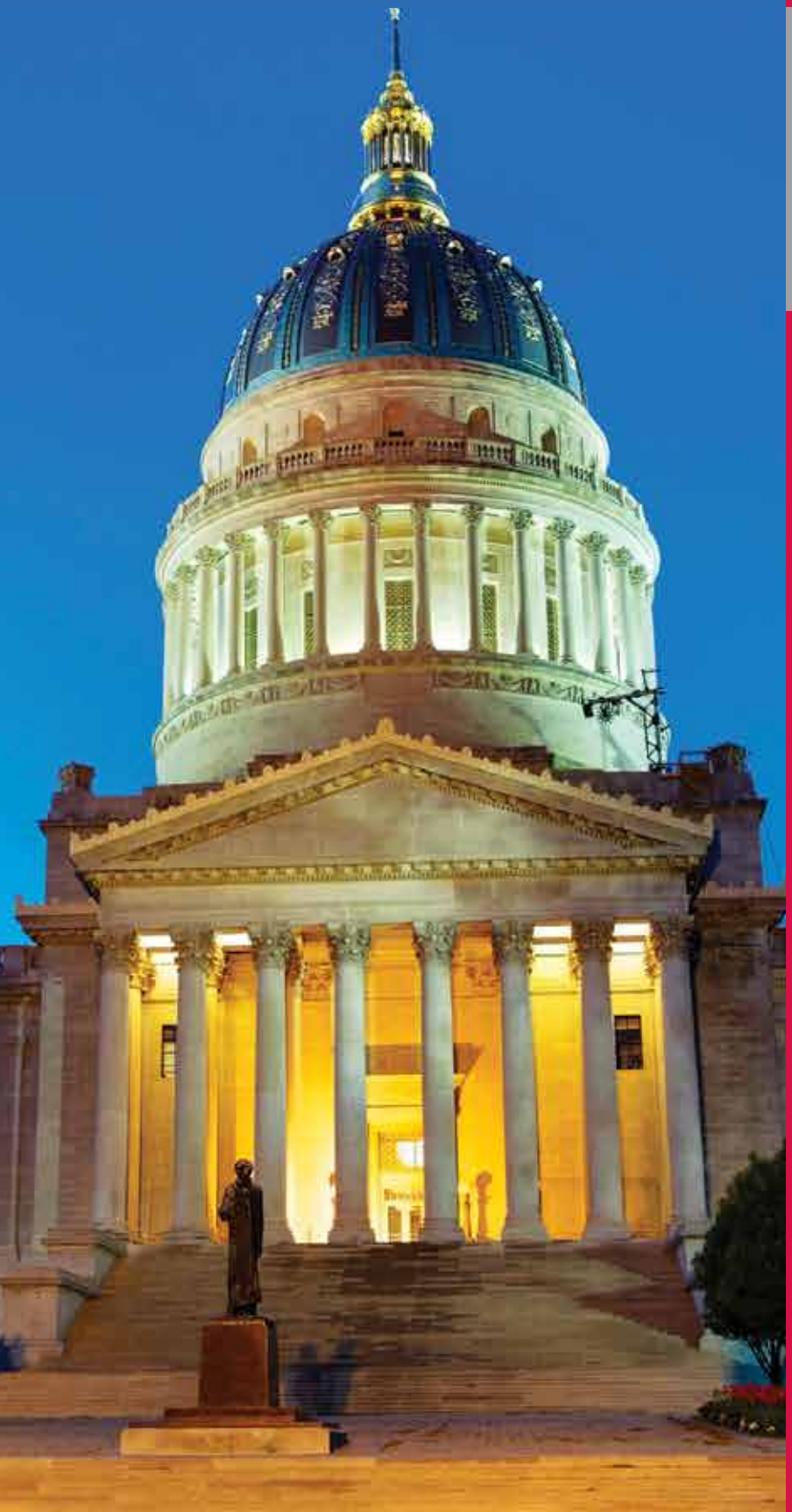
Court Watch

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



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

West Virginia Chamber

WEST VIRGINIA CHAMBER

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Credit Acceptance Corp. v. Robert J. and Billye S. Front, and Credit Acceptance Corp. v. Ocie Shrewsbury,
Nos. 11-1646 and 12-0545, 2013 W.Va. Lexis 725 (June 19, 2013)

***What the Court Reviewed*:**

Three orders from the Circuit Court of Raleigh County refusing to grant Motions to Compel Arbitration were appealed to the Supreme Court of Appeals of West Virginia. The Supreme Court was asked by Credit Acceptance Corp. to consider whether the Circuit Court erred in concluding that the arbitration agreements were unconscionable based upon the unavailability of the arbitration forums named therein and the inclusion of jury trial waiver provisions.

***What the Court Decided*:**

The Supreme Court's decision agreed with Credit Acceptance Corp. arguments as it concluded that the Circuit Court had improperly refused to order arbitration in these instances. Significantly, for the first time, the Supreme Court held that an order denying a Motion to Compel Arbitration is directly appealable under the "collateral order" doctrine. In years past, the Supreme Court has addressed this type of denial through its original jurisdiction on a Writ of Prohibition. The Supreme Court now recognizes that the better rule is to allow an immediate appeal of any denial of a request to arbitrate. That is a significant ruling for all parties attempting to enforce an arbitration agreement.

The Supreme Court concluded that one of the arbitration forums named in the agreement was still available to the parties for arbitration. On this basis, the Supreme Court rejected the Circuit Court's orders finding that the arbitration provision was procedurally unconscionable based upon subsequent events and substantively unconscionable since the chosen arbitral forum was no longer available. The Supreme Court also concluded as a matter of law that a jury trial waiver provision did not render the arbitration agreements unenforceable.

Finally, in rendering its decision, the Supreme Court issued one new significant Syllabus Point regarding arbitration agreements:

> 3. Where an arbitration agreement names a forum for arbitration that is unavailable or has failed for some reason, a court may appoint a substitute forum pursuant to section 5 of the Federal Arbitration Act, 9 U.S.C. § 5 (1947) (2006 ed.), only if the choice of forum is an ancillary logistical concern. Where the choice of forum is an integral part of the agreement to arbitrate, the failure of the chosen forum will render the arbitration agreement unenforceable.

Facts:

In the first case, in 2007, Robert and Billye Front purchased a 2003 Chevrolet Cavalier from an automobile dealer through a retail installment loan agreement with a security agreement with the automobile dealer. The automobile dealer assigned the note to Credit Acceptance Corp.

In 2008, the Fronts bought a 2005 Ford Focus from another automobile dealer through a retail installment loan agreement with a security agreement with the automobile dealer. The automobile dealer also assigned the note to Credit Acceptance Corp. Both of the retail installment loan agreements contained nearly identical arbitration clauses with jury trial waiver clauses. Under the agreements, the arbitrations were to be conducted before the National Arbitration Forum or the American Arbitration Association.

After the Fronts executed the retail installment loan agreements, the State of Minnesota sued the National Arbitration Forum and it entered into a consent decree with the Attorney General of that State agreeing to cease any consumer arbitrations. Shortly thereafter, 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, the Fronts commenced two civil actions against Credit Acceptance Corp. in the Circuit Court of Raleigh County in 2011, alleging four causes of action: violations of the West Virginia Consumer Credit and Protection Act; negligence; intentional infliction of emotional distress; and, invasion of privacy. Credit Acceptance Corp. filed a Motion to Compel Arbitration in both cases. The Circuit Court entered orders denying the Motions to Compel Arbitration finding that the arbitration provisions were procedurally unconscionable based upon subsequent events and substantively unconscionable since the chosen National Arbitration Forum was no longer available. The Circuit Court also found that the jury trial waiver provisions were in violation of the West Virginia Consumer Credit and Protection Act and that rendered the arbitration agreements unenforceable. Credit Acceptance Corp. appealed both of those orders denying arbitration.

In the second case, in 2010, Ocie and Virgil Shrewsbury purchased a 2000 Ford Expedition from an automobile dealer through a retail installment loan agreement with a security agreement with the automobile dealer. The automobile dealer assigned the note to Credit Acceptance Corp. The retail installment loan agreement contained an arbitration clause and a jury trial waiver clause. Under the agreement, the arbitration was to be conducted before the National Arbitration Forum or the American Arbitration Association. Similar to the Front case, the National Arbitration Forum was no longer available for arbitration in this case.

Thereafter, the Shrewsburies commenced a civil action against Credit Acceptance Corp. in the Circuit Court of Raleigh County in 2011, alleging four causes of action: violations of the West Virginia Consumer Credit and Protection Act; negligence; intentional infliction of emotional distress; and, invasion of privacy. Credit Acceptance Corp. filed a Motion to Compel Arbitration. The Circuit Court entered an order denying the Motion to Compel Arbitration finding that the arbitration provision was procedurally unconscionable based upon subsequent events and substantively unconscionable since the chosen National Arbitration Forum was no longer available. The Circuit Court also found that the jury trial waiver provision was in violation of the West Virginia Consumer Credit and Protection Act and that rendered the arbitration agreement unenforceable. Credit Acceptance Corp. appealed the order denying arbitration.

Holding:

The Supreme Court's decision in favor of Credit Acceptance Corp. shows a new willingness to follow the United States Supreme Court's precedents upholding arbitration agreements. The Supreme Court's decision finding that an order denying the Motion to Compel Arbitration is directly appealable under the "collateral order" doctrine is highly significant. In years past, the Supreme Court has required parties to file a discretionary Writ of Prohibition to address the denial of a Motion to Compel Arbitration. The Supreme Court now recognizes that the better rule is to allow an immediate appeal of any denial of a request to arbitrate.

The Supreme Court concluded that even though the National Arbitration Forum was no longer available to arbitrate these matters, 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 Supreme Court rejected the Circuit Court's orders finding that the arbitration provisions were procedurally unconscionable based upon subsequent events and substantively unconscionable since the chosen arbitral forum was no longer available.

The Supreme Court fully considered section 5 of the Federal Arbitration Act, 9 U.S.C. § 5 and it found that a court may appoint a new arbitrator if the choice of forum is an ancillary logistical concern. But if the choice of forum is an integral part of the agreement to arbitrate, the failure of the chosen forum will render the arbitration agreement unenforceable. In this case, the Supreme Court concluded that it did not need to further examine that issue since the American Arbitration Association is set forth in the arbitration agreements and they were available for the arbitration of these cases.

The Supreme Court also concluded as a matter of law that a jury trial waiver provision did not render the arbitration agreements unenforceable. Its ruling is rather decisive, relying on its prior precedent and Fourth Circuit precedent:

> Credit Acceptance argues that the foregoing rulings were erroneous. We agree. In Syllabus point 1 of *Brown II*, this Court held:
>
> > Under the Federal Arbitration Act, 9 U.S.C. § 2, a written provision to settle by arbitration a controversy arising out of a contract that evidences a transaction affecting interstate commerce is valid, irrevocable, and enforceable, unless the provision is found to be invalid, revocable or unenforceable upon a ground that exists at law or in equity for the revocation of any contract.
>
> 229 W. Va. 382, 729 S.E.2d 217 (citation omitted). Thus, insofar as an arbitration agreement, by its very nature, requires a party to

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> surrender his or her right to litigate, it may not be invalidated solely upon that ground. *See American Gen. Life & Acc. Ins. Co. v. Wood*, 429 F.3d 83, 91 n.6 (4th Cir. 2005) ("To the extent that Wood argues that any waiver of his constitutional right to access to state courts or trial by jury must be knowing and voluntary, we have already stated that 'the loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate.' *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002) (internal quotations and citations omitted).")

Id. at *45-46. The Supreme Court has refused in the past to recognize this obvious point and it has been an open question since 2002 when the Supreme Court refused to recognize this point in *State ex rel. Dunlap v. Berger*, 211 W.Va. 549, 567 S.E.2d 265 (2002). It is refreshing that the Supreme Court is now willing to conclude that the natural consequence of entering into an arbitration clause is the automatic waiver of any right to a jury trial as a matter of law.

Impact on Business:

This decision ordering arbitration is a very good one for West Virginia businesses. The 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 may mark a turning point in the willingness of the Supreme Court to begin following federal precedent and to ordering parties to meet their legal obligations under consumer and other types of arbitration agreements. Hopefully, the Circuit Courts of this State will see this decision as a signal from the Supreme Court that it is time to fall in line with federal precedents and start enforcing consumer and other types of arbitration agreements.

Vanderbilt Mortgage and Finance, Inc. v. Terri L. Cole
No. 11-1288, 740 S.E.2d 562, 2013 W. Va. LEXIS 191 (March 18, 2013)

***What the Court Reviewed*:**

Two orders from the Circuit Court of Harrison County regarding the award of civil penalties and attorney's fees under the West Virginia Consumer Credit and Protection Act, W.Va. Code §§ 46A-1-101, *et seq.* were appealed to the Supreme Court of Appeals of West Virginia. The Supreme Court was asked by Vanderbilt Mortgage and Finance, Inc. to consider whether an award of civil penalties could be awarded under the West Virginia Consumer Credit and Protection Act, W.Va. Code §§ 46A-1-101, *et seq.* when no actual damages were awarded by the jury. Vanderbilt Mortgage and Finance, Inc. argued that this also constituted a violation of the due process clause under the West Virginia and United States Constitutions. Vanderbilt Mortgage and Finance, Inc. also argued that the civil penalties should not be increased by inflation.

The Supreme Court was also asked by Vanderbilt Mortgage and Finance, Inc. to examine whether W. Va. Code § 46A-2-125 (d) was violated when calls were made to third parties, not Ms. Cole. Also, Vanderbilt Mortgage and Finance, Inc. argued that at most, the repeated or continuous calling should be considered one violation of the statute and only one civil penalty should have been awarded, not thirteen penalties. Finally, the Supreme Court was asked to decide whether the award of attorney's fees was appropriate when Ms. Cole only prevailed on thirteen of fifty-seven claimed violations of the West Virginia Consumer Credit and Protection Act, W.Va. Code §§ 46A-1-101, *et seq.* and because the Circuit Court considered impermissible factors in awarding attorney's fees.

***What the Court Decided*:**

The Supreme Court's decision rejected all of Vanderbilt Mortgage and Finance, Inc. arguments as it concluded that the Circuit Court had properly awarded civil penalties and attorney's fees for the violations of the West Virginia Consumer Credit and Protection Act, W.Va. Code §§ 46A-1-101, *et seq.* In so holding, the Supreme Court issued three new significant Syllabus Points regarding the West Virginia Consumer Credit and Protection Act, W.Va. Code §§ 46A-1-101, *et seq*.:

> 1. Because the amount of an award of civil penalties pursuant to W. Va. Code § 46A-5-101(1) (1996) is within the discretion of the circuit court, we review an award of civil penalties under this section for abuse of discretion.
>
> 2. Under W. Va. Code § 46A-5-101(1) (1996), an award of civil penalties is not conditioned on an award of actual damages.
>
> 3. The maximum award of a civil penalty allowable under W. Va. Code § 46A-5-101(1) (1996), adjusted for inflation pursuant to W. Va. Code § 46A-5-106 (1994), does not violate the due process and excessive fines clauses of the West Virginia Constitution and United States Constitution absent an abuse of discretion

by the circuit court awarding the civil penalty.

The Supreme Court also held that, as a matter of law, the award of attorney's fees was appropriate even though Ms. Cole only prevailed on thirteen of fifty-seven claimed violations of the West Virginia Consumer Credit and Protection Act, W.Va. Code §§ 46A-1-101, *et seq.* and the Supreme Court rejected the argument that the Circuit Court considered impermissible factors in awarding attorney's fees.

Facts:

Vanderbilt Mortgage and Finance, Inc. was Ms. Cole's loan servicer and it lawfully foreclosed on her home through a prior proceeding. She refused to leave the home and Vanderbilt Mortgage and Finance, Inc. filed an unlawful detainer action in magistrate court seeking possession of the home. The case was removed by Ms. Cole to the Circuit Court of Harrison County by her counsel Mountain State Justice and Ms. Cole counterclaimed for 57 violations of the West Virginia Consumer Credit and Protection Act, W.Va. Code §§ 46A-1-101, *et seq*., alleging repeatedly calling relatives and others after requesting that the calls cease, insulting Ms. Cole over the telephone and revealing private details of the loan to third parties without her permission.

A jury trial was held and the jury rendered a verdict in favor of Ms. Cole finding that Vanderbilt Mortgage and Finance, Inc. committed thirteen violations of the West Virginia Consumer Credit and Protection Act, W.Va. Code §§ 46A-1-101, *et seq.* The jury awarded Ms. Cole no actual damages. The Circuit Court determined that the unlawful detainer was a legal issue at the trial and he determined that Ms. Cole should vacate the property within thirty days. Thereafter, the Circuit Court considered the issue of civil penalties and awarded civil penalties for the thirteen violations in the total amount of $32,125.24. In making that award, the Circuit Court considered the provisions of W.Va. Code § 46A-5-101(1) and 106, which allow for civil penalties ranging from $100 to $1,000 per violation and he applied an inflation factor and awarded actual civil penalties ranging from $456 to $4,560 per violation. By separate order, the Circuit Court considered a fee request in the amount of $48,852 and it awarded Mountain State Justice $30,000 in attorney's fees.

Holding:

The Supreme Court held that civil penalties could be awarded under the West Virginia Consumer Credit and Protection Act, W.Va. Code §§ 46A-1-101, *et seq.* when no actual damages were awarded by the jury. The Supreme Court examined the express language of W.Va. Code § 46A-5-101(1) and it found no requirement that the Legislature intended the award of civil penalties only when an award of actual damages had been made. The Supreme Court noted that a similar interpretation of the Fair Debt Collections Practices Act, 15 U.S.C. § 692k had been made in federal court, *Baker v. G.C. Servs. Corp.*, 677 F.2d 775, 780 (9th Cir. 1982).

The Supreme Court also rejected Vanderbilt Mortgage and Finance, Inc.'s argument that an award of civil penalties constituted a violation of the due process clause under the West Virginia and United States Constitutions. Vanderbilt Mortgage and Finance, Inc. argued that the Supreme Court's ruling in *Fleming Landfill, Inc. v. Garnes*, 186 W. Va. 656, 413 S.E.2d 897 (1991) that punitive damages could not be awarded without actual damages should apply with equal force to civil penalties. The Supreme Court summarily rejected this argument holding that civil penalties are not the same as punitive damages. The Supreme Court went on to consider Vanderbilt Mortgage and Finance, Inc.'s arguments that due process will apply to an award of civil penalties and that it must bear a reasonable relationship or provide a reasonable warning to a defendant of the consequences of their conduct. The Supreme Court held that the language of W.Va. Code § 46A-5-101(1) and 106 allowed for civil penalties ranging from $100 to $1,000 per violation and the inflation factor provided fair and adequate warning to any Defendant and therefore, that there was no due process violation. The Supreme Court also found that the maximum civil penalty of $1,000, even adjusted for inflation did not violate the excessive fines clause of the West Virginia and United States Constitutions.

The Supreme Court was also asked by Vanderbilt Mortgage and Finance, Inc. to examine whether W. Va. Code § 46A-2-125 (d) was violated when calls were made to third parties, not Ms. Cole. On this basis, Vanderbilt Mortgage and Finance, Inc. argued that Ms. Cole had no standing to allege violations under state law. Also, Vanderbilt Mortgage and Finance, Inc. argued that at most, the repeated or continuous calling should be considered one violation of the statute and only one civil penalty should have been awarded, not thirteen penalties. These were both significant issues but the Supreme Court held that Vanderbilt Mortgage and Finance, Inc. had not properly appealed the Trial Order that addressed these legal issues. Therefore the Supreme Court refused to address the appeals on these issues.

Finally, the Supreme Court rejected Vanderbilt Mortgage and Finance, Inc.'s arguments that the award of attorney's fees was not appropriate when Ms. Cole only prevailed on thirteen of 57 claimed violations of the West Virginia Consumer Credit and Protection Act, W.Va. Code §§ 46A-1-101, *et seq.* and because the Circuit Court considered impermissible factors in awarding attorney's fees. The Supreme Court concluded that any award of attorney's fees was discretionary with the Circuit Court and that the Circuit Court considered the proper twelve factors under *Aetna Casualty & Surety Co. v. Pitrolo*, 176 W.Va. 190, 342 S.E.2d 156 (1986) in awarding fees. The Supreme Court noted that the Circuit Court reduced the attorney's fees request because of the "mixed degree of success" that Ms. Cole achieved.

The Supreme Court upheld the attorney's fees award finding that the Circuit Court did not abuse its discretion. The Supreme Court specifically found that Ms. Cole did not have to prevail on the majority of her claims under the West Virginia Consumer Credit and Protection Act, W.Va. Code §§ 46A-1-101, *et seq.* in order to be awarded attorney's fees under W.Va. Code § 46A-5-104. The Supreme Court also noted that Ms. Cole prevailed on four different types of claimed violations of the West Virginia Consumer Credit and Protection Act, W.Va. Code §§ 46A-1-101, *et seq.* and that the award of attorney's fees should be upheld. Finally, the Supreme Court rejected Vanderbilt Mortgage and Finance, Inc.'s arguments that the Circuit Court should not have considered Mountain State Justice's "livelihood or survivability" since those are not factors under *Pitrolo, supra*. The Supreme Court rejected this argument finding that they are related to the tenth *Pitrolo* factor.

Impact on Business:

This decision is not a good one for West Virginia businesses. The Supreme Court could have easily found that civil penalties were similar to punitive damages under *Fleming Landfill, Inc. v. Garnes*, and concluded that no civil penalties should have been awarded by the Circuit Court since the jury awarded nothing for compensatory damages. The Supreme Court also refused to address two important issues: (1) Ms. Cole's standing to allege violations under state law; and (2) whether the repeated or continuous calling should be considered one violation of the statute and only one civil penalty should have been awarded, not thirteen penalties.

Finally, the Supreme Court refused to provide any significant guidance to an award of attorney's fees when a plaintiff does not substantially prevail. Logic would dictate that an award of attorney's fees should be significantly lower when a plaintiff only prevails on thirteen of 57 claims of violations of the West Virginia Consumer Credit and Protection Act, W.Va. Code §§ 46A-1-101, *et seq.* The Supreme Court missed an opportunity to provide litigants and the Circuit Courts with substantial guidance in this area.

State of West Virginia ex rel. Discovery Financial Services, Inc., Discovery Bank, DFS Services, LLC, and American Bankers Management Company, Inc.; Bank of America Corporation and FIA Card Services: N.A.; FIA Card Services, N.A.; Citigroup Inc. and Citibank, NA; GE Money Bank; World Wide Financial Network National Bank, CSI Processing, LLC, and CCP North America LLP; HSBC Bank Nevada, NA and HSBC Card Services, Inc.; and JP Morgan Chase & Co. and Chase Bank USA, NA. v. Hon. David W. Nibert, Judge of the Circuit Court of Mason County, West Virginia
No. 13-0086, 2013 WWV Lexis (June 4, 2013).

What the Court Reviewed:

Whether the Attorney General has the authority to appoint private attorneys to serve as special assistant attorneys general for purposes of prosecuting claims on behalf of the State of West Virginia and, if so, whether compensating those attorneys from the funds recovered from a defendant violates the West Virginia Governmental Ethics Act or Rule 17(b) of the West Virginia Rules of Professional Conduct.

What the Court decided:

The Court held that the Attorney General was vested with common law powers and that those common law powers permitted him (a) to retain the services of outside counsel to prosecute cases on behalf of the State, and (b) to compensate outside counsel from funds "taken directly from a losing defendant". It further held that such an arrangement did not run afoul of any applicable ethical or professional standards of conduct. It did not address whether compensating such attorneys on a contingency fee basis was permissible.

Facts:

This appeal involved two consolidated cases brought by Attorney General Morrisey's predecessor alleging violations of the West Virginia Consumer Credit and Protection Act. Outside counsel was retained by the Attorney General's office to serve as "special assistant attorneys general" pursuant to agreements that, historically, have resulted in attorneys appointed to serve in that capacity being compensated on a contingency fee basis. The defendants in these cases challenged the authority of the Attorney General to employ the services of outside counsel in the absence of a statute authorizing him to do so. They also challenged the mechanism by which they were compensated, arguing that the fact that they had a financial interest in the outcome of the case violated the above referenced statutes and rules.

Holdings

The Court found that the special assistant attorneys general appointed by the Attorney General were not "employees" of the Attorney General. The letter appointing them provided that the special assistant attorneys general would be awarded attorneys fees only if they prevailed in the litigation against the defendants and then only in an amount approved by the court. As a consequence of this arrangement, there was no agreed upon wage or remuneration guaranteed to

the special assistant attorneys general and the West Virginia Governmental Ethics Act, which applies only to employees, was inapplicable.

The Court also found that the fee arrangement with the special assistant attorneys general did not violate the conflict of interest provisions of Rule 1.7(b) of the West Virginia Rules of Professional Conduct. Specifically, it found that the interests of the special assistant attorneys general in obtaining a fee did not materially limit their responsibilities to their client, since the State, through the Attorney General, retained control over the litigation. Moreover, there was nothing in the record establishing that the fees that may be awarded to the special assistant attorneys general were tied to the monetary value of any relief obtained against the defendants. As such, there was no evidence that the financial interests of the special assistant attorneys general conflicted with the interest of their client in violation of Rule 1.7(b).

Finally, in addressing the issue of the Attorney General's authority to appoint special assistant attorneys general, the Supreme Court, *sua sponta* and without the benefit of briefs by either party, overruled its decision in *Manchin v. Browning*, 170 W.Va. 779, 296 S.E.2d 909 (1982). In that earlier decision, the Court held that the Attorney General possessed no common law powers. Instead, he was vested with only those powers specifically delegated to him by the Legislature. In overruling its decision in *Manchin*, the Court found the Attorney General was vested with "inherent common law powers unless altered or changed by the Legislature." While the Court recognized that the Legislature can alter or repeal the common law in certain instances, such as where it has delegated its plenary powers to designated regulatory agencies, it also made clear that the Legislature may not abrogate the constitutional role of the Attorney General to serve as the chief legal officer of the State. Thus, while not designated as a core function of the office of the Attorney General, the Court held that, in the absence of any statutory enactment to the contrary, the Attorney General had the common law authority to retain the services of special assistant prosecuting attorneys and compensate them through a court-approved award of attorney's fees "taken directly from the losing opponent in the litigation."

Impact on Business

Given the fact that businesses, particularly those headquartered outside of West Virginia but doing business here have been the target of much of the litigation instituted by the Attorney General's office and prosecuted by special assistant attorneys general, this case has extreme importance. It creates uncertainty where none previously existed and authorized fee shifting to a losing defendant contrary to the traditional American Rule which requires parties to bear their own legal fees and costs.

The *Manchin* decision and its progeny represented the settled law of West Virginia for three decades. It clearly articulated the scope of the powers vested in the office of the Attorney General. In so doing, the Court converted the Office of Attorney General from a relatively weak position with limited authority to potentially one possessing enormous and far reaching power.

The concern raised by this decision is not that the Court found the Attorney General to be vested with broad common law powers. It stems, first, from the fact that it did not define what those powers were, electing instead to address that question "on a case by case basis." At common law, the attorney general was charged with protecting the interests first of the King and later the public. In the discharge of this obligation, the Attorney General was granted broad discretion to define what the interests of the King or the public were. Business operating in West Virginia are now without guidance as to whether the Attorney General's newly described powers are as expansive as was historically the case or are somehow more limited.

For example, is the Attorney General now empowered to file suit against medical clinics he believes to be operating in a manner inconsistent with the public interest? Is he authorized to seek injunctions against regulated industries where the regulations with which they must comply are insufficient, in his opinion, to protect the public interest? Those and a myriad of other questions remain unanswered and will likely remain unanswered until brought before the Court in a later case. The uncertainty that creates is not conducive to businesses expansion or growth in West Virginia.

Equally disturbing in terms of its impact on businesses is the Court's conclusion that the common law authorizes the Attorney General to engage in fee shifting. Specifically, the Court's decision authorizes the payment of the fees of special assistant attorneys generals by a losing defendant. That abrogates the traditional American Rule that calls for all parties to bear their own litigation costs. The prospect of having to pay not only their own lawyers but also those of the Attorney General whenever sued by him for activities deemed to be contrary to the public interest may have a chilling effect on those currently doing business here as well as those considering doing so in the future.

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ATTORNEY GENERAL POWERS

Tribeca Lending Corp. v. McCormick
No. 12-0150 (June 18, 2013), 2013 W. Va. LEXIS 721

***What the Court Reviewed*:**

The Supreme Court of Appeals of West Virginia was asked to consider two certified questions:

1. Is W.Va. Code § 38-1-[4a], which gives a borrower one year to challenge the validity of a foreclosure sale, and provides in applicable part that "no action or proceeding to set aside a trustee's sale . . . shall be filed or commenced more than one year from the date of the sale" applicable when counter-claims are asserted challenging the enforceability of the underlying mortgage loan agreement in response to an unlawful detainer action?

   The Circuit Court answered this question: **Yes**

2. Under W.Va. Code § 46A-5-101[1] which provides in applicable part that "[w]ith respect to violations arising from other consumer credit sales or consumer loans, no action pursuant to this subsection may be brought more than one year after the due date of the last scheduled payment of the agreement." When does the statute of limitations begin to run: the date the applicable Loan was accelerated and all amounts became due and payable; or, the projected date of the final installment payment of the executed loan agreement?

   The Circuit Court answered this question: **The date the applicable Loan was accelerated and all amounts became due.**

Id. at *4-5.

***What the Court Decided*:**

The Supreme Court disagreed with the Circuit Court's decision on the first certified question as it held:

> The one-year statute of limitation provided by W.Va. Code § 38-1-4a [2006] governs only an "action or proceeding to set aside a trustee's sale due to the failure to follow any notice, service, process or other procedural requirement relating to a sale of property under a trust deed." Challenges to a trustee's sale that do not pertain to the procedural requirements of the sale are not subject to the limitation period set forth in W.Va. Code § 38-1-4a.

Id. at *9-10.

> Where a consumer is sued for the balance due on a consumer transaction, any asserted defense, setoff, or counterclaim available under the Consumer Credit Protection Act, W. Va. Code, 46A-2-101, et seq., may be asserted without regard to any limitation of actions under W.Va. Code, 46A-5-102 (1974).

Id. at *12. (citing Syl. Pt. 6, *Chrysler Credit Corp. v. Copley*, 189 W. Va. 90, 428 S.E.2d 313 (1993)).

The Supreme Court agreed with the Circuit Court on its answer for the second certified question as it answered the second certified question as follows:

> Under W.Va. Code § 46A-5-101(1) [1996], which provides that an action under the West Virginia Consumer Credit and Protection Act involving certain "regulated consumer loans" must be brought within one year after the "due date of the last scheduled payment of the agreement," the statute of limitation begins to run on the date under the parties' agreement providing for the final periodic payment of the debt. However, if the periodic payments are accelerated under the terms of the agreement, causing all payments to become immediately due and payable by the consumer, then the statute of limitation begins to run on the date when the accelerated payment is due.

Id. at *19.

Facts:

James E. McCormick refinanced the mortgage on his home with a loan he obtained in 2005 from Tribeca Lending Corporation ("Tribeca"). The loan agreement provided that Mr. McCormick would repay the loan to Tribeca, over the course of thirty years, by making monthly payments. Tribeca's loan was secured by a deed of trust, also dated September 30, 2005, which similarly required Mr. McCormick to make payments of the loan's principal and interest in accordance with the loan's repayment schedule.

In addition to the loan repayment provisions, the deed of trust stated that if Mr. McCormick failed to make his scheduled payments, or otherwise defaulted on the terms of the loan agreement or deed of trust, Tribeca would give notice to Mr. McCormick and provide him an opportunity to cure his default. If Mr. McCormick then failed to cure his default, the documents allowed Tribeca to accelerate the loan's payments, saying "upon acceleration all sums . . . and accrued interest thereon shall at once become due and payable." The documents signed by Mr. McCormick permitted Tribeca to ultimately institute a foreclosure sale.

Thereafter, Mr. McCormick failed to make his monthly loan payments in accordance with the parties' agreement. Consequently, Tribeca sent Mr. McCormick a notice in 2007 that he was in default and that he had a right to cure. Mr. McCormick failed to cure his default. Accordingly, Tribeca accelerated the loan's payments causing the balance of the loan to become immediately due and payable, and also invoked its right to initiate a foreclosure sale of the house. The foreclosure sale was held at a public auction on December 19, 2007, and the property was sold to Tribeca. A trustee's deed was recorded conveying ownership of the property to Tribeca.

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Tribeca, as the owner of the house, filed an unlawful detainer action in 2008 against Mr. McCormick in the Magistrate Court of Kanawha County, alleging that he was unlawfully occupying its property. Mr. McCormick removed Tribeca's action from magistrate court to the Circuit Court of Kanawha County and asserted defenses and counterclaims to Tribeca's action. The circuit court dismissed Tribeca's action in 2009 because there had been no activity in this action for a period of more than one (1) year.

Subsequently, on June 2, 2011, Tribeca filed a new unlawful detainer action against Mr. McCormick based upon his failure to vacate the home. Mr. McCormick was represented by counsel for Mountain State Justice and they answered the complaint, and also asserted numerous counterclaims against Tribeca alleging violations of the West Virginia Consumer Credit and Protection Act, W.Va. Code §§ 46A-1-101, *et seq*. Specifically, Mr. McCormick asserted counterclaims against Tribeca alleging unconscionable contract (Count I); fraud (Count II); fraudulent appraisal (Count III); and unlawful debt collection (Count IV). Again, Mr. McCormick removed Tribeca's unlawful detainer action to the Circuit Court of Kanawha County. Tribeca then moved to dismiss Mr. McCormick's counterclaims as untimely, which the Circuit Court conditionally granted. The Circuit Court then certified the two questions to the Supreme Court.

Holding:

The Supreme Court disagreed with the Circuit Court and it answered the first certified question in the negative. *Id*. at *10.

The Supreme Court held that the one-year statute of limitation provided by W.Va. Code § 38-1-4a [2006] governs only an "action or proceeding to set aside a trustee's sale due to the failure to follow any notice, service, process or other procedural requirement relating to a sale of property under a trust deed." *Id*. at *9. In so doing, the Supreme Court reasoned that W.Va. Code § 38-1-4a [2006], imposes a one-year statute of limitation on certain actions to set aside a deed issued after a trustee's foreclosure sale. *Id*. at *7. However, the statute further specifies the precise types of challenges that are subject to this limitation period: an "action or proceeding to set aside a trustee's sale ***due to the failure to follow any notice, service, process or other procedural requirement relating to a sale of property under a trust deed.***" *Id*. at *8-9. W.Va. Code § 38-1-4a (emphasis added). The Supreme Court found this language to be plain in its specification that the only types of challenges to a trustee's sale governed by W.Va. Code § 38-1-4a are those that pertain to the procedural requirements of the trustee's sale. *Id*. at *9. By considering the Legislature's express definition of the scope of this statute, the Supreme Court held that it was apparent that the Legislature did not intend any other types of actions related to a trustee's sale to be governed by this one-year limitation period. *Id*. at *9.

The Supreme Court further explained that challenges to a trustee's sale that do not pertain to the procedural requirements of the sale are not subject to the limitation period set forth in W.Va. Code § 38-1-4a. *Id*. at *9. The Supreme Court, therefore, held that the statute of limitation provided by W.Va. Code § 38-1-4a did not bar Mr. McCormick's counterclaims for an unconscionable loan; intentionally misrepresenting the amount of the loan's monthly payments and its escalating interest rate; relying on a fraudulent appraisal that misrepresented the market value of the Saint Albans house; and assessing illegal charges in its attempt to collect a debt from Mr. McCormick because the counterclaims did not challenge the procedural posture of the trustee's sale or allege a failure to comply with the procedural requirements of a trustee's sale. *Id*. at *10.

With regards to the second certified question, the Supreme Court held that when Mr. McCormick's loan with Tribeca was accelerated, the statute of limitation began to run on the date when the accelerated payment was due. *Id*. at *20. The Supreme Court also expressly rejected Mr. McCormick's argument that the statute of limitations did not run until the date of his last loan payment in 2035.

The Supreme Court also held that Mr. McCormick was not entitled to assert any "defense, setoff or counterclaim . . . without regard to any limitation of actions" under W.Va. Code § 46A-5-102 because he was not being sued by Tribeca as a "consumer" under the West Virginia Consumer Credit and Protection Act. *Id*. at *16. *See* W.Va. Code § 46A-1-102(12). Accordingly, the Supreme Court held that any claims asserted by Mr. McCormick are subject to the one-year limitation period set forth in W.Va. Code § 46A-5-101(1). *Id*.

In reaching its decision on the applicable statute of limitations, the Supreme Court explained that W.Va. Code § 46A-5-101(1) establishes the time periods within which a consumer may file a cause of action against a creditor who has allegedly violated the provisions of the West Virginia Consumer Credit and Protection Act. *Id*. at *11. The Supreme Court held that it believed the language of W.Va. Code § 46A-5-101(1) was unambiguous because the phrase at issue, "the date due of the last scheduled payment of the agreement," plainly referred to the last date under the parties' agreement providing for payment of a specified loan amount. *Id*. at *17.

The Supreme Court referred to two federal courts that reviewed this same question. *Id*. at *18. The United States District Court Southern District of West Virginia held in *Delebreau v. Bayview Loan Servicing, LLC*, 770 F.Supp.2d 813 (S.D.W.Va. 2011) that if a loan agreement had a clause requiring a creditor to "accelerate the debt — and thereby make the last payment due immediately" upon the default of the consumer, then the only reasonable conclusion was that the one-year statute of limitation under W.Va. Code § 46A-5-101(1) was triggered by the acceleration. *Id*. (citing *Delebreau,* 770 F.Supp.2d at 821). The Fourth Circuit Court of Appeals, after reviewing the same case, affirmed the district court's decision. *Id*. (citing *Delebreau v. Bayview Loan Servicing, LLC*, 680 F.3d 412, 415 (4th Cir. 2012)).

The Supreme Court, therefore, concluded that under W.Va. Code § 46A-5-101(1), which provides that an action under the West Virginia Consumer Credit and Protection Act involving certain "regulated consumer loans" must be brought within one year after the "due date of the last scheduled payment of the agreement," the statute of limitation begins to run on the date under the parties' agreement providing for the final periodic payment of the debt. *Id*. at *19. The Supreme Court emphasized however, that if the periodic payments are accelerated under the terms of the agreement, causing all payments to become immediately due and payable by the consumer, then the statute of limitation begins to run on the date when the accelerated payment

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is due. *Id*. On this basis, the Supreme Court concluded that the Circuit Court correctly answered the second certified question.

Dissent

Justice Davis concurred in part and dissented in part. *Id*. at *1.

Justice Davis agreed with the majority's resolution of the first certified question, however disagreed with the majority's determination that the counterclaims asserted by Mr. McCormick in response to Tribeca's first and second unlawful detainer actions were untimely. *Id*. at *1. Justice Davis opined that pursuant to W. Va. Code § 46A-5-102 any "action against a consumer," W. Va. Code § 46A-5-102, would be sufficient to activate this statute to this Court's form complaint for unlawful detainer actions because W. Va. Code § 46A-5-102 does not limit or specify the exact type of action in response to which the consumer may assert his/her counterclaims. *Id*. at *3.

Justice Davis stated that W. Va. Code § 46A-5-102, not W. Va. Code § 46A-5-101(1), addresses the facts of the case *sub judice* to define the time period within which a consumer is required to bring a counterclaim asserting his/her rights under the West Virginia Consumer Credit and Protection Act. *Id*. at *6. Therefore, Justice Davis concluded that pursuant to the plain language of W. Va. Code § 46A-5-102 and *Chrysler Credit Corp. v. Copley*, 189 W. Va. 90, 428 S.E.2d 313 (1993), a consumer against whom an action had been brought, Mr. McCormick was permitted to assert any counterclaims arising under the West Virginia Consumer Credit and Protection Act "without regard to any limitation of actions." W. Va. Code § 46A-5-102. *Id*. at *11.

Impact on Business:

This decision is a significant ruling for the West Virginia banking industry. The Supreme Court concluded that the one-year statute of limitations set forth in the West Virginia Consumer Credit and Protection Act bared Mr. McCormick from asserting the claims he raised in his counterclaim. The Supreme Court agreed with the Circuit Court as it found that the acceleration clause set forth in the loan agreement requires that the statute of limitations begins to run on the date when the accelerated payment is due.

Foreclosures and unlawful detainer actions are routine proceedings in West Virginia and they allow for an ordinary disposition of real property interests. Had the Supreme Court allowed collateral attacks against foreclosure proceedings years later, the entire system of loan generation could have been disrupted.

Burke-Parsons-Bowlby Corp. v. Rice
No. 110183 (November 7, 2012)

What the Court Reviewed:

The Supreme Court reviewed the circuit court's denial of the employer-defendant's motion for a new trial in an action brought for age discrimination by a former employee.

What the Court Decided:

The Supreme Court upheld the circuit court's denial of the employer-defendant's motion for a new trial. In doing so, the Supreme Court affirmed a $2.1 million dollar judgment against the employer.

Facts:

Jerald John Rice began working at Burke-Parsons-Bowlby as a staff accountant and credit manager in 1985. He was eventually promoted to the assistant controller position and later became the corporation's controller. In 2008, Burke-Parsons-Bowlby was acquired by Stella-Jones, a Canadian corporation. Rice was retained after the acquisition to work as a controller at the Ripley, West Virginia headquarters. At the time of the acquisition, the majority of his work was focused on completing the end-of-year audit of Burke-Parsons-Bowlby and in reconciling matters related to the acquisition.

In a letter dated December 12, 2008, the president and CEO of Stella-Jones wrote to Rice thanking him for his contributions and confirming that his salary was being increased. Rice, even before the acquisition, recommended the hiring of an assistant controller; Stella-Jones hired the assistant. Rice's immediate supervisor told him to teach the new assistant controller everything that Rice knew. The new assistant controller started with Stella-Jones on February 16, 2009. Rice was 47 at the time and the new assistant controller was 29.

On March 12, 2009, Stella-Jones executives conducted a conference where the accounting department, including Rice, was complimented for making the acquisition run smoothly. After the conference and upon returning from lunch, Rice was informed by his supervisor that Rice's employment was terminated. The company had decided to eliminate his position. Rice had never received any warnings or reprimands concerning his work at any time before or after the acquisition. The young, new assistant controller continued to work for Stella-Jones.

In April 2009, Rice filed a complaint alleging that his former employer had "willfully, maliciously, and unlawfully" terminated Rice's employment. The allegation was one of age discrimination. The jury returned a verdict in favor of Rice on May 17, 2010. The verdict form consisted of four questions. The first two questions asked whether defendant had wrongfully terminated Rice based upon his age and, if so, whether defendant had acted maliciously. The jury answered "yes" to both questions. The third question asked whether Rice had unreasonably refused an offer of reinstatement. Finally, the jury was asked whether the defendant's actions warranted an assessment of punitive damages. The jury found that Rice had reasonably refused the offer of reinstatement; it did not award any punitive damages, however.

The defendant filed an appeal alleging four "errors" by the lower court. First, the defendant argued that the circuit court committed error by allowing evidence of an alleged "prior bad act" against another Stella Jones employee. That employee, who had worked for Stella-Jones (and a predecessor corporation) in the State of Washington for 35 years, claimed that he was the victim of age discrimination. He testified at trial, over the objection of the defendant, by way of a video-taped deposition. Second, the defendant claimed that the circuit court committed error by admitting evidence of Rice's damages beyond the date of his being offered reinstatement. Third, the defendant complained that the circuit court allowed the jury to ignore Rice's interim earnings under the so-called "malicious discharge" theory, and that doing so constituted a *de facto* finding of punitive damages without concomitant post-trial review.

Holding:

The Supreme Court rejected the assignment of error founded upon the other former employee's testimony being allowed at trial. The Supreme Court found the "other acts" evidence to be admissible under Rule 404(b) of the West Virginia Rules of Evidence. In making that determination, the Supreme Court addressed the similarity between the two claims. The Washington State employee claimed that he was discharged based upon his age and that he was replaced by a much younger employee with little experience. The termination from employment was reasonably close in time with the termination of Rice. Moreover, just as with Rice, the employee from Washington was a long-time employee of a company acquired by Stella-Jones just before the employee's termination.

The employer argued that the offer of reinstatement to Rice should have served to cut off his claim for front pay. (Rice was awarded more than $1.9 million dollars in front pay by the jury.) Although the Supreme Court noted that reinstatement is the preferred remedy, the Court held that Rice had submitted sufficient evidence to support his argument that reinstatement was not palatable. In making that case, Rice argued that managers of the company had said negative things about him in depositions and, accordingly, there was no trust in the relationship. The Supreme Court sanctioned Rice's tactics in side-stepping the offer of reinstatement.

The Supreme Court did not find that the unmitigated front pay constituted a *de facto* award of punitive damages. Without engaging in much probative analysis, the Court held that back wages and front wages awarded by a jury were "compensatory damages." The theory of malicious discharge focuses upon harm to an individual plaintiff. On the other hand, punitive damages focuses on a defendant's disregard generally for the rights of others. Accordingly, the Court upheld the substantial award of front pay notwithstanding that Rice was employed in a subsequent job by the time of trial. Justice Benjamin, in his partial dissent, disagreed with the Court's handling of the "malicious discharge" theory. He would not have allowed the jury to discount the value of Rice's mitigation.

Impact on Business:

This case has a negative impact on business in two ways. First, employers will sometimes offer reinstatement to employees during the course of litigation. There are many reasons for why an employer might make such an offer. During the course of litigation, managers may be called upon in depositions to give frank appraisals of the plaintiff. This case will allow plaintiffs to rely upon deposition testimony as grounds to reject a legitimate offer of reinstatement. The effect is to potentially drive up verdicts against employers. Second, the malicious discharge theory allows a plaintiff two bites at the apple on punitive damages. As Justice Benjamin opines, the malicious discharge theory is really punitive damages by a different name. The outcome in this case may have been influenced more than a little by the jury not returning any punitive damages award. There will be another case at another time that may include a double dip on damages. In that event, the Court will have a difficult time allowing the holding of this case to stand.

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EMPLOYMENT LAW

Cunningham v. Thomas Hospital
No. 11-0398 (November, 2012)

What the Court Reviewed:

Where three doctors were employed by a third party and contracted to perform services for Respondent, did Respondent exercise enough control over said doctors to establish an agency or employee/employer relationship, therefore making Respondent liable for the doctors' alleged negligence?

What the Court Decided:

No. In a decision that sets forth all relevant case law and tests regarding the establishment of agency and employee/employer relationships, the Court determined that such doctors were not employees of the Respondent hospital. Therefore, the Respondent was not vicariously liable for the negligence of the doctors.

Facts:

The Petitioners, Jan Cunningham and wife Lynn Cunningham ("Cunninghams"), appeal a judgment of the lower court granting summary judgment for the Respondent Thomas Hospital ("Thomas Hospital") on grounds that doctors employed by the hospital in an independent contractor capacity were not agents of the hospital and, therefore, the hospital was not vicariously liable for their negligence.

Jan Cunningham was brought into Thomas Hospital for undisclosed medical problems. Upon his arrival, he was evaluated and referred to Dr. Hossam Tarakji, M.D. ("Tarakji") who subsequently admitted him to into the hospital for treatment. During Cunningham's treatment, Tarakji went on vacation and assigned care from Dr. Thomas J. Rittinger, M.D. ("Rittinger") in his absence. Rittinger arranged for surgical consultation with Dr. Richard A. Fogle, M.D. ("Fogle") and shortly thereafter Fogle performed exploratory surgery on Cunningham. After this surgery, Cunningham developed a serious infection which required several follow-up surgeries. As a result, Cunningham sued Thomas Hospital alleging permanent injury as a result of the infection.

Notably, Tarakji and Rittinger were employed by Hospitalist Medicine Physicians of Kanawha County, PLLC ("Hospitalist Medicine") and treated patients exclusively at Thomas Hospital in accordance with a contractual relationship between Thomas Hospital and Hospitalist Medicine. Additionally, Fogle was employed at Delphi Healthcare Partners, Inc. ("Delphi"), and provided surgical services at Thomas Hospital in accordance with a contract between Thomas Hospital and Delphi.

In their civil action, the Cunninghams sought to hold Thomas Hospital vicariously liable for the alleged negligence of Tarakji, Rittinger and Fogle on the theory that the doctors were employees or actual agents of Thomas Hospital.

Holding:

Syl. Pt. 7:

> "There are four general factors which bear upon whether a master-servant relationship exists for purposes of the doctrine of respondeat superior: (1) Selection and engagement of the servant; (2) Payment of compensation; (3) Power of dismissal; and (4) Power of control. The first three factors are not essential to the existence of the relationship; the fourth, the power of control, is determinative." Syl. Pt. 5, *Paxton v. Crabtree*, 400 S.E.2d 245 (1990).

The Court separately evaluated each element of the employee/employer relationship test outlined above, and determined that such a relationship did not exist between Thomas Hospital and Drs. Tarakji, Rittinger and Fogle. In particular, the Court found Thomas Hospital's lack of control over the doctors dispositive of a finding that no employee/employer relationship, agency relationship, or joint venture existed.

The Court emphasized Thomas Hospital's control over only the general goals and objectives of the doctors and lack of control over their day-to-day actions. Further, the Court recognized that, while a contract for employment may appear to explicitly establish someone's job title, the actual practice of the employee or agent controls. Therefore, if someone is engaged as an agent, but instead performs duties that are typically those assigned to a full-fledged employee, the court will ignore the terms of the contract and treat the occupation as what it is in practicality.

In this case, the burden of proof was on Thomas Hospital to establish that its relationship with the doctors was that of an independent contractor, rather than agency or employee/employer. Based on the language of the contract and the actions of both parties, Thomas Hospital met this burden. Therefore, summary judgment for the Respondents was affirmed.

Impact on Business:

This case sets out the specific guidelines for establishing an employee/employer or agency relationship. Further, this case demonstrates the level of broad authority a principal can exercise over an independent contractor, without elevating their relationship status to that of agency or employment. Particularly, this case has substantial implications in the medical field, clearly establishing that hospitalists or surgicalists employed by third parties will not be held to be employees of the hospital for which they are performing services, unless the hospital exercises some form of control greater than what was exercised in this case.

WEST VIRGINIA CHAMBER
EMPLOYMENT LAW

Smith v. Apex Pipeline Services
No. 111610 (April 4, 2013)

What the Court Reviewed:

The Supreme Court reviewed the circuit court's order granting the employer's motion for summary judgment in a case alleging deliberate intention and workers' compensation discrimination.

What the Court Decided:

The Supreme Court affirmed the order granting the motion for summary judgment in both respects.

Facts:

Jason Smith was hired by Apex to work as a general laborer on a pipeline project in Boone County, West Virginia. It was the general practice of Apex to hire "out of the union hall" for pipeline projects. Thus was Smith hired.

On September 30, 2008, Apex employees were working with pipe in and around a trench. The pipes were secured by a wooden chock on one side and were cradled in loose dirt that had been removed from the trench on the other side. After one of the pipes was lowered into the trench, the laborers, in this instance Smith, were to move the chock flush to the remaining pipe. Smith failed to secure the pipe. When Smith entered the trench to set the skids on the first pipe, the unsecured pipe rolled into the trench and struck him on the back. Smith applied for and received workers' compensation benefits for his back injury.

In May 2009, although not yet released to return to work, Smith inquired of Apex about the availability of work. Apex replied that it did not have work for Smith and, because the project had been completed, Smith and other workers were laid off from employment. Consequently, Smith applied for and received unemployment compensation benefits.

In November 2009, Smith filed a civil action against Apex in which he alleged "deliberate intention" and workers' compensation retaliation. After discovery, Apex filed a motion for summary judgment on both counts. The circuit court granted the motion finding that Smith had failed to present any evidence on four of the five elements required for his deliberate intention claim and that he had further failed to demonstrate that the filing a workers' compensation claim was a significant factor in Apex's decision not to rehire him. Smith appealed.

Holding:

The Supreme Court made short shrift of Smith's appeal of the wrongful discharge claim. The Court agreed with the circuit court that the record demonstrated Smith was not rehired due to their being no work available. Other general laborers had been sent back to the union hall. In that regard, Smith did not dispute that he was one of many workers laid off when the Boone County project was completed.

The Supreme Court carefully parsed through the five elements required for a deliberate intent claim. Smith needed to present evidence on all five elements. The Supreme Court found his proof to be lacking on four of the elements. Accordingly, the Court affirmed the circuit court's grant of summary judgment.

Impact on Business:

The Supreme Court's decision on the workers' compensation discrimination claim is not of much precedential value. It simply stands for the proposition that an employee must come forward with some evidence showing a nexus between the pursuit of workers' compensation benefits and the adverse employment decision. Smith was unable to do that here.

The deliberate intent analysis in this decision is of greater value to employers. The case stands for the proposition that a circuit court must carefully parse through the evidence and, if it is lacking, not shrink from granting summary judgment to an employer. In this case, plaintiff had hired an expert who tried to bluff his way through the statutory elements. Both the circuit court and the Supreme Court called his bluff. On more than one element, the two courts found the expert's testimony to be wanting. For instance, an employer must have actual knowledge of the unsafe working condition. Moreover, the Court held that an employee cannot create an unsafe working condition and then claim that his employer intentionally exposed him to same.

WEST VIRGINIA CHAMBER
EMPLOYMENT LAW

Verizon Services Corporation v. Epling
No. 11-1425 (February 27 2013)

What the Court Reviewed:

The Supreme Court reviewed an order of the Circuit Court of Kanawha County reversing the decision of the Board of Review of WorkForce West Virginia. The Board of Review had found the employee, Ms. Epling, ineligible for unemployment compensation benefits.

What the Court Decided:

The Supreme Court reversed the decision of the circuit court.

Facts:

Loretta Epling was hired as a business consultant for Verizon on June 2, 2008. Due to having to pick up her children from daycare each evening, she chose to work a day shift in the business office on a schedule that was accommodating to her parenting needs. Prior to beginning employment, Epling was provided with a document entitled "Job Offer Confirmation" which informed her that her work schedule would be determined by her supervisor based upon the needs of the business. The document further stated that "this may include evenings, nights, weekends, overtime and over-night stays when required." Epling was provided with another document that was entitled "Statement of Understanding," which informed her that she may be scheduled to work any days/hours from Monday through Friday and may be required to work occasional weekend and holidays as needed.

In March 2010, due to a corporate acquisition, employees were reassigned to different shifts. These reassignments resulted in Epling's work schedule being changed to one that called for her to work from 12:00 p.m. to 8:00 p.m. three days a week, and 1:00 p.m. to 9:00 p.m. two days per week. Epling expressed concern regarding her child care, but Verizon was unable to accommodate her concerns due to the rights of employees with greater seniority.

On March 15, 2010, Epling resigned from employment and applied for unemployment compensation benefits. A deputy commissioner granted her those benefits, and an administrative law judge issued a like decision after an evidentiary hearing. The Board of Review, however, reversed the administrative law judge's decision that Epling had left work for good cause involving fault on the part of the employer. The Board of Review deemed Epling to be ineligible for unemployment compensation benefits.

Epling appealed the Board of Review's decision to the Circuit Court of Kanawha County. That court acknowledged that the collective bargaining agreement, which applied to Epling, permitted Verizon to alter the hours of employment. Nevertheless, the circuit court found that the needs of Epling's children were good cause and the fault of Verizon consisted of its "insistence on changing Ms. Epling's work hours and refusal to work within Ms. Epling's request for a work schedule that she could complete without jeopardizing the care of her children." Hence, the circuit court reversed the Board of Review.

Holding:

The Supreme Court noted that Epling was specifically advised in writing that the hours of her work could change. Moreover, the Court placed special emphasis on Epling's membership in a collective bargaining unit that had ceded authority to the employer to make unilateral changes in working hours. Accordingly, Verizon had acted within its rights under the collective bargaining agreement. The Supreme Court was sympathetic to Epling's parenting needs, but the Court held that there was no showing of "fault on the part of the employer." As such, the Court held that there needed to be a nexus between "good cause" and the employer's action. It found no nexus in this case. Accordingly, the Court reversed the lower court and reinstated the decision of the Board of Review.

Impact on Business:

It is rare that an employer will battle all the way to the Supreme Court on an unemployment compensation dispute. Apparently, this employer felt strongly about the principle involved. An employee had voluntarily accepted an employment arrangement which might call for an adjustment of work schedules. An employee cannot, when faced with a change in work schedules, resign from employment for purely personal reasons and then ask the employer to pay for the unemployment through charges to the employer's account. This case confirms law favorable to the employer.

WEST VIRGINIA CHAMBER
EMPLOYMENT LAW

Adams v. West Virginia Department of Agriculture, et al.
Memorandum Decision
No. 120615 (April 26, 2013)

What the Court Reviewed:

The Supreme Court reviewed an order granting to the West Virginia Department of Agriculture summary judgment in a civil action brought by a former employee alleging age discrimination, deprivation of a property interest, and deprivation of a liberty interest.

What the Court Decided:

The Supreme Court affirmed the circuit court's grant of summary judgment to the Department of Agriculture.

Facts:

Robert Adams was an at-will employee of the West Virginia Department of Agriculture and was employed as a pesticide officer in Morgantown. In February 2010, the Department investigated a report that Adams was acting inappropriately toward a co-worker. In the course of the investigation, the Department determined that Adams had made inappropriate remarks, played music in his office which appeared to depict a woman in sexual climax, opened the door to an occupied women's restroom while looking for a male employee, and made reference to a "hot buttered orgy" in a conversation with co-workers. Upon a review of Adams's computer activity, it was further determined that he routinely visited websites and accessed materials that were in violation of the Department's internet policies. Accordingly, Adams was placed on paid administrative leave pending further investigation.

As the Department continued to review Adams's activity in the office, it discovered that he kept an inventory of weapons he owned, collected sexual material, and maintained paper copies of sexualized cartoon art. Accordingly, Adams was terminated in March 2010.

Adams filed a civil action asserting various legal theories. Both parties filed motions for summary judgment. During the briefing of the motions, Adams for the first time asserted a claim that his liberty interest was implicated by the investigation and termination. The circuit court found that claim to be untimely and without merit. The circuit court granted the Department's motion for summary judgment and, in doing so, found that Adams could not make out a claim for property interest deprivation inasmuch as he had no right to continued employment. Moreover, the circuit court found that Adams did not establish a *prima facia* case for age discrimination or legally cognizable harassment. Adams appealed the circuit court's summary judgment order.

Holding:

The Supreme Court affirmed *in toto* the reasoning of the circuit court. With regard to the liberty interest claim, the Supreme Court held that Adams had not timely asserted the claim. In doing so, the Supreme Court noted that Adams had not even filed a motion for leave to amend his complaint.

Impact on Business:

Inasmuch as Adams was an employee of a constitutional officer, e.g., the Department of Agriculture, he was an at-will employee. This case stands for the proposition that an employer may discharge an employee whose behavior rises to such a level as to disrupt the work place.

Andrew O. v. Racing Corp of West Virginia
Memorandum Decision
No. 121255 (June 24, 2013)

What the Court Reviewed:

The Supreme Court reviewed the circuit court's order granting the employer's motion for summary judgment in this case of alleged disability discrimination.

What the Court Decided:

In a memorandum decision, the Supreme Court affirmed the order of the Circuit Court of Kanawha County granting the employer's motion for summary judgment.

Facts:

The plaintiff, identified in the Court's opinion as "Andrew O.," was hired as a blackjack dealer in April 2010 at Mardi Gras Casino and Resort. The plaintiff was twenty-two years old and weighed approximately 540 pounds. According to the Court's opinion, the plaintiff claimed that he had struggled with his weight since childhood; that he was diagnosed with thyroid disease at age twelve; and that he had arthritis in his legs and back. The plaintiff contended that his morbid obesity precluded him from finding clothing that fit properly and restricted his endurance in standing and walking.

The Mardi Gras Casino required employees to follow a dress code that included a long-sleeved tuxedo shirt, a bowtie, an apron, and black pants. The employee handbook required dealers to keep their tuxedo shirts tucked into their pants, their sleeves rolled down, and to wear the apron. The casino struggled to find a tuxedo shirt that would fit the plaintiff. It eventually was able to locate a size 7X tuxedo shirt on-line that was altered for the plaintiff. In what would become one of the factual issues in the case, the plaintiff claimed that the shirt did not fit him in such a way that he could tuck it into his pants.

The plaintiff was entitled to a 25 minute break during his shift. The plaintiff told his immediate supervisors that he was unable to walk to and from the employee break area without shortness of breath and becoming fatigued. His supervisors allowed him to take breaks in an alternate area. The plaintiff also had problems standing for long periods. The casino then assigned him to a wheelchair-accessible blackjack table so that he could sit while he worked.

Approximately one month after he was hired, the plaintiff was reprimanded for failing to keep his shirt tucked into his pants and for not taking breaks in designated areas. He also had his shirt sleeves rolled up and was not wearing the apron. One week later, the plaintiff received a second reprimand for taking breaks outside of the designated area. A few days later, the plaintiff came to work with his tuxedo shirt not tucked into his pants and his sleeves unbuttoned at the wrists. About an hour into his shift, the human resource manager suspended the plaintiff for "performance-based issues." Following a review, the human resource manager terminated the plaintiff for dress code and break area violations. In all, the plaintiff worked for the casino for less than two months.

The plaintiff filed an action in the Circuit Court of Kanawha County for disability discrimination. After discovery, the casino filed a motion for summary judgment. Following a

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hearing, the circuit court granted the casino's summary judgment motion for the following reasons:

> (1) [The plaintiff] was not disabled, in part, because obesity is not a per se impairment under the WVHRA and in part because [the plaintiff] acknowledged that he was able to do everything that an average person was capable of doing.
>
> (2) [The casino] had legitimate and non-discriminatory reasons for terminating [the plaintiff's] employment including ensuring uniformity of employees' apparel; keeping employees on break away from [the casino's] patrons; and proscribing incompetence and insubordination in its employees.

The plaintiff appealed the casino's grant of the summary judgment motion.

Holding:

The Supreme Court affirmed the circuit court's order granting the summary judgment motion. The Court first noted that obesity was not a per se disability under the West Virginia Human Rights Act, inasmuch as the Act did not include "obesity" in the list of physical impairments that typically denote a particular disability. As for the plaintiff's claims that he had a thyroid condition and arthritis, the Court found that the plaintiff did not contest the casino's argument that the plaintiff failed to provide any medical documentation regarding those conditions. Moreover, the plaintiff conceded in his deposition that he took no medication for thyroid disease and that his doctor did not attribute his morbid obesity to any underlying health issue. The Court then turned to the plaintiff's argument that he was disabled under the Act inasmuch as he was substantially limited in major life activities. In that regard, however, the plaintiff was defeated by his own testimony. He had testified during his deposition that he was able to "do almost everything" the average person did, albeit at his own pace. Thus, the Court did not find the record to support a finding of substantial limitation in a major life activity.

The plaintiff also argued that the casino had regarded him as being disabled. The Supreme Court held that the mere fact that the casino accommodated or attempted to accommodate the plaintiff's need was not a sufficient showing that the casino considered the plaintiff to be disabled. Specifically, the Court held that assisting an employee with a particular need, such as allowing the employee to sit while working, did not automatically mean that the employer considered the employee to be disabled.

Under the American with Disabilities Act Amendments ("ADAAA"), obesity may be an "impairment" if it is "severe" or results from a physiological disorder. While noting the pro-employee guidance of the Equal Employment Opportunity Commission on this point, the Supreme Court noted that the West Virginia Legislature had not amended the WVHRA to mirror the amendments to the ADA. Hence, the Court rejected the plaintiff's reliance upon federal law.

Impact on business:

In this opinion, albeit a memorandum decision, the Supreme Court adopts a surprisingly conservative and pro-employer stance on disability law. First, the Court found that obesity was not a per se disability under the West Virginia Human Rights Act. Accordingly, claimants will need to establish that the obesity otherwise meets the definition for disability. Second, the Court actively used what has become known as the "same actor inference" in upholding the discharge of this plaintiff. The "same actor inference" stands for the proposition that a manager who hires someone in a protected class is presumed to act with non-discriminatory intent when discharging that same employee. In this instance, the human resource manager had both hired and fired the plaintiff. Third, an employer can provide some assistance to employees without then being judged guilty of perceiving that employee as being disabled. Such a ruling encourages employers to work with employees. Fourth, the Court did not presume to encroach upon the legislature's prerogative on whether West Virginia will follow federal law. In sum, the Court declined the invitation to judicially amend the West Virginia Human Rights Act.

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Gibson v. Shentel Cable Co.
Memorandum Decision
No. 120132 (February 11, 2013)

What the Court Reviewed:

The Supreme Court reviewed an order of the Circuit Court of Fayette County dismissing a plaintiff's deliberate intent and wrongful discharge suit against his former employer.

What the Court Decided:

In a memorandum decision, the Supreme Court upheld the decision of the circuit court and incorporated by reference the written decision of the circuit court.

Facts:

The facts of the underlying action are a bit difficult to discern inasmuch as the circuit court essentially dismissed the plaintiff's case for failure to plead sufficient facts. It appears that plaintiff claimed to have been injured at work and to have been terminated from his employment on the same date. He thereafter filed a civil action alleging that his employer had acted with "deliberate intent" in causing his workplace injuries. He also alleged negligence, violation of the West Virginia Human Rights Act, intentional infliction of emotional distress, and retaliatory discharge.

The circuit court allowed the employee to amend his complaint in the face of a motion to dismiss filed by the employer. After the amended complaint was filed, the employer again filed a motion to dismiss. The upshot of the employer's motion was that the plaintiff had utterly failed to plead facts sufficient to put the employer on notice of the claims being made. The circuit court agreed with the employer. At the hearing on the motion to dismiss, the plaintiff again sought leave to amend his complaint. The circuit court denied this second attempt at amendment inasmuch as it was untimely.

Holding:

The Supreme Court wasted few words in upholding the decision of the circuit court. Indeed, as it sometimes does with memorandum decisions, the Supreme Court incorporated and attached the written order of the circuit court.

The circuit court took a dim view of the plaintiff's conclusory pleadings. Although recognizing that West Virginia is a "notice pleading" jurisdiction, the circuit court held that a plaintiff must plead some facts to show entitlement to relief. The Supreme Court agreed.

Impact on Business:

Although just a memorandum decision, this opinion seems to be a harbinger that the Supreme Court might hold plaintiffs to a higher standard on the initiation of lawsuits. This plaintiff tried to plead his case with just general references to theories of liability and statutory sections. In this instance, more was required of the plaintiff.

Henick v. Fast-Track Anesthesia Associates
Memorandum Decision
No. 111145 (November 26, 2012)

What the Court Reviewed:

The Supreme Court reviewed the orders of a circuit court following a bench trial. The Supreme Court upheld the circuit court's rejection of an employee's claims and a judgment for the employer on counterclaims.

What the Court Decided:

The Supreme Court affirmed the circuit court's rulings on the plaintiff's affirmative claims and the defendant's counterclaims.

Facts:

James Henick, an anesthesiologist, entered into an employment contract with Fast-Track Anesthesia Associates on April 4, 2008 under which he agreed to work for Fast-Track from July 1, 2008 through June 30, 2009. The terms of the contract could be renewed annually. Dr. Henick was to receive four weeks of vacation for each calendar year of employment under the contract. That contract was drafted by Dr. Henick's wife, a Virginia attorney. The contract was silent regarding reimbursement of accrued, unused vacation leave upon termination.

The employee handbook published by the employer stated that accrued, unused vacation leave was reimbursable where an employee resigned with notice.

Dr. Henick's employment was renewed on July 1, 2009, but the parties orally agreed to modify the contract so that the employment would end on December 31, 2009. A dispute arose between the parties in August of 2009. Dr. Jessica Palumbo, the sole owner and director of Fast-Track, learned that Dr. Henick had pre-signed fifty-four blank prescription forms and left them with his pain management nurse before he left for vacation. When Dr. Henick returned to the office, Dr. Palumbo met with him to discuss the signed blank scripts and then placed him on a paid suspension pending further investigation.

Shortly after the suspension, Dr. Henick discussed his suspension with another surgeon in the Martinsburg area. Dr. Henick told the other surgeon that Dr. Palumbo had asked him to pre-sign the blank prescription forms before he left for vacation.

Dr. Palumbo terminated Dr. Henick's employment with Fast-Track in mid-September of 2009 and reported him to the West Virginia Board of Medicine. Dr. Henick, in turn, filed a report with the Board of Medicine against Dr. Palumbo. Dr. Henick had allowed his medical license to lapse; accordingly, the Board of Medicine made no findings with regard to his license. The Board dismissed the report against Dr. Palumbo.

In March of 2010, Dr. Henick filed an action against Fast-Track and Dr. Palumbo for breach of contract and for failure to reimburse accrued, unused vacation leave in violation of the West Virginia Wage Payment and Collection Act. Fast-Track and Dr. Palumbo counterclaimed for breach of contract and for defamation *per se*. Following a bench trial, the circuit court entered an order dismissing Dr. Henick's breach of contract and WPCA claims. The circuit court found that Dr. Henick had breached his contract with his employer and, because he had

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been terminated, was not entitled to reimbursement for his accrued, unused vacation leave under the terms of the handbook. The circuit court then went on to find that Dr. Henick's statement to the other surgeon was defamatory *per se* inasmuch as it imputed incapacity in Dr. Palumbo's profession. The circuit court awarded Dr. Palumbo $100,000 in general damages on the defamation count and $87,167.00 in damages for breach of contract. Dr. Henick appealed the adverse judgment.

Holding:

The circuit court was acting as a trier of fact. Accordingly, the Supreme Court was reviewing both the legal and factual findings of the circuit court. In all respects, the Supreme Court upheld the rulings of the circuit court.

The Supreme Court held that the circuit court had properly construed the employment contract against Dr. Henick inasmuch as his wife was the drafter. The Court agreed with the circuit court's finding that Dr. Henick had breached the contract and, accordingly, was not entitled to any damages under the Wage Payment and Collection Act. The Court then went on to uphold the finding of defamation. In reviewing these factual findings by the circuit court, the Supreme Court was using an abuse of discretion standard.

Impact on business:

As with many memorandum decisions, this case stands on its own facts. It is reassuring, however, that the Court had some understanding for the damage that a disgruntled employee could do to an employer, especially a professional employer, on the way out the door. It appears that the employee, Dr. Henick, was guilty of egregious conduct during his employment and during his subsequent suspension. The Court held him accountable.

Lauderman v. Associated Specialists, Inc.
Memorandum Decision
No. 120390 (May 17, 2013)

What the Court Reviewed:

The Supreme Court reviewed the circuit court's order denying the plaintiff's motion to alter or amend a judgment in his favor so as to include statutory liquidated damages as additional relief.

What the Court Decided:

The Supreme Court affirmed the order by the circuit court denying the motion to alter or amend.

Facts:

Thomas Lauderman is a physician who was formerly employed by Associated Specialists, Inc. Lauderman sued Associated Specialists and its president, Saad Mossallati, asserting a violation of the West Virginia Wage Payment and Collection Act and a breach of contract. In essence, Lauderman was claiming that his employer had neither paid him monies due nor paid him on time. The case went to a jury trial in November 2011.

Although there were two separate counts against the two named defendants, the first special interrogatory on the jury verdict form did not differentiate between either the counts or the defendants. Rather, the interrogatory to the jury combined everything into one single question that asked whether the jury found in favor of the plaintiff with regard to his complaint against the company and its president. The jury checked "yes" in response to this question and awarded Lauderman $36,923.23 for "physician pay," $16,058.00 for "IRA contribution," and $19,000.00 for "tail insurance." The jurors were asked in a second special interrogatory whether the company president had knowingly permitted the violation of the Wage Payment and Collection Act. The jury responded in the negative. There was no objection at trial to the use of this verdict form.

In a post-trial motion, Lauderman asked the circuit court to award him statutory liquidated damages for his employer's failure to pay his final paycheck within seventy-two hours. The circuit court denied the motion and entered a final judgment order. Lauderman again asked the circuit court to alter or amend the judgment. The circuit court refused to do so.

Holding:

In reviewing the appeal, the Supreme Court could not determine whether the jury had ruled in favor of Lauderman on both counts of the complaint. The Court opined that the jury may have found in favor of Lauderman just on the breach of contract claim. It then noted that there was just one question on the verdict form that specifically addressed the Wage Payment and Collection Act. As to that question, the jury found against Lauderman. The Supreme Court agreed with the circuit court's conclusion that if Lauderman was seeking an award of liquidated

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damages, then he should have taken steps before and during trial to put the issue before the court – including, but not necessarily limited to, submitting a better jury verdict form.

Impact on Business:

This case is limited to its own facts. A plaintiff employee successfully sued his employer for unpaid wages and benefits. It is possible that he might have been able to multiple those damages, but it appears that the issue was not properly framed in the lower court.

REM Community Options v. Cain
Memorandum Decision
No. 111236 (November 12, 2012)

What the Court Reviewed:

The defendant employer appealed a $450,000 punitive damages award arising out of a wrongful termination case brought by a former employee.

What the Court Decided:

The Supreme Court held that there was sufficient evidence in the record to sustain the punitive damages award.

Facts:

Laura Cain was employed by REM Community Options as a lead therapeutic consultant from 1998 until December 29, 2008. The prior December, Cain was involved in an automobile accident while at work. Following her accident, Cain filed a workers compensation claim and continued working until she claimed that her physical limitations prevented her from performing her job duties. She went off work.

REM mailed Cain a form letter on December 23, 2008, upon receiving information that Cain was cleared to return to work. She was required to either return to work within six days of the letter or to respond by December 29, 2008. If she did not respond to the letter, Cain would be considered to have voluntarily resigned. Cain claimed to have received the letter on January 6, 2009, after the company-imposed deadline. She contacted a REM official, but REM had, pursuant to policy, terminated her employment.

Following her termination, Cain filed suit against REM claiming workers' compensation discrimination pursuant to West Virginia Code § 23-5A-1 and disability discrimination pursuant to the West Virginia Human Rights Act.

During the jury trial, the court instructed the jury on punitive damages over the objection of the defendant. The jury returned a verdict in favor of Cain on both legal theories and awarded her $76,000 in lost wages, $100,000 in emotional distress damages, and $450,000 in punitive damages. After conducting a post-trial review, the circuit court upheld the award for punitive damages finding that Cain did present sufficient evidence to support the award. On appeal, REM challenged only the award of punitive damages and argued, first, that there was insufficient evidence to sustain the punitive damages award and, second, that the jury was prejudiced by statements and arguments made by plaintiff's counsel.

Holding:

The Supreme Court agreed with the circuit court's findings of fact and conclusions of law, and upheld the award of punitive damages to Cain. In so affirming, the Court held that even if counsel had not made the complained-of statements and arguments, there was still sufficient evidence to support an award of punitive damages.

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Impact on Business:

It is typically not a good result when a jury returns a verdict that is a multiple of compensatory damages. This appeal did not turn, however, on any novel issue of employment law. It did not make law – good or bad. Rather, this case can be limited to its own facts.

Town & Country Animal Hospital, Inc. v. Mead
Memorandum Decision
No. 120154 (February 11, 2013)

What the Court Reviewed:

The Supreme Court reviewed an order of the circuit court reversing the Board of Review's decision which found that an employee was disqualified from receiving unemployment compensation benefits because she had voluntarily left work.

What the Court Decided:

The Supreme Court upheld the decision of the circuit court. Thus, the Court sustained the decision in favor of the employee that she had been terminated from employment and was thus eligible for unemployment compensation benefits.

Facts:

Dawn Mead worked for Town & Country until January 14, 2010. There was a dispute as to the cause of her being separated from employment. Town & Country claimed Mead resigned; Mead contended that she had been terminated. The memorandum decision does not set forth any version of the competing facts.

Mead filed for unemployment compensation benefits. The deputy commissioner denied her claim based upon a finding of "voluntary quit." The administrative law judge, after an evidentiary hearing, also ruled in favor of the employer. On appeal to the Board of Review, the employer again prevailed. Mead then appealed to the circuit court. At that level, Mead prevailed. Town & Country then appealed.

Holding:

The standard on appeal for factual determinations by an entity such as the Board of Review is "clearly erroneous." That is, the reviewing court must affirm the findings unless it determines that the factual findings were clearly erroneous. In this instance, the circuit court apparently used verbiage other than that standard. Nevertheless, the Supreme Court found in its review that the circuit court believed the Board of Review's findings to be clearly wrong. Accordingly, without much further discussion, the Supreme Court affirmed the ruling of the circuit court.

Impact on Business:

This employer prevailed at three different levels, including one level (administrative law judge) which involved an evidentiary hearing. The Supreme Court's memorandum decision does not clearly set forth why the circuit court set aside three levels of administrative decision making. In this respect, the decision does not reflect the stability and consistency that business needs in this state.

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Yates v. Board of Review
Memorandum Decision
No. 121068 (May 17, 2013)

What the Court Reviewed:

The Supreme Court reviewed an order of the Circuit Court of Kanawha County affirming the denial of unemployment compensation benefits to an employee was terminated for failing to abide by her employer's attendance policy.

What the Court Decided:

The Supreme Court affirmed the order denying unemployment compensation benefits.

Facts:

Tammy Yates was employed by Central West Virginia Aging Services, a provider of in-home care to the elderly and disabled throughout West Virginia, beginning in June 2008. The agency had a strict attendance policy that Yates acknowledged prior to her employment. Under that policy, four to six absences in a six-month period would merit a written warning, and seven to fifteen absences in a six-month period could lead to termination. Absences "may be excused" pursuant to a doctor's excuse.

Yates received two written warnings on February 2010; the second warning was marked as a "final warning," and listed twenty-seven days in the previous six months that Yates had either missed or left work early. Doctor excuses were only provided for eleven of those days. Notwithstanding the final warning, Yates's number of absences increased to a total of forty-one days by mid-May of 2010. Consequently, her employment was terminated. Yates submitted a doctor's excuse for a couple of the absences near the end of her employment.

Yates applied for unemployment compensation benefits. At the initial stage, a deputy commissioner granted the benefits. After a hearing before an administrative law judge, those benefits were denied on a finding of gross misconduct. Yates then appealed to the Board of Review and then to the circuit court. In both instances, the decision of the administrative law judge was affirmed. Yates then appealed to the Supreme Court.

Holding:

The Supreme Court found that there was no support in the record for Yates's argument that she had been terminated for absences that were excused by a doctor. Instead, the Court found that the record supported a finding that Yates had been terminated for "excessive absenteeism, and violation of the agency's attendance policy." Moreover, the Supreme Court held that given the written warning that Yates had received on this subject, she was guilty of "gross misconduct" and was therefore disqualified for unemployment compensation benefits.

Impact on Business:

Employers are entitled to have absence control policies. Moreover, employers should be encouraged to give direction in writing to employees as to acceptable levels of behavior. In this instance, the employer had both a clearly communicated policy and a written warning "of record" for the employee. This decision reinforces that employees will not be rewarded for gross abdication of their responsibilities.

American States Insurance Company v. Surbaugh
No. 11-1186 (February, 2013)

What the Court Reviewed:

Whether an employee exclusion clause under an insurance policy contract was unambiguous, conspicuous, and adequately brought to the attention of the insured, and therefore, enforceable against him.

What the Court Decided:

The terms of the insurance contract unambiguously and conspicuously established that employees were excluded from coverage, and this provision was properly brought to the attention of the insured.

Facts:

This case arose out of a wrongful death action brought after a clerk at a sporting goods store was accidentally shot while a customer was testing out a gun. The sporting goods store's insurer, American States Insurance Company ("American"), refused to cover any damages for the wrongful death, asserting that its policy contract with the store did not extend coverage to employees. In a settlement with the store, the deceased's mother obtained the rights to sue American for its refusal to cover the accident. Accordingly, the deceased's mother brought an action against American, claiming that the clause in the insurance policy that established the exclusion of employees was ambiguous, inconspicuous, and was not properly brought to the insured store's attention. Therefore, the mother argued, that particular provision of the policy could not be enforced. The trial court asked the jury to determine whether the provision was properly brought to the attention of the store. The jury found that the provision was not adequately highlighted and denied summary judgment in favor of American.

Holding:

The ruling of the trial court based on a jury verdict was reversed, and the West Virginia Supreme Court determined that summary judgment should be granted in favor of American. The Court found that the policy's terms were unambiguous, conspicuous, and were properly brought to the attention of the insured. A simple reading of the policy would have put the insured on notice that employees were not included in the coverage.

Syl. Pt. 4:

> "A party to a contract has a duty to read the instrument." Syl. Pt. 5, *Soliva v. Shand, Morahan & Co., Inc.*, 345 S.E.2d 33 (1986), *overruled on other grounds by National Mutual Insurance Co. v. McMahon & Sons, Inc.*, 356 S.E.2d 488 (1987).

Impact on Business:

Exclusionary clauses in insurance policy contracts generally will not be enforced if the insurance company does not properly explain them to the insured. The issue of whether or not an insurance policy clause has been properly explained is a question of law for the judge, not a question of fact for a jury. However, a party has a duty to read the contract and where its terms are clear and unambiguous, they will be enforced notwithstanding any claims of ignorance. Parties must carefully read what they sign and comply with the express terms of the agreement.

Cherrington v. Erie Ins. Prop. & Cas. Co.
No. 12-0036, 2013 W. Va. LEXIS 724 (June 18, 2013)

What the Court Reviewed:

(1) Whether the circuit court erred by ruling that there was no property damage because defective workmanship does not constitute an occurrence so as to trigger coverage under a commercial general liability ("CGL") policy?

(2) Whether the CGL policy's exclusions for "your work" and "impaired property or property not physical injured" precluded coverage?

(3) Whether Mr. Mamone's homeowners and umbrella insurance policies, which cover acts of the insured as a salesman, precluded coverage?

What the Court Decided:

(1) Defective workmanship does constitute an occurrence that triggers coverage under a CGL policy; therefore, the circuit court erred by ruling that there was no property damage.

(2) The policy expressly stated that damages arising from work done on Pinnacle's behalf by the subcontractors were covered; therefore, the CGL's policy's exclusions did not preclude coverage.

(3) Mr. Mamone's homeowners and umbrella insurance policies precluded coverage because he was acting in his professional capacity for Pinnacle and he was neither a current salesperson for Pinnacle, nor had he ever been a salesperson for Pinnacle.

Facts:

Lisbeth Cherrington entered into a contract with the Pinnacle Group, Inc. for landscaping services, interior furnishings, and the construction of a home. Anthony Mamone, who allegedly worked on his own behalf, and as an agent of Pinnacle, worked with Ms. Cherrington during the contract and construction processes. During the construction of the home, disputes arose between Ms. Cherrington and Pinnacle when Ms. Cherrington was asked to provide additional funds for landscaping charges that she believed to be included in the contract price. Ms. Cherrington also felt that she had been overcharged for the interior furnishings provided under the contract. After the home was completed, Ms. Cherrington observed various defects in the house, including an uneven concrete floor, water infiltration, a sagging support beam, and numerous cracks in the drywall.

Ms. Cherrington filed suit against Pinnacle and Mr. Mamone alleging, among other things, negligent construction of her home and breach of fiduciary duty. In addition, Ms. Cherrington claimed that Pinnacle's misrepresentations and negligent acts decreased her home's fair market value and caused her emotional distress and that such conduct was intentional and willful thus entitling her to punitive damages.

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During the period of the home's contract negotiation and construction, both Pinnacle and Mr. Mamone had in effect insurance policies from Erie. Pinnacle had a policy of commercial general liability insurance and Mr. Mamone had a policy of homeowners insurance and a personal catastrophe ("umbrella") policy of insurance. Following the filing of the lawsuit, both Pinnacle and Mr. Mamone requested Erie to provide coverage and a defense in accordance with their respective policies. Erie denied both coverage and a duty to defend under the Pinnacle and Mamone policies. In response, Pinnacle and Mr. Mamone filed a third-party complaint against Erie seeking a declaration of the coverage provided by their policies of insurance. Erie then filed a motion for summary judgment contending that the subject insurance policies did not provide coverage for the claims asserted by Ms. Cherrington and that Erie was not obligated to provide a defense to either Pinnacle or Mr. Mamone.

The circuit court granted Erie's motion for summary judgment upon determining that Ms. Cherrington had failed to state a claim for damages that would be covered by any of the insurance policies issued to Pinnacle or Mr. Mamone. The court found that Pinnacle's CGL policy provided coverage for "bodily injury" or "property damage" but that Ms. Cherrington's allegation of emotional distress, without physical manifestation, did not constitute a "bodily injury". Likewise, the court concluded that Ms. Cherrington had failed to establish covered "property damage" insofar as the damages she alleged in her complaint were economic losses for diminution in the value of her home or excess charges that she was required to pay under the contract. The circuit court also determined that Ms. Cherrington had not established that an "occurrence" or "accident" had caused the damages she allegedly had sustained because faulty workmanship, in and of itself, or absent a separate event, is not sufficient to give rise to an "occurrence" that would trigger coverage under Pinnacle's CGL insurance policy. For the same reasons, the circuit court found that coverage was not provided by Mr. Mamone's personal insurance policy.

Additionally, the circuit court determined that even if Mr. Mamone's homeowners or umbrella policies provided coverage, such coverage would be barred by the operation of the policies' business pursuits exclusions because "the subject litigation arose out of Mr. Mamone's continuous or regular activity for the purpose of gaining a profit or livelihood." Finally, the circuit court ruled that Erie did not have a duty to provide either Pinnacle or Mr. Mamone a defense to Ms. Cherrington's lawsuit. Pinnacle and Mr. Mamone, joined by Ms. Cherrington, appealed to the West Virginia Supreme Court of Appeals.

Holding:

(1) The Court, in overruling prior caselaw, held that "defective workmanship causing bodily injury or property damage is an occurrence under a policy of commercial general liability." The Court went on to concluded that, although the circuit court did not err by ruling that Ms. Cherrington had failed to demonstrate that she had suffered bodily injury, the circuit court erred by ruling that Ms. Cherrington failed to demonstrate property damage; therefore, Erie was obligated to provide coverage under Pinnacle's CGL policy.

(2) The Court held that the CGL's policy exclusions did not preclude coverage because the policy plainly provided that such "exclusion[] does not apply if the damaged work or the work out of which the damages arise was performed on your behalf by a subcontractor." Because Pinnacle's subcontractors completed the majority of the defective work, the Court held that the exclusion did not preclude coverage. Furthermore, the Court held that another exclusion did not preclude coverage because such exclusion would have produced "an absurd and inconsistent result." For example, the second exclusion expressly precluded coverage for "'[w]ork or operations performed . . . on [Pinnacle's] behalf . . . '" while the first exclusion covered the work. Moreover, the Court held that a third exclusion did not preclude coverage because it applied only to damages resulting from products that had been recalled and none of the products used in the construction of the home had been recalled.

(3) The Court held that the "business pursuits" exclusion set forth in both Mr. Mamone's homeowners insurance policy and his umbrella policy, which precluded coverage for injuries incurred while Mr. Mamone acted in his professional capacity as an agent of Pinnacle, precluded coverage for Ms. Cherrington's alleged injuries because Mr. Mamone failed to meet the "salesperson" exception. Specifically, the Court found that the record did not indicate that Mr. Mamone was neither a current salesperson for Pinnacle, nor had he ever been a salesperson for Pinnacle. Pinnacle's website identified Mr. Mamone as the corporations "principal." Additionally, in the third-party complaint filed by Pinnacle, Mr. Mamone was described as "the president and shareholder of . . . The Pinnacle Group, Inc."

Impact on Business:

Defective workmanship is considered an occurrence under a CGL insure policy. Furthermore, when insurance policies contain contradictory exclusions, the exclusions will be read to promote consistency and prevent absurd results. Most likely, when one exclusion would provide coverage, such exclusion will trump any contradictory exclusions.

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Hartford Fire Ins. Co. v. Curtis
No. 12-0037, 2013 W. Va. LEXIS 608 (June 5, 2013)

What the Court Reviewed:

(1) Whether the bonds issued by Hartford were judgment bonds or nature performance bonds?

(2) Whether a surety on a judgment bond who does not receive notice of an action prior to the entry of a default judgment against its principal is obligated to pay the judgment without the opportunity to present defenses that would have been available to its principal?

(3) Whether Hartford was entitled to a credit equal to the amount of the settlement reached with the other defendants in the Rhodes/Cochran litigation?

What the Court Decided:

(1) The bonds issued by Hartford were judgment bonds.

(2) A surety on a judgment bond who does not receive notice of an action prior to the entry of a default judgment against its principal is obligated to pay the judgment without the opportunity to present defenses that would have been available to its principal.

(3) Hartford was not entitled to credit equal to the amount of the settlement reached with the other defendants in the Rhodes/Cochran litigation because the settlement was not entered into prior to the judgment.

Facts:

This case contained two consolidated cases. In the first consolidated case, Micah and Angela L. Curtis (hereinafter "the Curtises") filed suit against Calusa Investments, LLC ("Calusa"), a mortgage lender, for alleged misrepresentations and actions that caused the Curtises to refinance the mortgage on their home on unfavorable terms. Hartford, Calusa's surety, was not made a party to the lawsuit and was not informed of the suit or a potential claim against Calusa.

Calusa failed to respond to the complaint and a default judgment was entered against it in the amount of $99,795.05 plus interest. Calusa failed to satisfy the judgment and Hartford was notified. The circuit court granted leave to the Curtises to file an amended complaint adding Hartford as a party defendant. The Curtises then filed a motion for partial summary judgment asking the circuit court to find, as a matter of law, that Hartford was liable for the entirety of the judgment under the terms of the bond it issued to Calusa. Hartford opposed the motion on the grounds that it had not been notified of the action against Calusa and that it had been denied an opportunity to present defenses or challenge the amount of damages claimed. The circuit court entered an order granting partial summary judgment in favor of the Curtises and finding Hartford obligated to satisfy the default judgment. A final judgment was entered in favor of the Curtises against Hartford in the amount of $99,795,05 plus interest.

In the second consolidated case, Jerry Lee Rhodes and Bonne M. Cochran (hereinafter "Rhodes/Cochran") filed suit against Equity South Mortgage, LLC ("Equity South"), a residential mortgage broker, for damages in connection with two allegedly oppressive home improvement loans brokered by Equity South. Hartford was the surety on the mortgage broker bond issued to Equity South. Equity South failed to respond to the complaint, and a default judgment was entered against it in the amount of $56,300 plus interest.

Equity South failed to satisfy the judgment, and Rhodes/Cochran presented Hartford with a claim for payment. Hartford refused to pay and Rhodes/Cochran filed suit against Hartford. Rhodes/Cochran then filed a motion for summary judgment, asking the circuit court to hold Hartford liable for the default judgment entered against Equity South. Hartford opposed the motion on the grounds that it had not been notified of the case against Equity South and that it had been denied an opportunity to present defenses or challenge the amount of damages claimed. The circuit court granted summary judgment in favor of Rhodes/Cochran and entered judgment against Hartford in the amount of $50,000, the amount of the bond. The circuit court concluded that the bond was a judgment bond and denied Hartford's request for a credit against the judgment in an amount equal to the funds paid in settlement by some of the defendants in the case. The cases were consolidated upon appeal to the West Virginia Supreme Court of Appeals.

Holding:

The Court held that the bonds issued by Hartford which stated that"[i]f any person shall be aggrieved by the misconduct of the principal, he may upon recovering judgement [sic] against such principal issue execution of such judgement [sic] and maintain an action upon the bonds of the principal in any court having jurisdiction of the amount claimed . . ." were judgment bonds. The Court went on to state that because the bonds issued by Hartford were judgment bonds, Hartford was obligated to pay the judgment without the opportunity to present defenses available to its principals because judgment bonds are not, as Hartford argued, subject to W. Va. Code § 45-1-3 which provides that, for a judgment against a principal to be binding against a surety, the surety must be given notice. Furthermore, the Court held that because a settlement was not entered into prior to the judgment, Hartford was not entitled to any credit in connection with the default judgment.

Dissent:

Justice Ketchum wrote a strong dissent in which he stated that the majority ignores the plain language of W. Va. Code § 45-1-3 which provides that "any surety shall be given notice and the opportunity to defend an underlying suit before judgment can be enforced against the surety." Justice Ketchum further stated that "[t]he statute makes no distinction between types of sureties and bonds." Justice Ketchum stated that the majority opinion was unfair to insurance companies and that such opinion allows plaintiffs to obtain consent judgment against the principal in return for the promise to only enforce the judgment against the surety who is unaware of the suit.

Impact on Business:

Insurance companies securing judgment bonds are obligated to pay a judgment without having prior notice of the judgment or an opportunity to defend. Justice Ketchum called this "unfair" to insurers.

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INSURANCE LAW

Lindsay v. Attorneys Liability Protection Society, Inc.
No. 11-1651 (April, 2013)

What the Court Reviewed:

Under a contract for an insurance policy, did the Petitioner's failure to follow the terms and give adequate notice of a claim bar their recovery?

What the Court Decided:

Because the terms of the insurance policy explicitly stated that all claims must be made within the one year policy period, Petitioner's failure to comply constituted a breach. Therefore, Respondent did not have to cover Petitioner for the claims tardily reported.

Facts:

The law firm of Tabor, Lindsay & Associates, PLLC, ("Lindsay") purchased from the Attorneys Liability Protection Society, Inc. (ALPS) a lawyers' professional liability insurance policy for a term of one year, renewable each year. The policy was a claims-made-and-reported policy, mandating that coverage would be provided when a claim is made to the insurance company, not when the circumstances giving rise to the claim occur. Further, the policy contract explicitly established that the claim had to be made during the one year policy coverage term in which the incident occurred. On January 10, 2008 a complaint was filed against Lindsay for misappropriation of funds. The firm hired its own counsel, and did not notify ALPS of this suit until May 20, 2010 after the relevant policy period had expired. Accordingly, ALPS rejected the notification and informed Lindsay that it would not be providing coverage in this matter. After an amended complaint was filed against Lindsay in the misappropriation matter, Lindsay filed a third-party complaint against ALPS for declaratory judgment that ALPS must cover Tabor Lindsay under the terms of their policy.

Holding:

The explicit terms of the contract for the insurance policy mandated that Lindsay must notify ALPS of any claims during the one year policy period in which the incident occurred. Lindsay secured their own counsel, and waited almost two years before notifying ALPS. Because this was a clear violation of the terms of the contract, summary judgment in favor of ALPS was affirmed.

Impact on Business:

This was another common sense holding, illustrating that you must carefully read what you sign and make sure you comply with the terms. Otherwise, the current West Virginia Supreme Court has no difficulty ruling against plaintiffs who do not comply with the terms of their own contracts.

State ex. rel. State Farm Mut. Auto. Ins. Co. v. Marks
No. 12-0304, 741 S.E.2d 75 (Nov. 15, 2012)

What the Court Reviewed:

Whether medical protective orders are valid and enforceable to limit the dissemination and retention of medical records obtained through discovery?

What the Court Decided:

Medical protective orders are valid and enforceable to limit the dissemination and retention of medical records obtained through discovery so long as such orders do not interfere with an insurer's legal reporting obligations.

Facts:

This case contained two consolidated cases. In the first consolidated case, Matthew Huggins was injured in a motor vehicle accident with Thomas Shuman. Mr. Huggins filed an action against Mr. Shuman; Mr. Shuman's employer, Woodward Video, LLC; and the owner of Woodward Video, Brian Woodward. In addition, Mr. Huggins filed a claim against the defendants' insurer, Nationwide Mutual Insurance Company, and his own insurer, State Farm. Mr. Huggins disagreed with Nationwide over the terms governing the disclosure of his medical records and information. State Farm became involved in the dispute and requested the circuit court to stay its decision regarding a medical protection order pending the United States Supreme Court's resolution of State Farm's appeal in *Bedell II*. The circuit court denied State Farm's request and entered a protective order granting Mr. Huggins protection for his confidential medical records and medical information. Nationwide and State Farm objected to the terms of the order, contending that the medical protective order was too restrictive because it affected their ability to retain and report the information to governmental agencies regulating insurers and to retain and utilize such information in its file. State Farm renewed its request to stay which the circuit court refused by order.

In the second of the consolidated cases, Carmella Faris was injured in a motor vehicle accident with Linda Lee Harding, who was insured by Nationwide. Mrs. Faris sought to recover benefits for her injuries from Ms. Harding's policy with Nationwide and signed medical authorizations to permit Nationwide to obtain her medical records and bills relating to the injuries she sustained in the accident. Mrs. Faris revoked the authorizations and filed a lawsuit against Ms. Harding to obtain compensation for her injuries. The circuit court entered a protective order granting Mrs. Faris protection for her confidential medical records and medical information. Nationwide objected to the terms of the order on the basis that the medical protective order was too restrictive because it affected its ability to retain and report information to governmental agencies regulating insurers and to retain and utilize such information in its claims and files. The circuit court consolidated the two cases and entered an order affirming the medical protective orders entered in both cases. Nationwide appealed to the West Virginia Supreme Court of Appeals.

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Holding:

The Court held that the medical protective orders were valid because the orders expressly recognized that the party receiving the protected information may be obligated to disclose the same to fulfill its mandatory reporting obligations. For example, the medical orders of protection (1) directed that documents subject to such orders were not required to be returned or destroyed until after the expiration of the reporting period imposed by the West Virginia Insurance Commissioner, (2) contained language that permitted insurers to apply to permit disclosure if the insurers believed that they were required to produce such protected information to a person or entity by operation of law, and (3) permitted the parties receiving the protected information to retain a copy of the protected information under seal.

In addition, the Court held that compliance with the medical protective orders would not be unduly burdensome because electronic systems have the ability to be programmed to satisfy the exact needs of users. Moreover, the Court found that the enforcement of medical protective orders does not impinge on insurers' rights to free speech or violate the full faith and credit or due process clauses of the Federal Constitution. Furthermore, the Court held that there is good cause for issuance of the medical protective orders because the orders prevent the dissemination of private records.

However, although the Court held that medical protective orders are valid and enforceable, the Court did state that a court may not issue a protective order directing an insurance company to return or destroy a claimant's medical records prior to the time period set forth by the West Virginia Insurance Commissioner.

Dissent:

Justice Ketchum, in his dissent, stated that "a plaintiff has no confidentiality or privacy interest in his or her medical records 'when those records are lawfully distributed to an adverse party in a personal injury lawsuit.'" Justice Ketchum also added that even if he agreed with the majority, their case-by-case medical protective order approach to protect medical records is inadequate because it requires a plaintiff's lawyer to go to court to obtain a medical protective order in every case which is time consuming and expensive and results in delays. To solve such issues, Justice Ketchum suggested that West Virginia adopt a medical privacy rule addressing the matter.

Justice Benjamin, in his concurrence and dissent, stated that the protective orders "impermissibly frustrate the Insurance Commissioner's prerogative and ability to investigate instances of fraud pursuant to the Insurance Fraud Prevention Act" and "put the insurance companies in an untenable position with respect to their regulatory obligations."

Impact on Business:

Insurers will have to go to court when they believe that protected information is necessary to comply with legal requirements; such will likely be expensive and result in cases being tried slowly.

State Farm Mut. Auto. Ins. Co. v. Schatken
No. 11-1142, 737 S.E.2d 229 (Nov. 16, 2012)

What the Court Reviewed:

(1) Whether State Farm's non-duplication of benefits provision as viewed against the "no sums payable" provision of W. Va. Code § 33-6-31(b) is valid?

(2) Whether the reimbursement provision in State Farm's policy violates W. Va. Code § 33-6-31(b)?

What the Court Decided:

(1) Non-duplication of benefits provisions in an underinsured motorist policy which permit an insurer to reduce an insured's damages by amounts received under medical payments coverage do not violate the "no sums payable" language of W. Va. Code § 33-6-31(b); therefore, State Farm's non-duplication of benefits provision is valid.

(2) The reimbursement provision was not ripe for adjudication.

Facts:

The Schatkens were injured when their vehicle was struck by a vehicle driven by Ida Trayter. Trayter was insured by Nationwide and carried $25,000.00 in liability coverage. Ms. Schatken incurred $29,368.47 in medical expenses as a result of her injuries. The Schatkens were insured by State Farm and carried a policy containing $5,000.00 in medical payments coverage, as well as $250,000.00 in underinsured motorist coverage. Nationwide tendered its liability limits of $25,000.00, to which State Farm consented and waived subrogation. The Schatkens exhausted the $5,000.00 in medical payments coverage in partial payment of Ms. Schatken's medical bills.

Settlement negotiations began between the Schatkens' counsel and State Farm for Ms. Schatken's underinsured motorist claim. The claims adjuster advised the Schatkens' counsel that she was basing her settlement offers on the net value of the claim after reduction of the $25,000.00 liability limits and $5,000.00 medical payments already received by Ms. Schatken, pursuant to the non-duplication provision in the State Farm policy which stated that the amount of damages resulting from bodily injury could be reduced by any damages that had already been paid or that are payable as expenses under the Medical Payments Coverage of the policy.

The Schatkens argued that the reduction of the offers made by State Farm by the amounts paid under the medical payments coverage violated W. Va. Code § 33-6-31(b) which provides that "[n]o sums payable as a result of underinsured motorists' coverage shall be reduced by payments made under the insured's policy or any other policy." The Schatkens filed suit against State Farm, its claims adjuster, and the adjuster's unidentified supervisors, alleging personal injury of Ms. Schatken and loss of consortium of Mr. Schatken pursuant to the underinsured motorist coverage, breach of contract and bad faith, and violation of the Unfair Trade Practices

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Act. In addition the Schatkens sought declaratory judgment that the non-duplication provision in State Farm's policy violated W. Va. Code § 33-6-31(b).

The Schatkens moved for partial summary judgment on their declaratory judgment action. State Farm then filed its response in which it noted that the policy also contained reimbursement language; therefore, Mrs. Schatken was required to reimburse it the $5,000.00 payment from Ms. Trayter and her liability insurer, Nationwide. In their reply, the Schatkens argued that the reimbursement provision also violated W. Va. Code § 33-6-31(b) and sought declaratory judgment on that provision as well. State Farm moved to strike that portion of the Schatkens' brief arguing that the reimbursement provision was not originally plead in the declaratory judgment complaint and had not been invoked as to Mrs. Schatken's claim. The Schatkens responded that by virtue of the statement in their brief, State Farm had placed the reimbursement provision at issue.

The circuit court granted partial summary judgment as to the non-duplication provision and denied the motion to strike. State Farm argued that the West Virginia Supreme Court of Appeals had upheld reimbursement provisions, but alternatively argued that the reimbursement provision did not constitute a "justiciable issue" because it did not intend to invoke the reimbursement provision.

The circuit court found that the reimbursement provision was invoked by State Farm, creating a justiciable claim, and granted summary judgment to the Schatkens, finding that the reimbursement provision violated W. Va. Code § 33-6-31(b). The court also found that the non-duplication provision violated the plain language of W. Va. Code § 33-6-31(b) because it "' [sought] to reduce available underinsured motorist benefits by Plaintiffs' medical payments coverage' and therefore violate[d] the public policy of full compensation articulated in several of th[e] Court's opinions regarding underinsured motorist coverage."

Holding:

The Court held that the circuit court erred in granting partial summary judgment to respondents as to the non-duplication provision because "a 'non-duplication' of benefits provision in an underinsured motorist policy which permits an insurer to reduce an insured's damages does not violate the 'no sums payable' language of W. Va. Code § 33-6-31(b)" so long as "it does not serve to reduce the underinsured motorist coverage available under the insured's policy." Furthermore, the Court held that the circuit court's award of summary judgment as to the reimbursement provision was erroneous because the issue was a mere contingency and not ripe for adjudication.

Dissent:

Justice Ketchum, with whom Judge Keadle joined dissenting, stated that the reduction by the majority opinion is contrary to the plain language of West Virginia's underinsured motorist statute because the reduction permits State Farm to reduce the Plaintiffs' personal injury damages payable under the uninsured coverage by the amount they received under the medical payments coverage.

Impact on Business:

Insurers may implement "non-duplication of benefits provisions in an underinsured motorist policy to offset uninsured and/or underinsured motorist coverage by medical payments to prevent a double recovery."

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INSURANCE LAW

W. Va. Employers' Mut. Ins. Co. v. Bunch Co.
No. 11-1750, 2013 W. Va. LEXIS 616 (June 6, 2013)

What the Court Reviewed:

(1) Whether the circuit court erred by ruling that the West Virginia Insurance Commissioner wrongfully allowed BrickStreet to charge Bunch a commission when no correlative actual expense had been incurred?

(2) Whether the circuit court erred by concluding that the rates charged by BrickStreet were unreasonable?

(3) Whether the circuit court improperly injected itself into a rate making matter expressly delegated to the Insurance Commissioner?

(4) Whether the Insurance Commissioner wrongfully denied Bunch's hearing request?

What the Court Decided:

(1) The circuit court erred by ruling that the Insurance Commissioner wrongfully allowed BrickStreet to charge Bunch a commission when no correlative expense had been incurred because expenses may be factored into an insurance premium prospectively.

(2) The circuit court erred by concluding that the rates charged by BrickStreet were unreasonable.

(3) The circuit court improperly injected itself into a rate making matter expressly delegated to the Commissioner.

(4) The Commissioner did not wrongfully deny Bunch's hearing request.

Facts:

Bunch Company filed a complaint against West Virginia Employers' Mutual Insurance Company, doing business as BrickStreet Mutual Insurance Company, for wrongfully charging it, and other similarly situated insureds, an agent commission expense in its workers' compensation premium. BrickStreet denied that it charged any insured an expense for an agent commission and argued that Bunch's claim was barred by the filed rate doctrine; therefore, their exclusive remedy lay with the Commissioner.

Judge Cummings held that Brickstreet had wrongfully charged Bunch a commission as part of its premium without incurring a specific agent-related expense. Soon after Judge Cummings' decision, the West Virginia Supreme Court of Appeals issued its decision in *State ex. rel. Citifinancial v. Madden,* 672 S.E.2d 365 (W. Va. 2008), in which the Court held that "any challenge to an approved insurance rate has to be raised in an administrative proceeding before the Commissioner pursuant to West Virginia Code § 33-20-5(d). . . And, only after such an administrative challenge has transpired, can judicial review occur." BrickStreet then sought relief from the ruling of Judge Cummings.

Judge Hustead granted relief to BrickStreet. In doing so BrickStreet, Judge Hustead ruled that Bunch was seeking to challenge an established insurance rate and that the Court was clear in *Citifinancial* that circuit courts do not have the authority to review rate-setting matters until such matters have first been challenged before the Commissioner. In response, Bunch filed a consumer complaint with the Commissioner in which it reasserted that BrickStreet was unlawfully charging an agent commission for its "direct-write" business. In its response to such complaint, BrickStreet stated that it had not charged Bunch an agent commission and that an insured's premium is based on multiple components, one of which is the loss cost multiplier ("LCM"). BrickStreet also agreed that included in the LCM are component expenses for the cost of acquisition and service fees and for any of its insureds who do not have agents, there are enhanced administrative needs that it is responsible for handling. BrickStreet asserted that, for those additional services, it is compensated through the premium components of acquisitions costs and services fees.

The Insurance Commissioner denied the relief sought by Bunch upon concluding that there was no factual dispute concerning the filing and approval of the rates and forms of BrickStreet and ruled that the rates charged by BrickStreet were reasonable in relation to the benefits provided. Bunch appealed the Commissioner's ruling to the Circuit Court of Kanawha County. Judge Kaufman reversed and vacated the Commissioner's order finding that the Commissioner erred by allowing BrickStreet to charge Bunch a commission when no corresponding expense had been incurred; and that the Commissioner erred in finding that the subject insurance rates were reasonable. In response, Bunch filed a new class action complaint in the Kanawha County Circuit Court, through which it sought monetary relief for BrickStreet's unlawful charge of an agent commission as part of its workers' compensation premium.

Holding:

The Court held that the circuit court wrongfully concluded that no expense can be factored into an insurance premium prospectively, rather than based on actual expenditures, and that the circuit court failed to recognize the language in 85 C.S.R. § 8-11.2 that specifically authorizes the inclusion of prospective expenses related to policy acquisition or servicing expenses.

The Court further held that the circuit court had improperly injected itself into a rate making matter because, as the Court had previously held in *Citifinancial,* circuit courts do not possess the authority to "'invade the jurisdiction of the Commissioner and conduct a reexamination of insurance rates previously approved by the Commissioner.'" In addition, the Court concluded that the circuit court failed to head the Court's recognition in *State ex. rel. Crist v. Cline,* 219 S.E.2d 358 (W. Va. 2006), in which it held that "we . . . give deference to [the Insurance Commissioner's] interpretation, so long as it is consistent with the plain meaning of the governing statute . . . ." Because the Court concluded that the circuit encroached upon a matter expressly delegated to the Commissioner, it held that the circuit court did not have the authority to rule that the rates charged by BrickStreet were unreasonable.

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The Court also held that the Commissioner has the authority to refuse a hearing request upon determining that a hearing "'[w]ould serve no useful purposes.'" 114 C.S.R. Section 13-3.3.b. The Court stated noted, however, it was troubled that the Commissioner, as a matter of routine, determining that hearings are unnecessary.

Impact on Business:

A workers' compensation insurer may include proposed administrative costs and expense rates in insurance premiums so long as such rates are calculated based on cost projections derived from past experience combined with a reasonable expectation of future losses and expenses.

This is an important decision because the Supreme Court affirmed that a circuit court shall defer to the Insurance Commissioner, who has exclusive authority, in ratemaking issues.

Comb v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA
Memorandum Decision
No. 12-0295, 2013 W. Va. LEXIS 508 (May 17, 2013)

What the Court Reviewed:

Whether the circuit court erred by concluding that there was no question of fact that Ms. Wheeler's automobile was not used in connection with Board of Education business?

What the Court Decided:

The circuit court did not err in concluding that there was no question of fact that Ms. Wheeler's automobile was used in connection with Board of Education Business.

Facts:

The Petitioner's daughter, Lauren, left Summers County High School with Meghan Wheeler, a graduate of the school, to attend a high school basketball tournament. Ms. Wheeler was not employed by the school board, was not connected in any way with the school, and had not been asked by anyone connected with the school to take Lauren to the game. While Lauren was riding in Ms. Wheeler's automobile, Ms. Wheeler lost control and crashed the automobile.

The Petitioner filed a complaint for damages related to injuries Lauren received in the accident. She named Ms. Wheeler, the Summer County Board of Education, and the Board's insurance carrier, Respondent National Union, as defendants. After the close of discovery, the Respondent filed its motion for summary judgment which the circuit court granted upon concluding that there were no facts that could support a finding that Ms. Wheeler was driving a "non-owned auto" within the definition of the policy at the time of the accident. The policy defined a non-owned auto as autos that are not owned, leased, hired, rented or borrowed, that are used in connection with business. The Petitioner appealed on the basis that the circuit court erred in concluding that there was no question of fact that Ms. Wheeler's automobile was not used in connection with Board of Education business.

Holding:

The Court held that Ms. Wheeler's vehicle was not a non-owned vehicle under the insurance policy because there was absolutely no evidence that linked Ms. Wheeler with Summers County High School or the Summers County Board of Education. Specifically, the Court found that there was no evidence that (1) Ms. Wheeler advanced school business when she took Lauren from the school, (2) that school officials were aware that Ms. Wheeler had left the school with the Lauren, and (3) that school officials needed or wanted Ms. Wheeler to drive Lauren to the tournament for which the school had already made busing arrangements.

Impact on Business:

To be categorized as a non-owned auto within the definition of an insurance policy, there must be factual evidence that supports that such vehicle is used in connection with business. The case affirms summary judgment in favor of the insurer.

Moore v. Allstate Ins. Co.
Memorandum Decision
No. 12-0288, 2013 W. Va. LEXIS 747 (June 24, 2013)

What the Court Reviewed:

(1) Whether the circuit court erred by instructing the jury that Mr. Moore's home was evidence which Mr. Moore had a duty to preserve?

(2) Whether the circuit court erred by instructing the jury that non-participation in the appraisal is a breach of the insurance contract?

(3) Whether the circuit court erred by permitting J. Rudy Martin, a lawyer practicing with the law firm of Jackson Kelly PLLC and Allstate's claims handling expert, to testify?

(4) Whether the circuit court erred by bifurcating the punitive damages aspect of the case?

What the Court Decided:

(1) The jury instructions were not so prejudicial as to warrant a new trial.

(2) Mr. Martin is an attorney with extensive experience in the insurance industry with substantial knowledge of claims handling practices, and the circuit court did not err by permitting him to testify.

(3) The circuit court did not err by bifurcating the punitive damages aspect of the case.

Facts:

Richard Moore and his deceased wife, Ruth Moore, filed an insurance claim following a house fire. The home was not habitable, and temporary housing arrangements were made. Allstate assigned Ken Whitt as the adjuster to process the claim for loss of personal property and contents and Joe Freme as the adjuster to process the claim for the structure. Allstate sent a letter to Mr. and Mrs. Moore explaining the policy's additional living expense coverage. The applicable coverage limit of the homeowners policy was $119,000.

Mr. Freme examined the premises several times and advised Mr. Moore that his initial estimate showed that it would take $48,261 to repair the damage to the home. Soon after, Mr. Freme and Allstate's claims manager, Roy Delph, met with Mr. Moore's counsel and the Moores' contractor at the property. At that time, the HVAC and electrical systems had not been tested because no temporary electrical power was operational at the home. Mr. Moore submitted repair estimates of $107,773 from building contractors City Window, and $165,972 from Shields Contracting, to Allstate.

Mr. Moore received Allstate's revised estimate of $50,275 to repair the home. In reply, Mr. Moore informed Allstate that if it could find someone to complete the repair work for the proposed amount, it should go ahead and repair the home. Allstate asserted that it had no legal right to contract with anyone to complete the work because it did not own the property. Allstate instructed contractor Chuck Heinlein to forward his contract to Mr. Moore. The contract stated that Mr. Moore would be held responsible for any amount that Allstate refused to pay. After reviewing this language, Mr. Moore did not feel comfortable entering into the contract.

Allstate then made a written demand for an appraisal pursuant to the insurance policy. Mr. Moore refused to proceed with the appraisal. Mr. and Mrs. Moore then filed a complaint against Allstate alleging breach of contract, bad faith, and Unfair Trade Practice Act violations. Thereafter, Mr. Moore decided to demolish the home and place a modular home on the property. At no time prior to the demolition of the property did Mr. Moore advise Allstate of his intent to destroy the home. Allstate then announced it was terminating Mr. Moore's extra living expense reimbursements. At that time, Allstate had issued payments for additional living expenses of $20,332 and unscheduled personal property of $32,766. Allstate paid petitioner $50,275, its final home repair estimate.

The case went to jury trial where the jury returned a verdict in favor of Allstate on all counts. Mr. Moore filed a motion for a new trial which the circuit court denied. Mr. Moore then appealed to the West Virginia Supreme Court of Appeals requesting that the Court remand the case for a new trial on the grounds that the circuit court erred by: (1) instructing the jury that Mr. Moore's home was evidence which Mr. Moore had a duty to preserve; (2) instructing the jury that non-participation in the appraisal is a breach of the insurance contract; (3) permitting J. Rudy Martin, Allstate's claims handling expert, to testify; and (4) bifurcating the punitive damages aspect of the case.

Holding:

(1) The Court held that neither the spoliation instruction regarding the duty to preserve the home as evidence, nor the appraisal instruction, were so prejudicial as to warrant a new trial. Specifically, with regard to the spoliation issue, at the time the home was demolished, a few issues remained unknown regarding the cost of repair, such as the electrical system, which information may have been meaningful to the case.

(2) The Court held that Mr. Martin had extensive experience in the insurance industry and substantial knowledge of claims handling practices; therefore, the circuit court properly exercised its discretion in allowing his testimony.

(3) The Court declined to disturb the circuit court's broad discretion and authority to manage and control its proceedings regarding the bifurcation of punitive damages.

Impact on Business:

Evidence regarding claims that an insured, or an insurer, anticipates will result in litigation must be preserved. In addition, failure to participate in the appraisal process may be viewed as a breach of the insurance contract.

WEST VIRGINIA CHAMBER
INSURANCE LAW – MEMORANDUM DECISIONS

Salmons v. State Farm Mut. Auto. Ins. Co.
Memorandum Decision
No. 12-0891, 2013 W. Va. LEXIS 642 (June 7, 2013)

All Justice concurred in the judgment.

What the Court Reviewed:

Whether a policyholder insured by the same insurance company as a sole at-fault tortfeasor is a first-party claimant under W. Va. Code R. § 114-14-2?

What the Court Decided:

No, simply because a policyholder and a tortfeasor are insured by the same insurance company, does not make a policyholder a first-party claimant.

Facts:

While operating her vehicle, Lilly Perry lost control and struck a parked car owned by Patricia Salmons, rendering Ms. Salmon's car inoperative. Both Ms. Perry and Ms. Salmons had automobile insurance coverage from State Farm. Ms. Salmons argued that State Farm and its claims representative, Christi Miller, committed first-party bad faith and violated the Unfair Trade Practices Act ("UTPA") by failing to properly handle her claim and pay for the damage to her car and loss of its use. The circuit court granted judgment on the pleadings in favor of State Farm and Ms. Miller, concluding that Ms. Salmons was a third-party claimant. Ms. Salmons appealed to the West Virginia Supreme Court of Appeals and argued that because she was insured by State Farm under her own automobile policy, her first-party rights attached as soon as she reported her loss to her insurance agent.

Holding:

The Court held that Ms. Salmons was not a first-party claimant under W. Va. Code R. § 114-14-2 despite the fact that she and Ms. Perry were both insured by State Farm. The Court went on to explain that Ms. Perry was the sole, at-fault tortfeasor, and Ms. Salmons was not a party to the insurance contract under which her claim was made and payable. Ms. Salmons, therefore, did not meet the characteristics of a first-party claimant but rather a third-party claimant whom cannot pursue a private action for neither common law bad faith nor statutory, UTPA violations.

Impact on Business:

An insurer wishing to pursue a first-party claimant suit must be a party to the insurance contract under which the claim was made and payable. If the insurer is not, such insurer is considered a third-party claimant.

Sayre v. Westfield Ins. Co.
Memorandum Decision
No. 11-1135, 2012 W. Va. LEXIS 948 (Nov. 26, 2012)

What the Court Reviewed:

(1) Whether the petitioner could bring a first-party common law bad faith lawsuit and statutory UTPA lawsuit against the insurer because his son was an insured under the underinsured motorist policy?

(2) Whether the circuit court erred by dismissing the common law bad faith claim?

(3) Whether the circuit court erred by dismissing the UTPA claim?

What the Court Decided:

The Court held that the circuit court did not err by dismissing the bad faith claim or UTPA claim because the Petitioner failed to allege sufficient facts in his complaint for such claims to survive Rule12(b)(6). Because the Petitioner failed to allege sufficient facts in his complaint to survive dismissal, the court declined to address whether he could bring a first-party common law bad faith lawsuit or statutory UTPA lawsuit.

Facts:

Robert Keith Sayre, the Petitioner's son, died from injuries sustained in an automobile accident. The son was riding as the guest passenger in a car owned by James Smith that was being driven by Richard "Ryan" Smith. Steve Sayre, the Petitioner, asserted that the accident was caused by the negligence and/or recklessness of both Ryan Smith and the driver of the other vehicle, Kurtis Barnett.

Ryan Smith and the Smith vehicle were covered by an automobile policy issued by Westfield Insurance Company. The Petitioner and Westfield reached a tentative settlement whereby Westfield agreed to pay the petitioner the policy's full per person liability coverage of $100,000. Mr. Barnett and his vehicle were covered by a policy issued by a different insurance company. A tentative settlement was reached whereby the petitioner and the Estate of Ryan Smith were to split the liability limits of Barnett's insurance. The Petitioner also asserted a claim for the underinsured motorist coverage in the Smith/Westfield policy. Such policy provided that Westfield would pay underinsured motorist benefits to an insured which was defined as "1. You or any family member, [or] 2. Any other person occupying or using your covered auto."

The Petitioner notified Westfield of the proposed liability settlement for full policy limits. The Petitioner's counsel sent a letter to Westfield's counsel acknowledging that the underinsured policy limit was $20,000 and requesting that coverage be tendered as well as payment for attorney fees. Westfield agreed to waive subrogation on the liability claims, agreed to pay the underinsured motorist claims, and tendered a check to the petitioner for the full underinsured motorist coverage of $20,000; however, Westfield refused to pay attorney fees to petitioner for

procuring the benefits. In response, the Petitioner filed suit against Westfield for its handling of his underinsured motorist claim, including refusal to pay the attorney fees. The Petitioner asserted negligence, breach of contract, common law bad faith, and violation of the unfair claim settlement practice portion of the West Virginia Unfair Trade Practice Act (UTPA). The Petitioner also sought declaratory relief.

The circuit court dismissed or, in the alternative, entered summary judgment for respondent on all of the Petitioner's claims. The Petitioner appealed the circuit court's ruling on his common law bad faith and UTPA claims, asserting that he could bring a first-party common law bad faith and statutory UTPA lawsuit because his son was an insured under the underinsured motorist policy language.

Holding:

With respect to the Petitioner's common law bad faith claim, the Court held that the Petitioner failed to allege sufficient facts to survive dismissal; therefore, the circuit court did not err by dismissing the claim. With respect to the Petitioner's UTPA claim, the Court reiterated that "'[m]ore than a single isolated violation of W. Va. Code, 33-11-4(9), must be shown in order to meet the statutory requirement of an indication of "a general business practice," which requirement must be shown in order to maintain the statutory implied cause of action.'" Specifically, the Court held that because the Petitioner alleged only that Westfield had previously denied his underinsured motorist claim, which it eventually paid, and insisted that he release his claim for attorney fees, he failed to allege sufficient facts to prove a UTPA violation; therefore, the circuit court did not err by dismissing his claim. Because the Petitioner failed to provide sufficient factual support for the common law bad faith claim and the UTPA claim, the Court declined to address whether the Petitioner could make a first-party bad faith claim for the purpose of resolution because his son was an insured under the underinsured motorist policy language.

Impact on business:

Uncertainty exists regarding whether first-party common law bad faith claims and statutory UTPA claims may be brought against an insurer by a parent of the insureds however the Court affirmed dismissal in favor of the defendant, a positive outcome.

Thomas v. State Farm Mut. Auto. Ins. Co.
Memorandum Decision
No. 11-0750, 2012 W. Va. LEXIS 729 (Oct. 19, 2012)

What the Court Reviewed:

(1) Whether the Circuit Court of Monongalia County erred by relying on the doctrine of reasonable expectations without having any evidence of the parties' intent regarding the anticipated coverage?

(2) Whether State Farm improperly based its declination of coverage on the language of the owned but not insured exclusion contained in Mr. Thomas' policy of motor vehicle insurance providing coverage for his personal automobile?

(3) Whether owned but not insured exclusions should be invalidated because they limit an insured's recovery of UIM benefits purchased as a result of the insurer's statutory duty to offer such optional coverage?

What the Court Decided:

(1) The circuit court erred by relying on the doctrine of reasonable expectations because the exclusionary language employed by State Farm was clear and unambiguous.

(2) State Farm did not improperly base its declination of coverage because the language of the subject owned but not insured exclusion plainly precluded optional UIM coverage when the insured is injured while using or occupying a motor vehicle that he/she owns but for which he/she has not purchased UIM coverage.

(3) Owned but not insured exclusions are valid because they exclude only the recovery of UIM benefits, not mandatory UM benefits.

Facts:

Dennis Thomas sustained fatal injuries when the tractor that he was driving was hit by a car driven by Charlotte Cain. Rose Thomas, Administratix of the Estate of Mr. Thomas, filed suit against Ms. Cain to recover for Mr. Thomas' injuries and his wrongful death. Ms. Cain's insurer offered its limits of liability coverage to Mrs. Thomas to which settlement State Farm agreed. Mrs. Thomas then sought to recover UIM benefits from the policy of motor vehicle insurance Mr. Thomas had purchased for his personal automobile, not his tractor, from State Farm. State Farm denied coverage based upon the policy's owned but not insured exclusion and moved for summary judgment.

The Circuit Court of Monongalia County awarded summary judgment to State Farm upon determining that no genuine issue of material fact existed with respect to State Farm's obligation to provide UIM benefits to Mrs. Thomas or Mr. Thomas. Additionally, the court determined that, as a matter of law, State Farm had no duty to provide UIM benefits to Mrs. Thomas or Mr.

Thomas because the tractor driven by Mr. Thomas was never insured for coverage; therefore, neither Mrs. Thomas nor Mr. Thomas had a reasonable expectation of insurance coverage. Mrs. Thomas appealed to the West Virginia Supreme Court of Appeals.

Holding:

(1) The Court held that "[g]iven the plain meaning of the controverted policy language at issue herein, we agree with Mrs. Thomas's contention that the circuit court erred by basing its decision on the doctrine of reasonable expectations. '[T]he doctrine of reasonable expectations is limited to those instances . . . in which the policy language is ambiguous.' Here, the exclusionary language employed by State Farm is clear and unambiguous; thus the doctrine of reasonable expectations is not applicable to the facts of the case."

(2) The Court held that the circuit court did not improperly base its declination of coverage on the language of the owned but not insured exclusion contained in Mrs. Thomas' policy because the provisions of the policy unambiguously precluded coverage from an insured who is injured while occupying a motor vehicle that he/she owns but for which he/she has not purchased UIM coverage. In addition, the Court held that "'[i]nsurers may incorporate such terms, conditions and exclusions in an automobile policy as may be consistent with the premium charged, so long as any such exclusions do not conflict with the spirit and intent of the uninsured and underinsured motorist statutes.'"

(3) The Court held that owned but not insured exclusions that exclude the recovery of UIM benefits, not mandatory UM benefits, are valid, enforceable, and not against public policy.

Impact on Business:

The Court reaffirmed that so long as owned but not insured exclusions are clear and unambiguous, such exclusions are permissible. Here, it is important that the Court upheld the plain language of the insurance contract.

Triad Insulation, Inc. v. Nationwide Mut. Fire Ins. Co.
Memorandum Decision
No. 12-1110, 2013 W. Va. LEXIS 768 (June 24, 2013)

What the Court Reviewed:

Whether the circuit court erred by determining that the Galligans were third parties to the insurance contract?

What the Court Decided:

The circuit court did not err by determining that the Galligans were third parties to the insurance contract.

Facts:

Triad Insulation, Inc. was the sole named insured under a commercial property insurance policy issued by Nationwide. Brian Galligan is the president/owner of Triad. The insurance policy provided coverage for direct physical loss or damage to real and personal property covered by the policy. The policy covered a building owned by Mr. Galligan's wife, Helen Rodman Galligan. The building suffered structural damage to its roof as a result of large quantities of snow and ice buildup. Triad reported the structural damage claim to Nationwide.

Triad and Mr. Galligan filed a complaint alleging that Nationwide mishandled the adjustment of the loss by failing and refusing to authorize necessary repairs in a reasonable and timely manner which would have prevented the total loss and demolition of the building. In response, Nationwide filed a motion to dismiss Count Five of the complaint, wherein Mr. Galligan claimed loss of his personal property stored in the building, on the basis that Mr. Galligan was not an insured under the insurance contract, and therefore his claim was a prohibited third-party bad faith suit.

The circuit court granted Nationwide's motion to dismiss. Triad and Mr. Galligan filed a motion for leave to file an amended complaint to add a negligence claim on behalf of Mrs. Galligan as the owner of the building. Nationwide opposed the motion for leave to file an amended complaint. The circuit court denied Triad and Mr. Galligan's motion for leave to amend because Mrs. Galligan was not an insured under the contract. Triad and Mr. Galligan appealed to the West Virginia Supreme Court of Appeals, contending that the Galligan's claims are not third-party bad faith actions because they are not adversaries of Triad, Nationwide's insured.

Holding:

The Court held that because the Galligans were non-parties to the insurance contract, they were third parties. The Court went on to state that because the Galligans were third parties, the Galligans were prohibited from bringing a common law tort action for breach of the duty of good faith and fair dealing arising out of Triad's insurance contract.

Impact on Business:

A non-party to an insurance contract is considered a third party and, therefore, cannot bring a common law tort action for breach of the duty of good faith or a fair dealing action.

WEST VIRGINIA CHAMBER
INSURANCE LAW – MEMORANDUM DECISIONS

Faith United Methodist Church and Cemetery of Terra Alta, West Virginia and Trinity United Methodist Church of Terra Alta, West Virginia v. Marvin D. Morgan
No. 12-0080 (W.Va. June 13, 2013)

Importance of Case:

This case created a new syllabus point (rule of law) relating to the conveyance, and meaning of surface rights.

What the Court Reviewed:

The West Virginia Supreme Court was asked to determine whether there was a conveyance of oil and gas under a certain tract of land and define what is meant by a conveyance of surface rights.

What the Court Decided:

Facts:

The dispute between the parties centers on one question: who owns oil and gas under a 225 acre tract of land in Preston County, WV. The 1907 deed contains the following language:

> That in consideration of the sum of $300.00 the receipt of which is hereby acknowledged, the said party of the first part ("sister") does grant unto the said party of the second part ("brother"), the following described property, that is to say: her 1/7 undivided interest *in the surface only* with the hereditaments and appurtenances thereto belonging (mining privileges having been previously sold) in the 225 acre tract of land.

Based on the language in this deed, the parties dispute what is meant by "surface only." The respondent believed that this deed conveyed the oil and gas rights, in addition to surface rights, of the underlying tract. The petitioners believed that the conveyance only related to "surface" rights and therefore implicit with this conveyance was a reservation of any and all oil and gas rights.

Holding:

The Supreme Court reversed the circuit court's decision and found that the subject deed only conveyed surface rights and reserved oil and gas rights on the subject property. In rendering its decision, the Court reversed a long standing precedent found in *Ramage v. South Penn Oil Company,* 118 S.E. 162 (W.Va. 1923). The Court believed that the term "surface" has a definite meaning and therefore is not presumptively ambiguous as described in the *Ramage* opinion. The Court further recognized under the *Ramage* opinion that there was uncertainty as to how property is to be conveyed in West Virginia. The Court held that the legal effect of granting surface and expressly reserving minerals should be no different from the legal effect of granting surface and impliedly reserving minerals. Therefore, uniformity can be achieved by giving the term "surface" its ordinary meaning. The Court further explained that *Ramage* is not sound law. First, the Court believes that the terms of a deed should be given their ordinary meaning. In addition, the Court pointed out that the parties should be able to rely on the four corners of the document and that under the *Ramage* opinion courts are required to go beyond the document and try to determine the parties' intent with the use of parole and other extrinsic evidence.

Impact on Business:

This opinion can be viewed as favorable to business. This opinion is highly important in the transfer and conveyance of property in West Virginia, especially in light of the Marcellus development. The Court provided an analytical framework for deeds which allows the language of the deed to control as opposed to extrinsic or parole evidence. For this reason, this decision should provide uniformity and consistency. The opinion seems also to be in line with other jurisdictions regarding how surface rights are defined.

WEST VIRGINIA CHAMBER
REAL ESTATE LAW

Feroleto Steel Company, Inc. v. Thomas A. Oughton, Assessor of Brooke County, County Commission of Brooke County and West Virginia State Tax Commissioner
230 W.Va. 5, 736 S.E. 2d 5, No. 11-0666 (September 25, 2012)

What the Court Reviewed:

Whether, for 2010 *ad valorem* property tax purposes, the Assessor, the State Tax Commissioner and the Circuit Court had improperly denied the taxpayer's claim of exemption of its inventory of steel coils from tax under the Freeport Amendment to the West Virginia State Constitution?

What the Court decided:

Answering in the affirmative, and sustaining the taxpayer's challenge, the Court held that the taxpayer's process, of slitting such coils to meet customer specifications, did not result in a product of a different utility than the pre-slitting coils themselves. Thus, the taxpayer's entire inventory of such coils, whether before, during or after such processing, satisfied the terms of the Freeport Amendment and, thus, was exempt from tax.

Facts:

Feroleto Steel Company, Inc. (hereinafter, the taxpayer) is engaged in business at its facility in Brooke County where it purchases and receives large coils of flat steel and, after cutting such coils into smaller widths and gauges according to orders for the same by its out-of-state customers, ships such cut-to-measurement, smaller and more narrow steel coils to those respective customers. Based on those circumstances, the taxpayer applied for exemption, under the Freeport Amendment, of its inventories of large pre-cut coils, of coils undergoing the cutting process and of the finished smaller and more coils ready for shipment.

Specifically, the Freeport Amendment to the West Virginia Constitution precludes the *ad valorem* property taxation of business inventories (except that of natural resource products) for items awaiting movement out of the State, so long as, while temporarily in the State, they are not processed to such an extent that a new product, or one of a different utility, is created. Section 1c, Article X, W.Va. Constitution; and W.Va. Code §11-5-13.

The Assessor and, later, the State Tax Commissioner, in a taxability ruling, ruled that the taxpayer's activity of cutting the larger steel coils into smaller, more narrow coils, resulted in products of a different utility than the utility they possessed upon initial receipt at the taxpayer's facility (i.e. larger, wider steel coils, prior to cutting, were considered to have had a different utility than the smaller, more narrow steel coils resulting from the taxpayer's cutting of the former). The taxpayer appealed to the Circuit Court which affirmed the rulings of the Assessor and the State Tax Commissioner.

Holding:

The Supreme Court reversed the Circuit Court and, instead, held that the taxpayer's process, of slitting the larger steel coils into smaller, narrower steel coils to meet customer specifications, did not result in products of a different utility than the pre-slitting coils themselves. Thus, the taxpayer's entire inventory of such coils, whether before, during or after such processing, was exempt.

In explaining its ruling, reversing the lower court, the Court relied on the Freeport Amendment's implementing legislation by which the Legislature expressed its intent that the constitutional provision and its implementing legislation were "to be liberally construed in favor of the person claiming the exemption." W.Va. Code §11-5-13a(b). Thus, the Court held that the taxing authorities' interpretation of the words "different utility" was too broad and could, if allowed to stand, essentially nullify the constitution's language expressly providing that "cutting" an item in inventory did not *per se* preclude the taxpayer's entitlement to the exemption.

The Court reasoned that, when the term "different utility" is read so broadly, it would be difficult to contemplate any cutting which did meet such a standard, and, thus render meaningless the general rule that cutting goods, while held in inventory pending shipment out of state, did not bar application of the exemption. Rather, the Court held that, particularly in light of the Legislature's expressly intended liberal interpretation in the taxpayer's favor, it would not allow the exception to the exemption (i.e. cutting which resulted in a product of a different utility) swallow the general rule that mere cutting would not generally bar application of the exemption to inventory items which were cut prior to movement out of state.

Impact on Business:

This ruling provides much-needed clarification and limitation of the meaning of the key term "different utility" in a manner that should encourage the operation of mid-stage industrial processing facilities in West Virginia, as the Freeport Amendment was intended to do when it was adopted by a vote of the people in 1986. Even the Court's admonishment, that the "decision is narrow" (see, footnote 7), by referring to the basis of such narrowness as being the specific statutory provision at issue (as opposed to the specific facts), would, on its surface, leave open the prospect of robust application of its holding to a wide variety of reasonably comparable processing activities.

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Mountain America, LLC, et al. v. Donna Huffman, Assessor of Monroe County, et al.
229 W.Va. 708, 735 S.E. 2d 711, Nos. 11-1057 and 11-1058 (October 19, 2012)

What the Court Reviewed:

Whether there was error in the Circuit Court's ruling, upholding the Assessor's 2008 and 2009 *ad valorem* tax valuations of the taxpayers' properties, on the grounds that: (1) the doctrine of *res judicata* (i.e. the matter has already been decided) did not apply; (2) the tax valuations were grossly unequal in comparison with the tax valuations of other property in the county and (3) such inequality was the result of the Assessor's systematic under-valuation of the property of other taxpayers. (Note: the author of this report and his firm represented the taxpayers in this case.)

What the Court decided:

Answering in the affirmative as to the first ground, the Court held that, notwithstanding unsuccessful and legally final challenges, on some of the similar substantive grounds, of their 2007 tax valuations by some of the same taxpayers, the doctrine of *res judicata* did not apply to bar the taxpayers' challenges of the subsequent years' tax values set by the Assessor. Accordingly, the Court reversed the Circuit Court's ruling and remanded the case with directions to address the merits of the other two grounds of the taxpayers' appeal.

Facts:

The taxpayers consisted of a developer of a new, early-stage, up-scale, rural residential community, along with several dozen out-of-state individuals who had, in the years immediately prior to 2007, purchased lots in the development for prices well in excess of the traditional market levels in the county. Few of the planned amenities or individual residences had been constructed at the time the case arose (or even by now, for that matter). In 2007, the Assessor, used those higher prices to set the values of the taxpayers' properties for *ad valorem* tax purposes. As a result, the taxpayers pursued administrative and judicial challenges of those values on the multiple constitutional grounds that: (1) the wide and prejudicial disparities between their taxable values and those of the property of other taxpayers in the county violated the equal protection provisions of both the West Virginia Constitution and the U.S. Constitution; and (2) the process by which the taxpayers' challenges were addressed by the county commission violated the due process provisions of both constitutions as well.

Despite proof, based on recent selling prices, that the 2007 tax valuations of their properties were many times greater than the taxable values of other comparable properties, and that there was a long-term systematic under valuation of other similar properties in the county in violation of state assessment equalization standards, the Circuit Court ruled, and the West Virginia Supreme Court affirmed, that the taxpayers' equal protection rights were not violated: (1) because they did not present separate appraisals of their property; (2) their properties were properly assigned by the Assessor to a new, separate "neighborhood" based entirely on the much higher recent sales prices paid for their property; (3) the under valuations had occurred prior to the tax year in question (2007) and (4) the Assessor was seasonably curing the acknowledged tax valuation disparities.

Further, despite West Virginia's generally prejudicial system of review, particularly including the conflict of both the reviewing body's fiscal responsibilities, and its members' personal pecuniary interests, with the rights of the taxpayers to have a neutral review of their objections, the Circuit Court overruled the taxpayers' challenges on the grounds that: (1) except for the developer entity (Mountain America, LLC), the other fifty-plus taxpayers had not perfected their appeals from the ruling of the Monroe County Commission, and (2) that even if there were some inequality with respect to the one taxpayer which had perfected its appeal, the Assessor was entitled to more time to correct it.

Later, the taxpayers filed a petition for writ of *certiorari* with the United States Supreme Court (Petition Docket No. 09-1007), seeking a review of the West Virginia Court's ruling on their 2007 tax valuations, based on the federal constitutional questions. The West Virginia Manufacturers Association filed a brief as *amicus curiae* in support of the taxpayers' due process claims. On April 26, 2010, the United States Supreme Court denied the petition without comment.

At the same time, because, for 2008 and 2009 tax purposes, none of the "seasonal" relief of the excessive tax valuations had been implemented by the Assessor, nor, upon review, adopted by the County Commission, the taxpayers challenged, again on equal protection grounds, those values in an appeal to the Circuit Court. Referring to its earlier decision upholding assessments against one, but not any of the other fifty-plus taxpayers, for 2007 *ad valorem* property tax purposes, the Circuit Court sustained the 2008 and 2009 assessments of all the appealing taxpayers, on the basis that its ruling in the 2007 case was *res judicata* as to all the taxpayers' property values and as to the equal protection issue, thus, barring any further judicial review of the same. The taxpayers then sought review by the West Virginia Supreme Court.

Holding:

Upon that review, the Court held, on the basis of a seventy-five (75) year-old precedent, that neither the doctrines of *res judicata* nor collateral estoppel apply to bar the taxpayers' challenges of subsequent years' property tax assessments for the same property. In Re: United Carbon Company Assessment, 118 W.Va. 348, 190 S.E. 546 (1937). Curiously, without discussion or explanation supporting such an abandonment of the doctrine of *stare decisis*, Chief Justice Ketchum's dissent called for overruling the Union Carbon Company holding.

Impact on Business:

Despite the Court's failure to address the substantive merits of the taxpayers' appeal based on equal protection grounds, its affirmation of the long-standing principle, that each property tax year stands on its own, serves to maintain an important aspect of the system by which administrative and judicial reviews of property tax values are conducted. Thus, neither taxpayers nor assessing officials are automatically precluded from annually adjusting or seeking review of the values of any given property for *ad valorem* tax purposes.

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In theory, from a taxpayer's perspective, such a rule presents both: (a) an opportunity to challenge, in a later year, excessive tax valuations despite failing to successfully do so in an earlier year, and (b) the risk that the assessing officials may not adopt, in that later year, an earlier year's reasonable valuation. However, experience tells us that, as a practical matter, assessing officials are far more likely to leave standing, for at least a few years, reasonable values in the immediately preceding year, particularly when those values are the result of successful administrative or judicial challenges to higher values prosecuted by the taxpayer. The importance to taxpayers, of this practical consideration, lies, in part, in the reality that, despite recent modest statutory reforms in the property tax value review process, it often is not feasible for taxpayers to effectively challenge, with expert appraisal data, etc., excessive valuations of any particular property in the first year they emerge. Of course, given the statutorily-mandated periodic review of property tax values (every three years), future valuations will, inherently, reflect evolving conditions.

Pope Properties/Charleston LLC v. The Honorable Sallie Robinson, in her capacity as Kanawha County Assessor.
230 W.Va. 382, 738 S.E. 2d 546, No. 11-1398 (February 6, 2013)

What the Court Reviewed:

Whether, for 2011 *ad valorem* property tax purposes, the Circuit Court was correct in holding that the Assessor had not abused her discretion by using the market data (comparable sales) method, instead of the income method, to appraise the taxable value of the condominium apartment housing units owned by the taxpayer, a commercial lessor**.**

What the Court decided:

The Court unanimously affirmed the Circuit Court's ruling and, thus, sustained the action of the Assessor in using the market data (comparable sales) method, instead of the income method, to appraise the taxable value of the taxpayer's improved real estate consisting of condominium apartment housing units for *ad valorem* property tax purposes.

Facts:

In the late 1990s, Pope Properties/Charleston, LLC ("the taxpayer") purchased 79 units of a 102-unit apartment complex, known as Country Club Village Apartments, which had been constructed in 1979 and converted to condominium ownership whereby each unit could be bought, sold, mortgaged and/or leased. During its ownership of the 79 units ("the subject property"), the taxpayer, a commercial lessor, had leased each of them to individual residents.

In establishing the value of each unit of the subject property for 2011 tax purposes, the Assessor used the market data (sales comparison) approach whereby she based those values on the recent selling prices of what she considered to be comparable individual owner-occupied residential condominium apartment units. The taxpayer objected to the resulting tax values of each unit of the subject property as being too high on the grounds that, as commercial property, the subject property should be appraised as a whole using the income method, and that, using the selling prices of individual owner-occupied residential condominium apartment units to determine the value of a commercial property, was improper. Upon its review of the taxpayer's objections, the Kanawha County Commission, sitting as a Board of Equalization and Review, upheld the Assessor's taxable values because it found that the taxpayer had failed to prove, by clear and convincing evidence, that the Assessor had abused her discretion in using the market data approach.

When the taxpayer appealed the adverse decision of the County Commission, the Circuit Court rejected the taxpayer's contentions that the Assessor's failure, to acknowledge the commercial nature of the residential apartment units in the hands of the taxpayer (as opposed to the owner-occupied residential nature of the properties the selling prices of which she relied on in valuing the units of the subject property), showed her valuation to be erroneous. Specifically, the Circuit Court held that the different uses in owning the sold individual units as personal residences on the one hand, as compared with the commercially rented individual units of the

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subject property on the other, did not alter the intrinsic value of either for property tax purposes. Rather, the Circuit Court observed, those differences only matter for property tax rate classification purposes, not for valuation purposes.

Holding:

Upon review, the Supreme Court affirmed the Circuit Court's holding and, thus, sustained the Assessor's valuations. In doing so, it reiterated the heavy burden of proof imposed on taxpayers challenging taxable values set by the Assessor, to-wit: to show by clear and convincing evidence that such values are erroneous. See, In re: Tax Assessment of Foster Foundation's Woodlands Retirement Community, 223 W.Va. 14, 672 S.E.2d 150 (2008).

Moreover, the Court held that, even if the Assessor, in applying the market data (sales comparison) approach by relying on the recent selling prices of individually owned and occupied residential condominium apartment units, had mistakenly concluded that the units of the subject property were, due to their condominium status, not commercial property, such a misclassification was not legally relevant. Rather, the Court held that, under the rules governing the appraisal of commercial real estate, and its long-standing precedent applying those rules, the Assessor had broad discretion, absent proof of abuse of that discretion, to consider and apply any one or more of the three basic approaches to valuation: the income method, the cost method and, most importantly, the market data (sales comparison) method. See, In re: Tax Assessments Against American Bituminous Power Partners, 208 W.Va. 250, 539 S.E.2d 757 (2000).

Impact on Business:

The most optimistic view of the effect of this ruling is that the Court did and said nothing that exacerbates the already daunting task of effectively challenging *ad valorem* property tax values. Beyond that, business taxpayers should find some comfort in Justice Ketchum's reaffirmation (in syllabus point 6) of the requirement that, at the least, a court, reviewing property tax value challenges, must "make specific findings of fact and conclusions of law addressing the assessing officer's consideration of the required appraisal factors…" Regrettably, such a fundamental element of due process has not always been observed in earlier property tax rulings by either Circuit Courts or the Supreme Court. Thus, when that judicial mandate is viewed in the context of certain recent legislative rule-making, refining the substantive rules for appraising commercial and industrial property for tax purposes, a basis for some optimism about the objectivity and fairness of such tax valuations may be seen.[1]

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[1] Committee Substitute For SB 270 (effective April 13, 2013) authorized the State Tax Commissioner to promulgate an amended regulation providing for the appraisal of commercial and industrial property for *ad valorem* property tax purposes. CSR §110-1P-1 et seq. While still preserving the assessing officials' broad discretion to emphasize any one of the three primary approaches to valuation (cost, market and income), the principal substantive changes in these rules involve the addition of far more detailed explanations of the application of functional obsolescence as part of employing the cost method. These modest reforms are an outgrowth of the business community's grave concerns over the extremely arbitrary tax values a 3-2 majority of the Court upheld, in last year's reported case of Century Aluminum Of West Virginia, Inc. v. Jackson County Commission, et al., upon review of a lower court ruling sustaining the excessive tax values of the machinery and equipment of that long-idled aluminum manufacturing facility. See, 229 W.Va. 215, 728 S.E.2d 99 (Docket No. 11-0590, issued May 29, 2012). Chief Justice Ketchum, joined by Justice Benjamin, filed a dissenting opinion in Century Aluminum.

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