged and verbally abusive. On November 29, 2011, Mayor Higgins terminated Brown without providing a reason nor holding a pre-termination hearing.

Brown filed the instant complaint in June 2012, contending that he was discharged without a pre-termination hearing and in contravention of public policy. The defendants, the City and Mayor Higgins, filed a motion to dismiss, arguing that Brown failed to state a claim, that his discharge contravened public policy, and that he was not entitled to a pre-termination hearing and they were entitled to qualified immunity. The circuit court granted the motion to dismiss.

Brown appealed the circuit court's ruling, alleging three "errors." First, Brown argued that the circuit court wrongfully denied a pre-termination hearing pursuant to West Virginia law. Second, he contended that the circuit court erred in granting the motion to dismiss his claim for discharge in contravention of public policy. Finally, Brown claimed that the circuit court mistakenly found that defendant-employers were entitled to qualified immunity.

Holding:

The West Virginia Supreme Court affirmed the circuit court's ruling that Brown was not entitled to a pre-termination hearing. The Court found that because the City is a Class III city and its police department is a non-civil service department, Brown was not entitled to civil service protections. Rather, he was an at-will employee, and could be terminated without cause. Furthermore, the Court found that the applicable pre-termination hearing statute only applied to "accused officers," and Brown did not allege he was an "accused officer."

The Court, however, agreed with Brown that refusing to retaliate against an employee for filing a racial discrimination claim constituted a substantial public policy of West Virginia. Brown alleged that Mayor Higgins ordered him to place a GPS tracking unit in Officer Ivy's police car in retaliation for the racial discrimination claim. Brown refused, and contended that Mayor Higgins subsequently terminated his employment. The Court found that Brown stated a cause of action for wrongful discharge.

Finally, the Court concurred with Brown that the defendants were not protected by qualified immunity. With respect to the instant suit, neither the City nor Mayor Higgins were covered by

WEST VIRGINIA CHAMBER EMPLOYMENT LAW

the provisions of The Governmental Tort Claims and Insurance Reform Act. Furthermore, Mayor Higgins' alleged conduct, if true, violated the West Virginia Human Rights Act ("WVHRA"), and an employer must know the fundamental public policies of the state and nation as expressed in statutes. The Court also ruled that there is no qualified immunity for an executive official who acts maliciously, and Brown's allegations were sufficient to overcome a motion to dismiss.

Impact on Business:

For all employers, this case stands for the proposition that retaliation against an employee who files a discrimination claim violates a substantial public policy of West Virginia. Thus, it is illegal to discriminate against an employee who refuses to retaliate against another employee for filing a discrimination suit. This finding may make it difficult for employers to take legitimate disciplinary action against employees that have filed discrimination claims. The supervisor may object claiming that the disciplinary action is retaliatory. Although the result is unsurprising, this case provides additional clarity concerning discrimination in the workplace.

Burkhamer v. City of Montgomery
Case No. 13-0930 (May 30, 2014) (Memorandum Decision)

What the Court Reviewed:

The West Virginia Supreme Court reviewed a circuit court order granting summary judgment in favor of defendant-employer regarding a former employee's claim that the defendant-employer failed to hire him in contravention of public policy.

What the Court Decided:

The West Virginia Supreme Court affirmed the circuit court's ruling, finding that the employee failed to city any legal authority to support his claim.

Facts:

Charles Lee Burkhamer, Jr., was a police officer for the City of Smithers, West Virginia. In February of 2012, he filed an application for employment as a police officer with the respondent, City of Montgomery. Burkhamer was allegedly told by the City of Montgomery's ("City") police chief he could not be hired because he once arrested the City's Street Commissioner for driving under the influence. He further claimed that the City's police chief advised him not to file a lawsuit, because the police chief would hire him as soon as another officer (Lt. James Ivy) was removed from the payroll. Burkhamer testified favorably for Lieutenant Ivy as a subpoenaed witness at Ivy's administrative hearing on July 28, 2012. Burkhamer eventually reapplied for employment with the City, but never received a response.

Burkhamer filed suit, arguing that the City refused to hire him because he arrested the City's Street Commissioner for DUI and provided testimony favorable to Lt. Ivy during his administrative hearing. In his complaint, Burkhamer alleged a claim of "failure to hire in contravention of public policy." The circuit court granted the City's motion for summary judgment, concluding that a common law "failure to hire" cause of action has not been recognized in the state, and permitting this claim to proceed would not be in the interests of judicial economy or efficiency.

Burkhamer appealed, contending that the circuit court erred in granting the motion for summary judgment and failing to recognize his claim for failure to hire in contravention of a substantial public policy.

Holding:

The West Virginia Supreme Court affirmed the circuit court's ruling, finding that Burkhamer's brief included neither legal authority nor analysis supporting his argument that West Virginia should recognize a failure-to-hire claim. Burkhamer analogized his situation to the recognized claim that an employee has a cause of action for retaliatory discharge where an employer's motivation for discharging the employee contravenes some substantial public policy. The Court, however, found Burkhamer's "refusal to hire" analogy lacking clear legal analysis and therefore upheld the circuit court's order.

Impact on Business:

This memorandum decision is notable in that it refused to recognize an expansion of the common law theory of wrongful discharge in violation of a substantial public policy. On a different set of facts with better legal analysis, the Court may very well recognize the theory. Accordingly, employers should not take too much comfort in this decision.

WEST VIRGINIA CHAMBER EMPLOYMENT LAW

Chamberlain v. Wexford Health Sources, Inc.
Case No. 13-0038 (November 8, 2013) (Memorandum Decision)

What the Court Reviewed:

The West Virginia Supreme Court reviewed a circuit court order granting summary judgment in favor of the defendant-employer, dismissing a former employee's complaint alleging a claim for retaliatory discharge.

What the Court Decided:

The West Virginia Supreme Court affirmed the circuit court's ruling granting summary judgment in favor of the defendant-employer, finding that the former employee failed to cite a substantial public policy of West Virginia providing her with a cause of action.

Facts:

Wexford Health Sources, Inc. ("Wexford"), had a contract with the West Virginia Department of Corrections ("DOC") to provide healthcare services to prison inmates. Barbara Chamberlain was an at-will employee of Wexford, working as a licensed practical nurse. Chamberlain received numerous disciplinary actions for poor attitude.

On January 1, 2010, Chamberlain submitted an incident report regarding unsecured medications in the hospital lab. Her supervisor, Tristan Tenney, issued a written disciplinary warning for poor work performance on January 18, 2010, which Chamberlain asserted was in retaliation for the incident report. Around April 15, 2010, Chamberlain received a final written warning from Tenney for bad attitude, and she resigned on May 15, 2010.

On April 18, 2012, Chamberlain filed a complaint alleging a claim for retaliatory discharge in violation of public policy, citing to four different statutory provisions to support her claim: 1) corrections program public policy; 2) safe workplace public policy; 3) wage payment public policy; and 4) sex discrimination public policy. Wexford filed a motion to dismiss, arguing that Chamberlain failed to cite a substantial public policy in support of her claim. The circuit court denied this motion.

The parties filed a stipulation of dismissal of the claims of retaliatory discharge in violation of public policy based on sex discrimination and wage payment on December 6, 2012. Wexford requested that the circuit court reconsider its previous motion to dismiss the two remaining public policy grounds: 1) that corrections programs shall be administered in a "just and humane" manner; and 2) that employers must provide and maintain employment places in a reasonably safe condition.

Upon reconsideration, the circuit court found in favor of Wexford. Further, it found that Wexford had an overriding business interest to discharge Chamberlain based on her bad attitude and work performance warnings. The circuit court dismissed the complaint on December 6, 2012.

Chamberlain appealed the order, arguing that the circuit court erred in granting summary judgment because the court wrongly determined that there was no substantial West Virginia public policy to support her claim of retaliatory discharge. Specifically, she contended that there is a substantial public policy requiring humane treatment of inmates and establishing inmates' rights to medical care, supporting her claim for retaliatory discharge.

Holding:

The West Virginia Supreme Court held that an inmate's right to adequate medical care is not a substantial public policy exception to support a cause of action for retaliatory discharge. To sustain a cause of action for retaliatory discharge, the public policy must be substantial, meaning so widely regarded as to be apparent to employers and employees alike. The statute to which Chamberlain cited is too generally worded to provide specific guidance.

Further, on appeal, Chamberlain raised a new policy to support her claim, citing a DOC Policy Directive. This directive promotes acceptable levels of inmate hygiene, but is silent regarding adequate medical care. The Court similarly found this directive too general to provide specific guidance, and declined to pass on a non-jurisdictional question that had not been decided by a circuit court.

Thus, because Chamberlain did not have a cause of action for retaliatory discharge, the Court found no error in the circuit court's holding that she could be discharged with or without cause. She was an at-will employee, and Wexford's decision to discharge her based on her record of bad attitude was permissible.

Impact on Business:

Limited to its own facts, this case supports that an at-will employee may be terminated with or without cause, provided there is no evidence of retaliatory or otherwise wrongful discharge. Moreover, the Court did not allow a plaintiff to rely upon statutes that were too general in nature to provide specific guidance to an employer.

WEST VIRGINIA CHAMBER
EMPLOYMENT LAW

Chapman v. Verizon Communications, Inc.
Case No. 13-0466 (November 22, 2013) (Memorandum Decision)

What the Court Reviewed:

The West Virginia Supreme Court reviewed the circuit court's summary judgment order in favor of the defendant-employer on a former employee's claim of unlawful disability termination and the failure to offer reasonable accommodations in violation of the West Virginia Human Rights Act ("WVHRA").

What the Court Decided:

The West Virginia Supreme Court affirmed the circuit court's ruling, finding that even if the former employee established a prima facie case of workers' compensation discrimination, the submission of a falsified document was a legitimate, non-discriminatory basis for termination.

Facts:

On June 12, 2009, Randall Todd Chapman, a Verizon employee, was injured in an automobile accident on his way to work. Chapman was treated at a hospital and released with a written excuse to miss three days of work. Chapman submitted a request for Family Medical Leave Act ("FMLA") time. Verizon denied his request. He appealed the denial, but Verizon refused it a second time. Verizon then suspended Chapman for ten days, citing the FMLA denial and his "unsatisfactory overall performance."

Chapman admitted receiving a letter denying the FMLA request but asserted that he subsequently received another letter approving his request. Upon return from his suspension, Chapman submitted the letter allegedly approving his FMLA request to Verizon management. Doubting the letter's authenticity, Verizon opened an internal investigation and determined the letter was falsified. On November 20, 2009, Verizon terminated Chapman for submitting a fraudulent FMLA approval letter and for making false statements during the investigation, both of which violate Verizon's written Code of Business Conduct.

Chapman subsequently sued Verizon alleging unlawful disability termination and the failure to offer reasonable accommodations in violation of the WVHRA. The circuit court granted summary judgment in favor of Verizon, concluding that regardless of who actually fabricated the approval letter, submission of a falsified document was a legitimate, non-discriminatory basis for Chapman's termination. The circuit court also ruled that Chapman neither offered evidence that he was disabled, nor that Verizon knew or should have known that he needed a disability accommodation.

Chapman appealed, challenging the circuit court's order granting summary judgment for Verizon on the WVHRA claims.

Holding:

The West Virginia Supreme Court affirmed the circuit court's order granting summary judgment, finding that Chapman admitted he had no impairment that substantially limited his life activities. Thus, he did not have a disability, so Verizon could not have committed disability discrimination. The Court further reasoned that even if Chapman's injuries constituted a temporary disability subjecting him to WVHRA protections and he established a prima facie case of discrimination, the falsification of the approval letter was a legitimate reason for Chapman's termination.

Impact on Business:

The West Virginia Supreme Court, for the second time this term, approved a summary judgment to an employer where the plaintiff-employee was unable to rebut the employer's reasons for discharge of the employee. Decisions such as this one make success for employers more likely at the dispositive motion stage.

WEST VIRGINIA CHAMBER
EMPLOYMENT LAW

Eddy v. Ingenesis, Inc.
Case No. 13-0888 (April 25, 2014) (Memorandum Decision)

What the Court Reviewed:

The West Virginia Supreme Court reviewed an order dismissing the employee's West Virginia Wage Payment and Collection Act ("WPCA") claim against her former employer, Ingenesis, Inc., on personal and subject matter jurisdiction grounds.

What the Court Decided:

The West Virginia Supreme Court affirmed the circuit court's dismissal of the employee's claim for failure to establish personal and subject matter jurisdiction.

Facts:

Ingenesis hired Rhonda Eddy to serve as "Director of Correctional and Detention Healthcare Staffing" for the federal contractor Homeland Security, Immigration, and Customs Enforcement Health Services Corporation ("HSIC"). The parties entered into an employment contract containing a choice of law clause providing that their relationship would be governed by Texas law. Ingenesis designated Eddy as an employee at its San Antonio, Texas headquarters. Eddy's e-mail signature similarly identified her business address as the Texas headquarters, and her work phone as a Texas number. The parties agreed that Eddy would work remotely from her home office in West Virginia to manage healthcare personnel working primarily in Texas and Arizona. Eddy claimed she conducted 90% of her work from her West Virginia home using a computer and phone provided by Ingenesis. She also claimed Ingenesis based her travel reimbursement on the distance to and from her West Virginia office, deducted West Virginia state income tax, and paid West Virginia unemployment tax on her behalf.

On February 15, 2013, Ingenesis terminated Eddy without cause. Ten days later, Ingenesis paid her all accrued wages and benefits. The WPCA provides, in relevant part, that when a person is discharged from employment, the employer must pay the employee's wages in full no later than the next regular payday or four business days, whichever comes first.

On April 23, 2013, Eddy filed the instant complaint, alleging Ingenesis had violated the WPCA. On July 9, 2013, the circuit court granted Ingenesis' motion to dismiss Eddy's complaint, finding that it did not have personal jurisdiction over Ingenesis. The circuit court also ruled that it did not have subject matter jurisdiction over Eddy's WPCA claim because the employment contract contained a valid choice of law clause mandating that Texas law would govern any dispute between the parties.

Eddy appealed the circuit court's order, raising three assignments of error. First, she argued that the circuit court erred in concluding that it did not have personal jurisdiction over Ingenesis. Second, she claimed the circuit court incorrectly found that Ingenesis' activities in West Virginia did not establish sufficient minimum contacts to satisfy due process. Third, Eddy complained that the circuit court wrongfully concluded that it lacked subject matter jurisdiction over her claim.

Holding:

The West Virginia Supreme Court rejected Eddy's argument that the circuit court erred in finding that it did not have personal jurisdiction over Ingenesis. The Court ruled that Eddy failed to make a prima facie showing that the circuit court had personal jurisdiction over Ingenesis. Although Ingenesis obtained a certificate of authority to transact business in West Virginia, Ingenesis had no contracts for healthcare staffing in the state, and Eddy did not manage any healthcare providers in West Virginia.

The Court similarly affirmed the circuit court's ruling that Eddy failed to make a prima facie showing of sufficient minimum contacts. She did not show that Ingenesis purposefully acted to obtain West Virginia benefits or privileges, transacted business in West Virginia, or required Eddy to work in West Virginia.

Finally, the Court upheld the circuit court's finding that it lacked subject matter jurisdiction to hear Eddy's claim because her employment contract contained a valid choice-of-law clause stating that the relationship would be governed by Texas law.

Impact on Business:

Limited to these facts, this case assures non-West Virginia businesses that they cannot be haled into West Virginia courts without some minimal connections to the state. In this case, a company headquartered in Texas did not establish sufficient connections by allowing a single employee to work remotely from her West Virginia home where her primary duty was to manage healthcare workers in Texas and Arizona. Businesses should be cautious, however, in believing that they can generally avoid West Virginia-specific wage and hour laws and other state employment laws by including a choice-of-law provision in an employment contract.

WEST VIRGINIA CHAMBER
EMPLOYMENT LAW

JWCF, LP v. Farruggia
Case No. 12-0389 (October 7, 2013) (per curiam)

What the Court Reviewed:

The West Virginia Supreme Court reviewed the circuit court's denial of defendant-employer's motions for judgment as a matter of law and a new trial in a worker's compensation employment discrimination case.

What the Court Decided:

The West Virginia Supreme Court affirmed the circuit court's ruling, finding that a jury could have found a prima facie case of discrimination under West Virginia law.

Facts:

Steven Farruggia suffered a compensable back injury while working for JWCF, a telecommunications company. Farruggia underwent a surgical procedure, and later returned to work in a light duty position. On November 12, 2007, he agreed to a $20,000 settlement for his worker's compensation claims, and was terminated on November 29, 2007. He applied for re-employment on February 14, 2008, but was not offered a position. Farruggia filed a civil action against JWCF on April 11, 2008, alleging worker's compensation discrimination. Farruggia, as well as other witnesses, testified that the termination was premised on the workers' compensation settlement. A jury found for Farruggia, awarding nearly $260,000.

JWCF subsequently moved for a new trial, which the circuit court denied. JWCF appealed, asserting a number of "errors." Primarily, it challenged the circuit court's denial of judgment as a matter of law and a new trial.

Holding:

The Court rejected the argument that the evidence submitted to the jury was insufficient to demonstrate that JWCF violated the laws prohibiting worker's compensation discrimination. Although Farruggia did not submit competent medical evidence indicating his ability to return to his pre-injury employment, the relevant statute does not require as much. Furthermore, the Court affirmed the circuit court's ruling that a prima facie case of discrimination was established under West Virginia law. Specifically, Farruggia provided evidence that he was injured on the job, a worker's compensation claim was initiated, and the claim was "a significant factor in the employer's decision to discharge or otherwise discriminate against the employee."

The Court similarly affirmed the circuit court's denial of a new trial. New trials should rarely be granted except in the case of prejudicial error or the failure to do substantial justice. The Court concluded the jury verdict was not against the clear weight of the evidence, and found no error.

The Court rejected JWCF's less significant assignments of error, affirming the circuit court's denial of JWCF's motions for judgment as a matter of law and a new trial.

Impact on Business:

This case has a point of law that is unfavorable for businesses. The Court held that an employee need not submit competent medical evidence indicating his ability to return to pre-injury employment. Thus, an employee may request his pre-injury job without providing medical documentation. Consequently, an employer cannot rely on lack of medical evidence demonstrating an employee's ability to return to his previous position as justification for not rehiring or reinstating the employee.

Nevertheless, given the wording of the applicable statute, it is not a surprising result. In any event, if an employer has a good faith doubt as to the employee's ability to do the job safely, the employer can always require the employee to submit to a fitness-for-duty examination.

WEST VIRGINIA CHAMBER
EMPLOYMENT LAW

Studeny v. Cabell Huntington Hospital
Case No. 13-0363 (November 22, 2013) (Memorandum Decision)

What the Court Reviewed:

The West Virginia Supreme Court reviewed the circuit court's order granting summary judgment in favor of defendant-employer, relating to the payment of severance pay for two former employees' earned sick leave following layoffs.

What the Court Decided:

The West Virginia Supreme Court affirmed the circuit court's ruling that the defendant-employer did not offer to pay accrued sick time as severance pay.

Facts:

Jana Studeny and Amy Smith ("the employees") were laid off from their employment with Cabell Huntington Hospital ("Cabell"), on January 6, 2009. Cabell promised laid-off employees a severance package including: 1) one week's pay in lieu of the required seven days' advance notice of layoff; 2) salary continuation pay based on years of service; and, 3) payment of accrued benefit time. Cabell asserted that the employees were never told they would receive payment for unused sick time, but the employees disputed this assertion.

The employees filed unemployment claims with WorkForce West Virginia, and were initially deemed ineligible for benefits while they received salary continuation payments. The employees appealed the decision, and Cabell initially argued that "salary continuation pay" is considered wages. The Administrative Law Judge ("ALJ") reversed the initial decision, finding that vacation pay, severance pay or savings plans received by an individual are excluded from the definition of wages. Thus, the ALJ ruled that "salary continuation pay" can only be characterized as severance pay, and is excluded from wages.

The employees claimed they should have been paid for unused sick time, claiming it was "accrued benefit time," and filed suit claiming breach of contract relating to the alleged promise of severance pay. The circuit court granted summary judgment in favor of Cabell, holding that Cabell did not offer the employees severance pay, and any offer of severance pay was not supported by consideration and therefore gratuitous and unenforceable.

The employees appealed the circuit court's ruling, alleging several "errors." Primarily, they argued that the circuit court erred in finding that Cabell did not offer severance pay. Similarly, they contested the circuit court's conclusion that severance pay is gratuitous and unenforceable for lack of consideration.

Holding:

The Supreme Court rejected the employees' argument that the record demonstrated an offer of sick time as part of the severance pay. The employees needed to show the existence of an offer, acceptance, mutuality of assent, and consideration. Cabell accomplished its goal of reducing its workforce when they terminated the employees, absent any bargaining. Further, Cabell did not communicate an offer to pay accrued sick leave time as severance pay. Thus, there was neither an offer nor the mutuality of assent.

The employees did not show that Cabell received any benefit from the severance payments; nor did they show any detriment, loss or forbearance upon receipt of the severance payments. Thus, the Court upheld the circuit court's ruling that no consideration existed to establish a contract for the payment of the employees' unused sick time.

The Court rejected the rest of the employee's assignments of error.

Impact on Business:

Although a memorandum decision, this ruling is favorable for business because the Court placed the burden on the employees to show that their employer offered to pay accrued sick leave as a severance benefit. If the decision were otherwise, then there would be a disincentive for employers to offer sick leave benefits or to otherwise offer benefits to terminated employees.

WEST VIRGINIA CHAMBER
EMPLOYMENT LAW

Toney v. EQT Corp.
Case No. 13-1101 (June 13, 2014) (Memorandum Decision)

What the Court Reviewed:

The West Virginia Supreme Court reviewed the circuit court's order granting defendant-employer's motion to compel arbitration of a claim brought by a former employee.

What the Court Decided:

The West Virginia Supreme Court upheld the circuit court's order, finding that the Alternative Dispute Resolution Agreement was a valid contract.

Facts:

Gregory Toney was employed by EQT for several years prior to his termination in January of 2012. On May 9, 2012, he filed a civil action against EQT and Daniel Crowe, his immediate supervisor, alleging a number of violations including age discrimination, hostile work environment based on age, retaliatory discharge, and hostile work environment and unlawful retaliation for reporting alleged violations of the West Virginia Human Rights Act ("WVHRA").

On April 22, 2013, the defendants filed a motion to dismiss and to compel arbitration based upon an Alternative Dispute Resolution Agreement ("the Agreement") executed by the parties. The Agreement covered "any claim that is related in any way to an individual's employment with Equitable [now EQT] that is recognized in the federal or state courts where the employee works." The circuit court granted the defendants' motion.

Toney appealed the circuit court's determination that a valid arbitration agreement existed between the parties, alleging three "errors." First, he argued the Agreement was unenforceable for lack of adequate consideration. Second, he claimed the Agreement was unenforceable because it was based on an illusory promise. Third, he complained that the Agreement was an unconscionable contract of adhesion and was therefore unenforceable.

Holding:

The West Virginia Supreme Court rejected Toney's assignment of error based on lack of adequate consideration. In exchange for signing the Agreement, Toney became eligible to participate in EQT's 2007 and future Short Term Incentive Plan ("STIP"). Had Toney not signed the Agreement, he would not have been eligible to participate. Furthermore, the Court upheld the lower court's finding that the mutual commitments to arbitrate contained in the Agreement were, on their own, sufficient consideration to support the Agreement.

The Court similarly denied Toney's argument that the Agreement was not enforceable because participation in the STIP was based on an "illusory promise." Toney received valuable consideration ($8,000 in gross pay) as a direct result of signing the Agreement in 2007. At the time, the he was aware he would receive the bonus if he executed the Agreement, so there was nothing illusory about this promise. With respect to STIPs in future years, the Court held that EQT's promise of future eligibility constituted a statement of a future contingency rather than an illusory promise.

The Court found the Agreement neither procedurally nor substantively unconscionable. Procedural unconscionability considers inequities, improprieties or unfairness in the bargaining process and formation of the contract. Toney is a high school graduate, graduated from the State Police Academy, earned an associate's degree as a petroleum engineer, and held a responsible position with EQT. Further, he had the opportunity to ask questions of EQT's human resources department. Thus, the Court found no procedural unconscionability.

Substantive unconscionability is concerned with unfairness in the contract and whether a contract term is one-sided. The Court held that Toney merely repackaged his first two arguments concerning an alleged lack of consideration, which were rejected, so the Agreement was not substantively unconscionable.

Impact on Business:

Although limited to its own facts, this case generally reaffirms the validity of agreements to arbitrate any disputes between employers and employees.

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Walkup v. Davis-Stuart, Inc.
Case No. 13-0251 (November 22, 2013) (Memorandum Decision)

What the Court Reviewed:

The West Virginia Supreme Court reviewed the circuit court's summary judgment order in favor of the defendant-employer on a former employee's claim of retaliatory discharge based upon workers' compensation discrimination.

What the Court Decided:

The West Virginia Supreme Court affirmed the circuit court's ruling granting the defendant-employer's motion for summary judgment, finding that even if the former employee established a prima facie case of workers' compensation discrimination, his repetitive absenteeism from work and failure to notify the defendant-employer of such absences were legitimate and non-retaliatory reasons for his termination.

Facts:

Gary Walkup was terminated from his employment with Davis-Stuart, Inc., around January of 2011. Walkup asserted that he was terminated due to his workers' compensation award. Davis-Stuart contended that Walkup failed to report to work for several weeks and therefore abandoned his job.

Walkup filed suit alleging termination in violation of West Virginia law prohibiting an employer from discriminating against an employee because of that employee's receipt of or attempt to receive workers' compensation benefits. The circuit court found that Walkup's excessive absenteeism was a sufficient non-discriminatory basis for his termination, and granted summary judgment in favor of Davis-Stuart. Walkup appealed the summary judgment order.

Holding:

The Court affirmed the circuit court's ruling, finding that Waldrup's excessive absences were sufficient non-retaliatory grounds for his termination. Although some absences were related to his workplace injury, many resulted from unrelated matters, such as childcare issues, bad weather, and lack of electricity in his home. Further, Waldrup failed to explain why he failed to call in or otherwise explain several absences. Thus, even if Waldrup established a prima facie case of workers' compensation discrimination, the Court held that Davis-Stuart presented legitimate non-retaliatory reason for Waldrup's termination.

Impact on Business:

In other decisions, the Court has suggested that a plaintiff who makes out a prima facie case is entitled to have that case decided by a jury. In this memorandum decision, however, the Court upheld dismissal of the case where a plaintiff was unable to rebut the employer's legitimate, non-discriminatory reasons for the termination.

Weimer v. Sanders
Case Nos. 12-0477 and 12-1506 (November 13, 2013)

What the Court Reviewed:

The West Virginia Supreme Court appealed the circuit court's order granting the defendant-employers' motion to dismiss former employees' claims alleging discriminatory discharge.

What the Court Decided:

The West Virginia Supreme Court reversed the circuit court's finding that that a complainant under the West Virginia Human Rights Act ("WVHRA") must exhaust available administrative remedies prior to initiating an action in circuit court.

Facts:

This case consolidated the appeals of Theresa L. Weimer and Vicky Lou Hughes.

Theresa L. Weimer

Theresa Weimer began teaching at Pocahontas County High School ("PCHS") in 2006. She suffered from a number of health issues, known to the school principal, including insulin-dependent diabetes, lumbar degenerative disk disease, and acute renal failure. She was suspended without pay on November 30, 2009, but the suspension was eventually converted to family medical leave. Weimer returned to work in Fall 2010, but received no accommodations. In late 2011, she tripped and fell in her classroom. Shortly thereafter, based on recommendations from the principal and superintendent, her employment was terminated.

Following her termination, Weimer filed a complaint in circuit court against the school principal, Thomas Sanders, the Superintendent, and the Pocahontas County Board of Education. She did not file a grievance with the West Virginia Public Employees Grievance Board ("Grievance Board"). The complaint alleged violations under the WVHRA, including discriminatory discharge on the basis of actual or perceived disability, hostile work environment on the basis of actual or perceived disability, and disparate discipline on the basis of actual or perceived disability.

The defendant-employers filed a motion to dismiss, arguing that Weimer's complaint was flawed because she failed to exhaust her administrative remedies with the Grievance Board. The circuit court granted the motion to dismiss, and Weimer appealed.

Vicky Lou Hughes

Vicky Lou Hughes worked as a coordinator/clinical associate for the Center for Excellence in Disabilities ("CED"), a branch of West Virginia University ("WVU"). During the interview process, Hughes advised CED that she had a disability requiring reasonable accommodations. CED initially accommodated her requests.

On April 6, 2010, Hughes was informed that her job performance was the subject of consumer complaints. After an investigation, she received a warning letter stating her work quality was unsatisfactory.

In June of 2010, Hughes suffered an orthopedic injury resulting in a year-long medical leave of absence. When she attempted to return, she was informed that several of her requests for accommodation were rejected, and was terminated on October 31, 2011.

Hughes initiated the Grievance Procedure, asserting that CED refused to provide needed reasonable accommodations. Several grievance hearings reportedly occurred, and Hughes filed this circuit court claim before the most recent grievance hearing. Her claim alleged violations of the WVHRA for failure to provide reasonable accommodations for her disability. The circuit court granted defendants' motion to dismiss, finding that a parallel, contemporaneous proceeding may not be maintained. Thus, since she elected the Grievance Procedure, she needed to exhaust her administrative remedies before filing an action in circuit court. Hughes appealed this order.

Holding:

The employees alleged the circuit court erred in dismissing their claims because they did not complete the administrative grievance process before filing their claims in circuit court. In reviewing the applicable statutes, the Court held that a public employee may file a written grievance to the West Virginia Public Employee Grievance Board, but such a filing is permissive and not mandatory under the clear wording of the statute.

The Court previously held that a claimant may pursue an action in either the Human Rights Commission or the circuit court. Thus, there is no requirement that a complainant must exhaust the administrative remedies prior to filing a circuit court action. Consequently, the court reasoned that a complainant is likewise not required to file a grievance with the Grievance Board before filing a claim pursuant to the WVHRA in circuit court. A complainant may therefore initiate an action in circuit court to enforce rights granted by the WVHRA.

The Court similarly invoked an earlier case for its holding that a claimant may prosecute a case before the Grievance Board to its conclusion and still retain the right to redress for the same issue before the circuit court. The Court reasoned that if a claimant initiates an action before the Grievance Board and abandons or relinquishes the claims prior to resolution, nothing precludes subsequent actions in the circuit court.

Thus, the Court reversed and remanded the circuit courts' dismissal orders.

Impact on Business:

This case is not favorable to public sector employers, because it specifically finds that an aggrieved employee may initiate a circuit court action against an employer rather than proceed through administrative channels. Furthermore, an employee may initiate concurrent actions before an administrative agency and a circuit court, even if the former process is not completed. Although most states require the exhaustion of administrative remedies, the strong precedent in West Virginia for not requiring exhaustion left little doubt that the Court would reach this result.

Cava v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA.
Case No. 12-0203 (September 12, 2013), 2013 W. Va. LEXIS 914

***What the Court was asked to Decide*:**

Whether the Circuit Court of Marion County erred by granting summary judgment in favor of National Union on the basis that the claims contained in the Petitioners' third-party complaint were not derivative of the claims asserted in the underlying lawsuit.

What the Court Decided:

The Circuit Court of Marion County did not err by granting summary judgment in favor of National Union on the basis that the claims contained in the Petitioners' third-party complaint were not derivative of the claims asserted in the underlying lawsuit.

Facts:

The Petitioners' former employee filed a lawsuit against the Petitioners for wrongful termination. When the Petitioners reported such lawsuit to their insurance carrier, National Union, National Union denied coverage. In response, the Petitioners filed a third-party complaint against National Union in which they asserted that National Union was guilty of common law bad faith and violating the West Virginia Unfair Trade Practices Act ("UTPA").

National Union responded to the Petitioners' complaint by filing a motion for summary judgment in which it argued that the Petitioners' complaint against it should be dismissed because the bad faith and UTPA claims did not derive from the underlying wrongful termination claim. National Union also argued that the Petitioners' complaint should be dismissed because the complaint was not filed within the applicable one year statute of limitations. In response to National Union's motion for summary judgment, the Petitioners argued that their claims were connected to the wrongful termination claim; thus, their complaint should not be dismissed. Additionally, the Petitioners argued that because their claims against National Union were connected to the wrongful termination claim, the running of the statute of limitations must be tolled under W. Va. Code § 55-2-21 (1981).

The Circuit Court of Marion County awarded summary judgment to National Union upon determining that there was no logical relationship between the wrongful termination claim and the claims alleged by the Petitioners in their third-party complaint. The Petitioners appealed to the West Virginia Supreme Court of Appeals.

Holding:

The Court held that the Circuit Court of Marion County did not err by dismissing the Petitioners' third-party complaint because the Petitioners' claims against National Union were not derivative of the original wrongful termination claim, and, thus, should have been brought in a separate lawsuit. The Court then went on to state that if the complaint had requested that the circuit court hold that there was coverage under the insurance policy, or hold that National Union had a duty to defend the Petitioners in the underlying wrongful termination claim, the Petitioners would have had a strong argument that the third-party complaint was permissible under Rule 14(a) of the West Virginia Rules of Civil Procedure. Specifically, the Court stated that allowing impleader as a matter of course when an insurer refuses to defend an insured serves the following purposes:

(1) eliminating circuity of actions; (2) preventing potential lag between a judgment against a defendant in one action and a judgment in the defendant's favor against the insurer in an subsequent action; and (3) allowing the insurer to be apprised of the evidence that develops during the lawsuit, thus, allowing the insurer to evaluate its position in light of all of the facts.

Concurrence:

Chief Justice Benjamin stated that the majority's discussion regarding the ability of a party to file a third-party complaint requesting a declaratory judgment that an insurance policy provides coverage is advisory and unnecessary in the case.

Impact on Business:

Courts may allow insureds to bring non-derivative, third-party complaints against insurance companies when the insured's complaint requests that the court find that there was coverage under the policy or requests that the court hold that the insurer had a duty to defend the insured in the underlying claim.

Dorsey v. Progressive Classic Ins. Co.,
Case No. 12-1254 (November 13, 2013), 2013 W. Va. LEXIS 1286

***What the Court was asked to Decide*:**

Whether a guest passenger is considered a first-party insured under the medical payments section of a motor vehicle insurance policy when the policy defines an insured person as "any other person while occupying a covered vehicle."

What the Court Decided:

"Where a West Virginia motor vehicle insurance policy includes within the definition of an insured person 'any other person while occupying a covered vehicle,' a guest passenger is a first-party insured under the medical payments section of the policy."

Facts:

Johanna Dorsey sustained bodily injuries when a truck owned by Comcast and driven by James Renforth rear-ended the Subaru that she was a guest passenger in. The Subaru was insured under a West Virginia motor vehicle policy of insurance issued by Progressive. Ms. Dorsey filed a medical payments claim with Progressive under the Subaru's policy, and Progressive paid the medical payments policy limit in the amount of $5,000.00 on her behalf. Ms. Dorsey also filed a personal injury action against Comcast and Mr. Renforth.

Ms. Dorsey settled her personal injury action against Comcast and Mr. Renforth for $60,000.00. Soon after Ms. Dorsey settled her personal injury action, Progressive asserted a subrogation lien against her recovery for $5,000.00; the amount that it had paid to her under the medical payments coverage policy. Upon learning of the subrogation lien, Ms. Dorsey contacted Progressive and argued that it must reduce its lien by its pro rata share of attorney fees and costs that she incurred in the lawsuit against Comcast and Mr. Renforth. Progressive asserted that no reduction was warranted.

After Progressive refused to reduce its lien against Ms. Dorsey's settlement, Ms. Dorsey filed a lawsuit against Progressive in which she alleged that Progressive's refusal to reduce the lien by the pro rata share of attorney fees and costs constituted common law bad faith and a violation of the West Virginia Unfair Trade Practices Act ("UTPA"). In response, Progressive filed a motion to dismiss, or, in the alternative, a motion for summary judgment. According to Progressive, as a guest passenger, Ms. Dorsey's coverage was not coextensive with that of the Subaru's policy owner, Joshua Teacoach. Specifically, Progressive argued that as a non-premium paying, extra-contractual insured under the policy, Ms. Dorsey was a third-party insured without standing to pursue her common law and statutory bad faith claims.

The circuit court denied Progressive's initial motion; however, soon after the denial, Progressive filed a motion to reconsider based on the West Virginia Supreme Court of Appeal's holding in *Loudin v. Nat'l Liab. Fire Ins. Co*., 716 S.E.2d 696 (W. Va. 2011), in which the Court held that "[a] first-party bad faith action is one where the insured sues his/her own insurer for failing to use good faith in settling a claim filed by the insured." The circuit court, emphasizing that Ms. Dorsey was not a named insured under the Progressive policy and that she paid no premiums for the policy, held that Ms. Dorsey was a third-party insured, and, therefore, she was precluded from

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pursuing her common law and statutory bad faith claims against Progressive. Ms. Dorsey appealed to the West Virginia Supreme Court of Appeals.

Holding:

The Court held that when a West Virginia motor vehicle insurance policy includes within the definition of an insured person "any other person while occupying a covered vehicle," a guest passenger, such as Ms. Dorsey, is a first-party insured under the medical payments section of the policy. Specifically, the Court stated that under W. Va. C.S.R. § 114-14-2.3 (2006), a first-party claimant or insured includes an individual "asserting a right to payment under an insurance policy or insurance contract arising out of the occurrence of the contingency or loss covered by such policy or contract." The Court went on to state that nothing in Loudin excluded insureds, such as Ms. Dorsey, from first-party status.

Dissent:

In his opinion, Chief Justice Benjamin stated that the Majority had departed from well-established law by imposing a duty of good faith and fair dealing on insurance companies when dealing with third parties despite the absence of any contractual duty.

Impact on Business:

Now, despite the absence of a contractual relationship, insurance companies owe a duty of good faith and fair dealing to persons included within the definition of an insured person under the medical payments section of West Virginia motor vehicle policies.

Flowers v. Max Specialty Ins. Co.,
Case No. 13-0262 (June 4, 2014), 2014 W. Va. LEXIS 630

***What the Court was asked to Decide*:**

(1) Whether the circuit court erred when it held that the commercial general liability policy at issue permitted the insurer to terminate its duty to defend at such time as the liability policy limit was exhausted through the expenditure of attorney's fees and costs.

(2) Whether the circuit court erred when it held that the coverage available was limited under the Limited Assault and Battery endorsement to the insurance policy.

What the Court Decided:

(1) Because the purported monetary limitation on the insurer's duty to defend was not set out in clear, direct, and unambiguous language, the circuit court erred when it held that the commercial general liability policy permitted the insurer to terminate its duty to defend at such time as the liability policy limit was exhausted through the expenditure of attorney's fees and costs.

(2) The circuit court did not err when it held that the coverage available was limited under the Limited Assault and Battery endorsement to the insurance policy.

Facts:

Dave Flowers owned and operated a bar called Venom. One night, an altercation occurred between Venom patrons that resulted in three patrons receiving gunshot wounds. After the shooting, one of such patrons, Darin Drane, informed Mr. Flowers that he intended to sue Venom for negligence, negligent security, and failure to warn. After receiving warning of such claim, Max Specialty, Venom's insurer, issued a reservation of rights to Venom and filed a declaratory judgment action to determine coverage under Venom's commercial general liability ("CGL") insurance policy.

Venom's CGL policy contained a provision that excluded claims arising from "Assault and Battery." The policy also contained a "Limited Assault or Battery" endorsement that limited available coverage to $25,000.00 per event. In its declaratory judgment, Max Specialty asserted that its duty to defend ended once the $25,000.00 coverage limit was exhausted, whether through payment of attorney's fees and litigation costs, or settlement of claims. Specifically, Max Specialty pointed out that the policy expressly provided that the most that it would pay per event under the policy for any assault, battery, or physical altercation was $25,000.00 reduced by any "supplementary payments." "Supplementary payments" was not defined anywhere in the "Limited Assault or Battery" provision.

The circuit court agreed with Max Specialty and held that Max Specialty's duty to defend Venom ended once the $25,000.00 coverage was exhausted, whether through payment of attorney's fees and litigation costs, or settlement of the claims. The circuit court also held that Venom's policy limited coverage to $25,000.00 under the given facts rather than the $1,000,000.00 available under Venom's main CGL policy. Venom and Mr. Drane appealed to the West Virginia Supreme Court of Appeals.

Holding:

The Court held that, because the purported monetary limitation on Max Specialty's duty to defend was not set out in clear, direct, and unambiguous language, Venom's CGL policy did not permit Max Specialty to terminate its duty to defend at such time as the liability policy limit was exhausted through the expenditure of attorney's fees and costs. With regards to whether the coverage available for Mr. Drane was limited under the Limited Assault and Battery endorsement to the policy; the Court held that the policy clearly and unambiguously limited the available coverage under the given facts to $25,000.00.

Concurrence:

Justice Ketchum pointed out that "supplementary payments" was not defined anywhere in the "Limited Assault or Battery" endorsement, and, although it was defined in the CGL coverage provision, such provision expressly provided that supplementary payments would not reduce the limits of coverage. According to Justice Ketchum, such provisions were contradictory, confusing, and ambiguous; thus, the circuit court went against West Virginia law when it ruled that the payments did reduce the policy limits.

Impact on Business:

The Court reaffirmed that ambiguous insurance policy provisions will continue to be interpreted in favor of the insured.

Lemasters v. Nationwide Mut. Ins. Co.
232 W.Va. 215, 751 S.E.2d 735 (2013), Case No. 12-0774 (October 29, 2013) (per curiam)

***What the Court was asked to Decide*:**

Whether an insured is entitled to recover from attorney fees, costs, and expenses incurred in vindicating a bad faith claim against the insurer.

What the Court Decided:

An insured is not entitled to recover attorney fees, costs, and expenses incurred while vindicating a bad faith claim against the insurer. Rather, attorney fees are awardable only for fees incurred in the underlying action against a tortfeasor and *Hayseeds* damages do not continue to accrue while a bad faith case is litigated.

Facts:

Mr. Lemasters was injured in an automobile accident for which he was not at fault on June 15, 2004. After settling his personal injury claim with the at-fault driver, Mr. Lemasters submitted an underinsured motorist claim to his insurer, Nationwide. The UIM claim eventually settled for the full policy limit of his UIM coverage.

Then, the Lemasters filed a motion to amend their complaint to include a bad faith claim for violation of the Unfair Trade Practices Act. The Lemasters alleged that Nationwide had acted in bad faith by delaying payment for the first-party claim for UIM benefits. After a seven-day trial on the bad faith claim, the jury found for the Lemasters, awarding $400,000 in compensatory damages and $200,000 in punitive damages. The Lemasters then moved for attorney fees and costs incurred in the initial UIM action pursuant to *Hayseeds, Inc. v. State Farm Fire & Cas*., 352 S.E.2d 73 (W. Va. 1986), as well as for fees and costs incurred in prosecuting the bad faith action.

The Circuit Court found that the Lemasters had substantially prevailed and were therefore entitled to reasonable fees, costs, and litigation expenses in the amount of more than $30,000 for the underlying action. However, the Circuit Court rejected the Lemasters' request for attorney fees and costs incurred in the subsequent bad faith case.

Holding:

The Court held that the circuit court was correct and the Lemasters were not entitled to receive attorney fees for expenses incurred while vindicating the bad faith claim. The Court relied upon *Doddrill v. Nationwide Mut. Ins. Co*., 491 S.E.2d 1 (W. Va. 1996), which held that attorney fees are awardable only for fees "incurred in the underlying action against a tortfeasor."

Dissent:

Justice Davis, in her dissent, stated that, by concluding that a plaintiff who prevails in an action against an insurer for violating the UTPA is not entitled to attorney's fees incurred while litigating such action, the Majority has essentially overruled *Jenkins v. J.C. Penney Cas. Ins. Co.*, 280 S.E.2d 252 (W. Va. 1981), and its progeny. Specifically, Justice Davis cited an excerpt from *Jenkins* in which the Court held that "increased costs and expenses including the increase in attorney's fees resulting from the failure to offer prompt fair settlement [can] be recovered." Justice Davis went on to state that the *Doddrill* Court did not limit the recovery of attorney's fees to only those incurred in the underlying action against an insurance company.

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Impact on Business:

This is a great win for the insurance industry and for business in general. The Court refused to accept the insured's arguments and refused to force insurance companies to pay attorney fees, costs and expenses incurred by an insured while vindicating a bad faith claim.

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Lightner v. Riley, Insurance Commissioner
Case No.12-0566 (June 4, 2014) (per curiam)

***What the Court was asked to Decide*:**

This case presented the question of whether the Insurance Commissioner was obligated to provide a formal hearing in connection with a Consumer Complaint challenging the reasonableness of insurance rates for credit property insurance and involuntary unemployment insurance.

What the Court Decided:

Facts:

Lightner was a second iteration of the West Virginia Supreme Court's earlier decision in *State ex rel. City Financial, Inc. v. Madden*, 223 W.Va. 229, 673 S.E.2d 365 (2008). In that case, the West Virginia Supreme Court had held that the West Virginia Consumer Credit Protection Act, even though it permitted a cause of action for recovery of excess charges included in a consumer credit transaction, did not authorize circuit courts to invade the jurisdiction of the Insurance Commissioner and conduct a reexamination of insurance rates previously approved by the Commissioner. Instead, any challenge to an approved rate had to be raised in a proceeding before the Insurance Commissioner.

Lightner subsequently filed a Consumer Complaint which included hundreds of pages of exhibits. He also demanded a formal hearing. The Commissioner then undertook a parallel investigation of not only the allegations in the Consumer Complaint, but all the rate filings made by the insurer. This included retaining the services of an independent actuary to review the rate filings. The Commissioner subsequently found that the rates charged were reasonable in relation to the benefits provided and further concluded that a hearing would serve no useful purpose.

Lightner appealed the Insurance Commissioner's order to the Circuit Court of Kanawha County, pursuant to the Administrative Procedures Act, which affirmed the ruling of the Commissioner.

Holding:

In affirming the decision of the Circuit Court of Kanawha County, the West Virginia Supreme Court again stated that the Legislature did not authorize circuit courts to invade the jurisdiction of the Insurance Commissioner and conduct a reexamination of rates previously approved by the Commissioner. The most critical aspect of the Court's decision, however, was the conclusion that the Insurance Commissioner was not required, under the circumstances, to provide a formal hearing. Instead, Legislative rules permitted the Commissioner to decline to provide a hearing if it would serve no useful purpose and the Court found no abuse of discretion in declining to provide a hearing given how extensive the record was before the Commissioner.

Impact On Business:

This case is of interest to the business community because it essentially re-affirms the filed rate doctrine which requires that challenges to administrative actions, particularly with respect to rate setting, should be brought before the administrative agency and not in circuit court. Requiring that such challenges be brought before an administrative agency, a more balanced forum with expertise, eliminates the unpredictability of the court process.

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Thomas v. McDermitt
Case No. 12-0688 (October 7, 2013), 2013 W. Va. LEXIS 1515 (Certified Question)

***What the Court was asked to Decide*:**

Whether an insurance company's failure to use the West Virginia Insurance Commissioner's prescribed forms pursuant to W. Va. Code § 33-6-31d results in underinsured motorists coverage being added to the policy as a matter of law.

What the Court Decided:

"An insurance company's failure to use the West Virginia Insurance Commissioner's prescribed forms pursuant to West Virginia Code § 33-6-31d (2011) results in the loss of the statutory presumption and a reversion to the standard enunciated in *Bias v. Nationwide Mutual Insurance Co*., 179 W. Va. 125, 365 S.E.2d 789 (1987)." Syl. Pt. 12.

Facts:

Angela Thomas purchased an automobile liability policy from State Farm. While purchasing such policy, an agent for State Farm offered Ms. Thomas underinsured motorist ("UIM") coverage. The agent explained the purpose of UIM coverage, the limits available, and the cost of each limit. Ms. Thomas declined to purchase the UIM coverage by signing a form provided by National Union that indicated that she (1) read and understood the notice regarding coverage, (2) understood UIM coverage, and (3) was exercising her right to reject such coverage.

Two years after Ms. Thomas declined to purchase the UIM coverage, Ms. Thomas, her husband, and their son, were involved in a motor vehicle accident in which William McDermitt negligently collided with the Thomases' vehicle. As a result of the accident, the family sustained injuries in excess of the coverage provided under Mr. McDermitt's insurance policy. Because the cost of the family's injuries exceeded the liability insurance available, Ms. Thomas filed a UIM claim with State Farm which State Farm denied for lack of UIM coverage.

Subsequent to State Farm's denial of coverage, the Thomases initiated a lawsuit against State Farm in which they asserted that UIM coverage was available because State Farm had failed to precisely comply with the Insurance Commissioner's prescribed form. The Circuit Court of Mason County certified to the West Virginia Supreme Court the question of whether failure to precisely comply with the West Virginia Insurance Commissioner's prescribed forms pursuant to W. Va. Code § 33-6-31d results in underinsured motorists coverage being added to an insurance policy as a matter of law.

Holding:

The Court held that an insurance company's failure to use the West Virginia Insurance Commissioner's prescribed forms pursuant to W. Va. Code § 33-6-31d results in the loss of the statutory presumption of compliance with the statute, not the addition of coverage to the policy as a matter of law. Specifically, the Court held that because the statute fails to include any provision regarding the result of an insurer's failure to utilize the prescribed forms, the statute is directory, not mandatory. The Court went on to hold that, upon the loss of the presumption, the insurer is obligated to prove that (1) it made a commercially reasonably offer of coverage to the insured, and (2) the insured's rejection of such coverage was knowing and intelligent.

Dissent:

Justice Davis stated that in *Bias v. Nationwide Mut. Ins. Co.*, 365 S.E.2d 789 (W. Va. 1987), the Court adopted the following succinct holdings: (1) when an offer of optional coverage is mandated by statute, an insurer is required to show that it made an effective offer of such optional coverage to the insured; and (2) when the insurer cannot show that it has made a statutorily required effective offer of optional coverage to its insured, such optional coverage is included in the policy of insurance by operation of law. According to Justice Davis, the first of the two holdings was overruled by W. Va. Code § 33-6-31d(a); thus, to have an effective offer of optional coverage, the West Virginia Insurance Commissioner's prescribed forms must be used. Therefore, according to Justice Davis, when the forms prescribed by the West Virginia Insurance Commissioner are not used, the optional coverage is added to the policy as a matter of law.

Impact on Business:

Insurers now know that, to comply with W. Va. Code § 33-6-31d, they are not required to use the precise forms prescribed by the West Virginia Insurance Commissioner. However, should an insurer fail to use the prescribed forms, such insurer forfeits the presumption of compliance.

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Kubican v. The Tavern, LLC
Case No. 12-0507 (November 6, 2013) (Certified Question)

***What the Court was asked to Decide*:**

The West Virginia Supreme Court was asked to answer a certified question from the Circuit Court of Harrison County in regard to the immunity enjoyed by members of an LLC under West Virginia Code § 31-B-3-303. The case arises out of personal injuries sustained in a fight at a local bar. Presumably, because the bar had no money or assets, Plaintiff sought to impose personal liability on the individual members of an LLC which owned the bar.

Facts:

On or about February 7, 2011, Joseph Kubican ("Kubican") filed a Complaint naming Bubba's Bar and Grill and Harry Wiseman as Defendants. The Complaint consisted of three counts: 1) negligence, 2) negligent training and supervision of the bar staff and security personnel, and 3) willful and wanton misconduct. Kubican subsequently learned that the bar was actually owned by The Tavern LLC. The Tavern LLC had two members: James Pugh and Lawson Magnum. After a certain amount of discovery, Kubican sought to amend his Complaint to name Pugh and Magnum as Defendants under the doctrine of "piercing the corporate veil."

The individual Defendants objected to the Amended Complaint and argued to the circuit court that immunity existed under West Virginia Code § 31-B-3-303. This provision provides, in pertinent part, the following:

> (a) Except as otherwise provided in subsection (c) of this section, the debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise, are solely the debts, obligations and liabilities of the company. A member or manager is not personally liable for a debt, obligation or liability of the company solely by reason of being or acting as a member or manager.

The Circuit Court of Harrison County agreed with the arguments and ruled that the individual members could not be personally liable for any debt, obligation or liability of the company solely by reason of being or acting as a member or manger. The Circuit Court clarified that there were no specific allegations of actual wrongdoing on the part of Pugh and Mangum. Rather, according to the Amended Complaint, the claims against Pugh and Mangum were based solely on their status of members or managers of an LLC. This distinction was not fully developed in the opinion.

Holding:

The West Virginia Supreme Court believed that whether absolute immunity was afforded to members of an LLC under West Virginia Code § 31-B-3-303 was a matter of first impression. At the outset, the Court essentially applied basic statutory construction to give effect to its meaning and application. The Court found that the statute clearly and unambiguously stated that there is immunity afforded to members of an LLC to the extent liability is based solely on an individual being a member or manager of an LLC. However, the Court pointed out that term "solely" used in the statute implied that the legislature provided a basis for members of an LLC to be liable under other theories. Relying on the old maxim *expresio unius est exclusio alterius*, which means the expression and mention of one thing applies as an exclusion of another, the Court held that absolute immunity does not exist if a party can pierce the corporate veil. However, the analysis did not stop there.

The Court reviewed numerous cases dealing with the equitable doctrine of piercing the corporate veil. The Court applied a two-prong analysis to determine those instances when corporate immunity may be lost and personal liability can attach to individuals of an LLC. This two part test considered: 1) unity of interest and ownership; and 2) fraud, injustice, or an inequitable result. While the Court acknowledged that immunity is not lost simply because an LLC fails to adhere to corporate formalities, the Court set out factors which show when immunity can be lost. The Court further found that the analysis requires a case-by-case analysis, meaning it will be factually dependent. The Court adopted such factors as: (1) commingling of corporate and shareholder funds, (2) failure to file statutory forms for corporate affairs, (3) undercapitalization, (4) failure to provide separate bank accounts or bookkeeping records; and (5) failure to hold regular shareholder and director meetings. The Court also ruled that the doctrine of piercing the corporate veil applied not only to breach of contract cases, but also to retaliatory discharge and discrimination claims.

Impact on business:

Ultimately, this ruling is unfavorable for the business community. Entrepreneurs form LLCs for the sole purpose to protect themselves from personal liability. This case may have a chilling effect on that process. Arguably, businesspersons will be less likely to engage in certain risky endeavors under the specter of personal liability. While the Court's analysis is sound from a common law perspective, individual shareholders of an LLC may not be able to extricate themselves from litigation as the analysis adopted by the Court is fact-driven and dependent the circumstances of the case. In other words, motions to dismiss or motions for summary judgment may be difficult to obtain.

Of note, there seems to be continued confusion about liability solely as a member of an LLC versus liability for the personal acts or decisions of a manger of an LLC. In other words, the Court found the foregoing liability distinguishable from a holding an LLC member or manager reliable based on his or her own tortious conduct. This rational and distinction is very difficult to apply, and results in additional confusion with when and why liability can attach to a member of a LLC.

WEST VIRGINIA CHAMBER
PIERCING THE CORPORATE VEIL AND CRIMINAL CONVERSATION

State ex rel Golden v. Hon. Kaufman
Case No. 14-0280 (June 16, 2014)

***What the Court was asked to Decide*:**

Whether West Virginia law recognizes a claim for "criminal conversation and adultery" by a husband against the man with whom his wife was having an affair.

What the Court Decided:

No. The Supreme Court of Appeals held "the torts of criminal conversation and adultery are, in essence, common law actions for alienation of affections. Accordingly, the torts of criminal conversation and adultery are not valid causes of action in West Virginia."

Facts:

The plaintiff sued the defendant and his employer, a financial consultant, because the defendant was having an affair with the plaintiff's wife which began when he assisted her with some retirement transactions.

The circuit court granted summary judgment because West Virginia law does not recognize claims for alienation of affection. Those claims are prohibited under West Virginia Code § 56-3-2a. Analyzing the claims made, the court found that the claim of "criminal conversation" or "adultery" had been abolished by statute.

Impact on Business:

The plaintiff sued the defendant broker and his employer. For businesses, this opinion is favorable because they are protected from liability in the event one of their employees engages in an extramarital affair.

Hersh v. E-T Enterprises, Ltd. Partnership
232 W. Va. 305, 752 S.E.2d 336 (2013), Case No. 12-0106 (November 12, 2013)

***What the Court was asked to Decide*:**

The issue in *Hersh* was whether the open and obvious doctrine should be abolished or, alternatively, whether the doctrine should be altered to emphasize the foreseeability of injury as a result of the open and obvious nuisance.

What the Court Decided:

Facts:

In *Hersh*, the plaintiff fell down "a staircase in a commercial parking lot that lacked handrails" and alleged that the property owners "were prima facie negligent because a local ordinance legally required the installation of at least one handrail." *Hersh*, 752 S.E.2d at 339. The defendants countered that the missing handrail was open and obvious. *Id.* The circuit court agreed and granted the summary judgment to the defendants. *Id.*

Holding:

Reversing summary judgment, the Court found that the property owners, by local ordinance, had a duty of care that included placing handrails on the stairs. The Court abolished the traditional open and obvious doctrine and altered the issue to one of foreseeability of injury, overruling *Sesler v. Rolfe Coal & Coke Co.*, 51 W. Va. 318, 41 S.E. 216 (1902), and *Burdette v. Burdette,* 147 W. Va. 313, 127 S.E.2d 249 (1962). Id. at Syl. Pt. 6.

The Court's decision on the obviousness of a danger created four new Syllabus Points (including Syl. Pt. 6 just cited):

> 5. In the ordinary premises liability case against the owner or possessor of the premises, if it is foreseeable that an open and obvious hazard may cause harm to others despite the fact it is open and obvious, then there is a duty of care upon the owner or possessor to remedy the risk posed by the hazard. Whether the actions employed by the owner or possessor to remedy the hazard were reasonable is a question for the jury.
>
> In the ordinary premises liability case against the owner or possessor of the premises, the finder of fact may consider whether a plaintiff failed to exercise reasonable self-protective care when encountering an open and obvious hazard on the premises. The plaintiff's confrontation of an open and obvious hazard is merely an element to be considered by the jury in apportioning the relative fault of the parties.
>
> The owner or the possessor of premises is not an insurer of the safety of every person present on the premises. If the owner or possessor is not guilty of negligence or willful or wanton misconduct and no nuisance exists, then he or she is not liable for injuries sustained by a person on the premises.

Id. at Syl. Pts. 5, 7, 8. The Court reasoned that the open and obvious doctrine was introduced and subsequently evolved during West Virginia's use of contributory negligence. *Id.*, 752 S.E.2d at 346.

Impact on Business:

The duty of care of property owners is now broadened to potentially make property owners insurers of the safety of every person present on the premises, in spite of the Court's repeated assertions (and new Syllabus Point) that they are not. This new legal duty will categorically increase the risk and cost of owning property. The West Virginia business community should expect insurance premiums to rise in preparation for careless plaintiffs seeking retribution. The possibility of prevailing on a motion for summary judgment in premises liability cases is gone. The options for defense now are limited to settling early or defending the case through trial with the hope of convincing a jury of the plaintiff's folly.

Judith Collett, Assessor of Taylor County v. Eastern Royalty, LLC
232 W.Va. 126, 751 S.E. 2d 12, Case Nos. 12-0764 through 12-0768 (October 21, 2013)

What the Court Reviewed:

Whether, for ad valorem property tax purposes, the County Assessor, who, first accepted and later, disagreed with the values determined by the State Tax Commissioner for natural resource property, could challenge such values before the County Commission sitting as the Board of Equalization and Review? (Note: the firm, of which the author of this report is a member, represented one of the several taxpayers in this consolidated case.)

What the Court Decided:

The Assessor's exclusive statutory remedy was to present her objections to the West Virginia Property Valuation Training and Procedures Commission (PVTPC). W.Va. Code §11-1C-10(g).

Facts:

The taxpayers were all the owners of in-place coal reserve properties, the values of which, for property tax purposes, were determined, in the first instance, by the State Tax Commissioner and, then, reported to the County Assessor for completion of the assessment and taxation process. Initially, the Assessor accepted the values and placed them on the property books for subsequent presentation to the Taylor County Commission sitting as the Board of Equalization and Review (the Board). However, when the Board was sitting as such, based on a review of the values by a private appraiser hired by the Assessor, acting in consultation with a senior official of the State Tax Department's Property Tax Division, the Assessor came to conclude that the values were erroneous. She then went before the Board to object to the initial values and to ask the County Commission to increase them on the basis of her consultant's report. The County Commission sustained the Assessor's objections and ordered the values to be raised accordingly. Upon the taxpayers' appeal to the Circuit Court, the County Commission's decision was overruled. The Assessor and County Commission appealed the Circuit Court's ruling to the West Virginia Supreme Court.

Holding:

Upon review, the West Virginia Supreme Court affirmed the Circuit Court's holding and, thus, sustained the State Tax Commissioner's valuations. In doing so, it cited the plain language of the governing statute in concluding that: (1) the State Tax Commissioner has the exclusive authority to initially determine the values of natural resource properties for property tax purposes; W.Va. Code §§ 11-1C-10 and 11-6K-1 et seq.; and (2) when the Assessor received those values from the State Tax Commissioner, though she could have (and, initially did) accepted them, but, because she did not accept them, she was required to go before the PVTPC to show just cause for such failure to accept the values and to provide the PVTPC with a plan by which a different appraisal would be conducted. W.Va. Code § 11-1C-10(g).

However, before reaching that conclusion, the Court acknowledged that other, more generally applicable, statutory provisions could be read as giving the Assessor, in addition to the remedy before the PVTPC, the option of presenting her objections to natural resource property valuations, initially determined by State Tax Commissioner, to Board. See, W.Va. Code §§ 11-3-24. In fact, a 1999 ruling of the Court, involving the valuation of managed timberland by the State Tax Depart-

ment, had recognized that relief before the Board as being available to a county assessor. *In re: The 1994 Assessments of Property of Righini,* 197 W.Va. 166, 475 S.E.2d 166 (1999).

In resolving the perceived ambiguity, the Court first determined that, in part based on the Constitutional mandate that, as to any particular species of property, taxation is to be "equal and uniform throughout the state," the Legislature's intent in enacting the overall statutory structure was to give the State Tax Commissioner the exclusive authority to initially determine the taxable values of natural resource property. W.Va. Const., Art. X, Sec. 1. Thus, the Court concluded that, in the case of such property, and despite the absence of clear language pre-empting the Assessor's remedy before the County Commission, which remedy it had recognized in *Righini*, the Legislature's intent was to make the PVTPC the sole forum for the Assessor to object to the taxable values of natural resource property determined, in the first instance, by the State Tax Commissioner. Thus, the Court held, that, once she initially accepted the values of the taxpayers' coal reserves, and failed to object to them before the PVTPC, the Assessor did not have the option of challenging them before the Board. In doing so, the Court overruled the precedent of *Righini* to the contrary.

Impact on Business:

This ruling is a welcome affirmation of the statutory primacy of the State Tax Department, with its generally more objective and technically qualified appraisal capacity, in determining the taxable values of natural resource (and, by the same law, industrial) property. As a result, where the owners of such properties are satisfied with the State Tax Department's values of such properties, the long-standing ambiguity, suggesting the concurrent general statutory review authority of institutionally-biased county officials in such cases, has been favorably resolved against the availability of that alternative remedy for assessors. However, in cases where the Tax Department's values of natural resource or industrial property are erroneously excessive, the owners of such properties are, like the owners of all other business property, still remitted to those same county officials for relief. Thus, the beneficial impact of this ruling is limited in its scope.

Lee Trace, LLC v. Gearl Raynes, Assessor of Berkeley County, West Virginia
232 W.Va. 183, 751 S.E. 2d 703, Case Nos. 12-0638 and 12-0992 (October 21, 2013) (per curiam)

What the Court Reviewed:

1. Whether the written notice the Assessor provided the taxpayer, of the increased taxable value of its property, and of the right to seek review by the County Commission, sitting as a Board of Equalization and Review, satisfied the applicable statute and was constitutional under the Due Process clause?

2. Whether, due to the absence, asserted by the Assessor, of data necessary to apply the market and income valuation methods as otherwise contemplated in the governing regulations, her determination of the taxable value of the taxpayer's income-producing commercial property could be based on the cost method alone?

What the Court Decided:

1. The notice neither complied with the Legislature's intent in providing for notice nor satisfied constitutional due process. 2. Due to the absence of timely and sufficient data to do otherwise, the Assessor had the discretion to base the taxable value of the subject property on the cost method alone.

Facts:

In the first case (No. 12-0638), involving the valuation of the taxpayer's newly constructed apartment complex for 2010 ad valorem property tax purposes, the Assessor's notice of increased taxable value, merely advised the taxpayer that "[i]f you believe an adjustment in the [taxable] value is necessary, you should contact the County Commission sitting as a Board of Review and Equalization." Thus, when the taxpayer, on December 21, attempted to challenge that value, its written application for relief was rejected because, as to the review and adjustment of 2010 property tax values, the Board had adjourned sine die (*i.e.* without the authority to reconvene) on February 25, 2010. The statutory provision for the notice, then in effect, simply stated that, in the course of giving written notice of increased taxable values, the Assessor was required to also "advise [the taxpayer] of his or her right to appear and seek an adjustment." W.Va. Code § 11-3-2a(a) [2008].

The second case (No. 12-0992) involved questions of the selection among, and reliance on, the three primary valuation methods (cost, income and market), and the availability to the Assessor of the data necessary to apply the income method which the taxpayer requested, but, for the Assessor's use of which, it did not timely supply. Specifically, the governing regulations contemplate that, when sufficient relevant data to apply them is available, the Assessor is to, at least, consider each of the three methods and, as much as feasible, reconcile their results in a final valuation. Title 110, Code of State Regulations, Series 1P, §2.2.1 (1991).

Because of the omission of the necessary data, from the record made before the Board, the Circuit Court exercised its newly enacted authority to remand a case, in such instances, to the Board to allow discovery and to take more evidence. W.Va. Code §11-3-25(c). Following those remand proceedings, the Circuit Court authorized a valuation based on the numerical average of: the Assessor's cost approach and a hybrid income approach, the latter of which having been the result of the court-directed combined efforts of the Assessor, the taxpayer and the Board in the course of the remand.

Holding:

Upon review, the West Virginia Supreme Court held, in the first case, that the intent, if not the express language, of the applicable version of the notice statute was to give the taxpayer adequate notice of its right to seek review, and, that, by omitting the deadline for seeking review, the notice actually given in this case, failed to do so, and, thus, was also in violation of procedural due process. W.Va. Code § 11-3-2a(a) [2008].

In the second case, a majority of the Court (over Justice Ketchum's dissent), held that, despite the actions of the Assessor and the Board, with the input of the taxpayer, in averaging the results derived from a modified income method, with the results of the original cost method value determined by the Assessor, all to re-determine the taxable value of the property, the Assessor's original (higher) value should be reinstated. The basis for such a ruling was that, under prior rulings and applicable regulations, when, as here, a taxpayer fails to timely provide to the Assessor the data necessary to apply either the income or market methods, and when such data is not otherwise available to the Assessor due to an absence of relevant transactions, the Assessor has the discretion to rely exclusively on the cost method to determine the taxable value of an income-producing commercial property.

Impact on Business:

The Court's ruling in the first case should lead to a much-needed improvement in the clarity of notices of the right to obtain administrative and judicial review of proposed tax assessments of all kinds, not just of property taxes. Unfortunately, however, the majority ruling in the second case will further embolden county officials to engage in the pervasively prejudicial tax assessment practice of disregarding, under the unsubstantiated guise of lacking timely and sufficient data to do otherwise, the use of the income and market methods to set the taxable values of income-producing commercial property. Instead, as a result of this ruling, they will continue to claim the absolute discretion to exclusively employ the cost method with its often arbitrary and typically higher taxable values.

Fortunately, the last word on these matters has not been written. Specifically, pursuant to the Court's remand, these cases, consolidated with identical cases involving the same taxpayer's property for four subsequent years, are now pending before the Business Court Division of the Circuit Court where many these issues are being re-litigated. When, as is likely, they, again, reach the Supreme Court, more favorable outcomes are, at least, possible. Thus, the glass can be seen as half-full.

Charles R. and Linda D. Wright v. Angela Banks, Assessor of Jefferson County
232 W.Va. 602, 753 S.E. 2d 100, Case No. 11-1768 (November 21, 2013) (per curiam)

What the Court Reviewed:

Whether, in determining the taxable value of the taxpayers' residence, the Assessor's failure, to consider the recent price they paid for it, was erroneous?

What the Court Decided:

It was erroneous for the Assessor to find that the arms-length price, the taxpayers paid for their residence just seven (7) days before the assessment date, was not substantial evidence of its value for ad valorem property tax purposes absent evidence allowing her to disregard that price as an anomaly.

Facts:

On June 23, 2010, the taxpayers purchased their residence in an arms-length transaction for $234,000. Later in 2010, based on her determination of the property's value as of July 1, 2010, the Assessor informed the taxpayers that its value for 2011 tax purposes was $355,200.

At the hearing before the County Commission sitting as a Board of Equalization and Review, the Assessor's appraiser explained the fifty plus percent (50+ %) increase on the basis of the range of values she had found from a survey of the selling prices of comparable houses and on the basis of her view that the price the taxpayers had paid was "an anomaly." In selecting transactions for her survey, the Assessor's appraiser testified that she intentionally excluded various sales occurring in foreclosure-related circumstances, though she was unable to identify those transactions at the hearing. She did testify that, although she had not actually inspected the interior of the taxpayers' house, she had set its value near the upper end of the range in her surveyed comparable sales because of its size and the fact that it had been a model home, which experience told her was likely to have superior amenities as such. The Assessor, however, did not provide any specific proof as to why the price paid by the taxpayers was "an anomaly."

Holding:

Upon review, the Supreme Court held that the Assessor's valuation was erroneous on several grounds. In doing so, it first cited the long-standing principle that, though not conclusive, the recent arms-length price paid for a property should be a substantial factor in determining its taxable value.

Further, the Court noted as meaningful, the failure of the Assessor to provide any evidence supporting her conclusion that the price the taxpayers paid was "an anomaly." This, the Court said, did not comport with the Assessor's duty to seek out all information which would enable her to determine true and actual value. Rather, the Assessor's appraiser was left to simply conclude that the taxpayers "got a great deal on a substantial home, [and that the sale was] a stroke of luck in a down market." To the contrary, the Court found that there was no evidence that the sellers, having sold the house to the taxpayers for $5,000 more than their listing price, were under pressure, compulsion or duress to sell for less than full value, due to "foreclosure-like circumstances" or otherwise.

Impact on Business:

The most remarkable feature of this ruling is how the Court applied the rules establishing the burden of proof in such cases. Specifically, with considerable justification, Justice Loughry, in a dissenting opinion that was nine pages longer than the Court's ruling, saw, as being a departure from prior rulings, the majority's emphasis on what the Assessor did not show in support of the assessment, as opposed to what the taxpayer affirmatively showed in terms of both the error of the assessment and the value of their property. For example, in finding her assessment erroneous, the majority emphasized that the Assessor, without any proof, concluded that the purchase price the taxpayers paid was simply an anomaly, thus, to justify her failure to afford it any appreciable weight in determining taxable value.

To Justice Loughry, the majority's ruling was at odds with most of the Court's prior decisions holding that the assessor's assessment is rebuttably correct, that the standard of proof to show it to be erroneous is clear and convincing evidence and that the burden of proving that is clearly, and at all times, on the taxpayer to show both that the assessment is erroneous and what is the property's true and actual value. However, the majority here appeared to accept the proof of the purchase price the taxpayer paid not only as strong, though not conclusive, evidence of the property's value, but also as proof of the error of the Assessor's value. Though it was a deviation from the Court's approach in prior cases, which imposed a two-part burden on the taxpayer to show both that the proposed assessment of the subject property is erroneous and what is its true and actual value, given the equally long line of cases, indicating that a recent arms-length price paid for the subject property is strong proof of its taxable value, the logic of the majority's approach appears to be sound in light of the Assessor's failure to offer any justification for her disregard of that price as an anomaly.

This new approach should first be viewed most favorably by the business community because, in recent years, severely distressed economic conditions have depressed the broader market for real estate in many locations, which should now, as a result of this ruling, no longer operate as an authorization for county officials to arbitrarily disregard many discounted value purchases in favor of unrealistically higher taxable values. Beyond that, if this four-to-one split per curiam, but most recent, property tax valuation decision can be seen as a signal of the Court's willingness to allow a taxpayer's superior proof of the value of its property to also serve as a showing of the error of the Assessor's proposed value, and, even more importantly, if it operates to limit, in any meaningful manner, the otherwise almost unbridled scope of county assessors' discretion to choose appraisal methods which result in the highest possible taxable values, those would be most welcome developments.

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