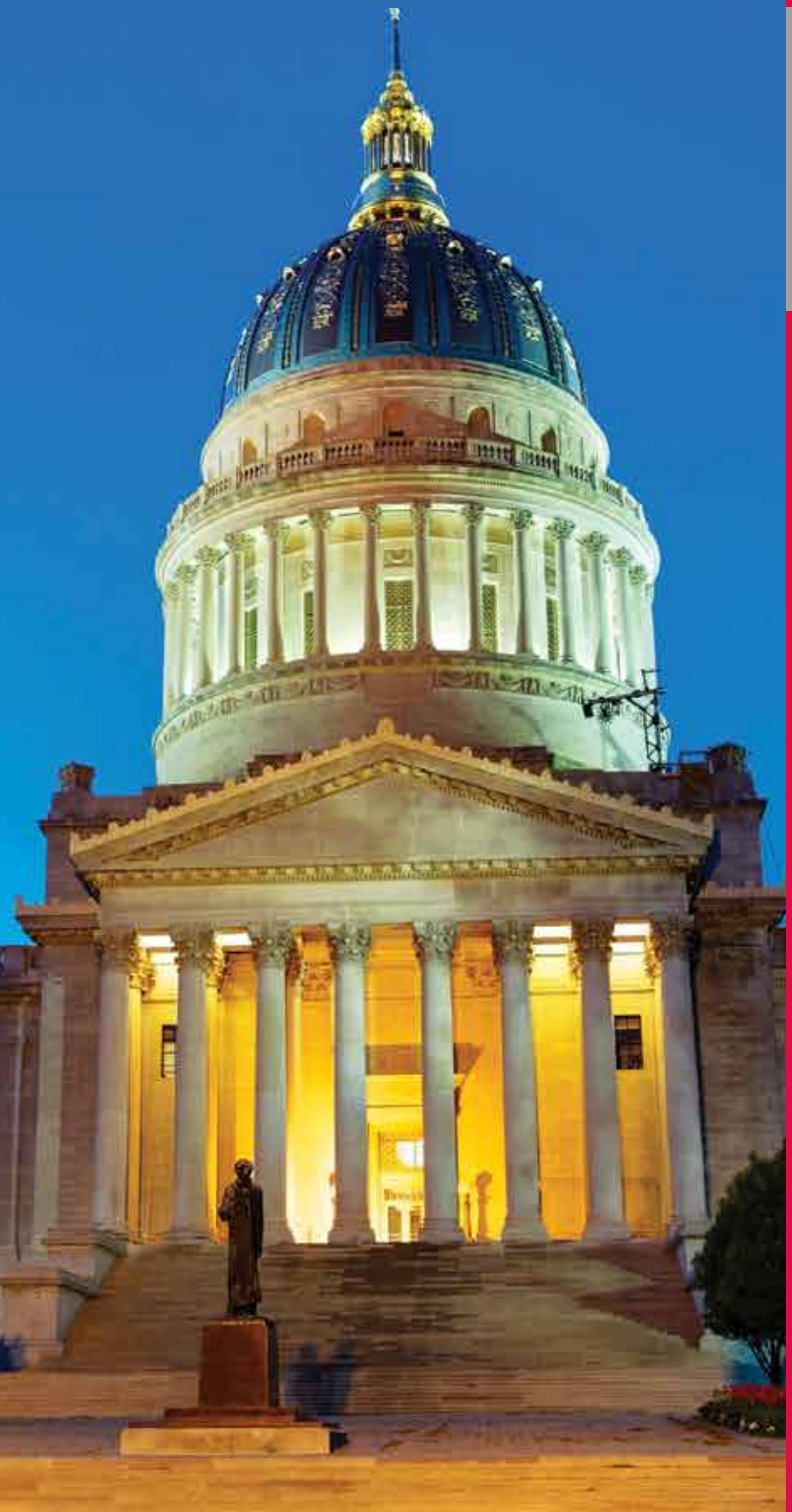
Court Watch



A report prepared for members of the West Virginia Chamber of Commerce 2017

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

West Virginia Chamber

We express deep appreciation to the attorneys of our Legal Review Team who volunteered their time and expertise to review the cases decided by the West Virginia Supreme Court of Appeals in the Fall 2016 and Spring 2017 Terms of Court and present this report of the impact of those Court decisions on our state's economy to Chamber members.

The West Virginia Chamber of Commerce
CourtWatch Legal Review Team 2017

Webster J. Arceneaux, III
Lewis Glasser Casey & Rollins PLLC — *wjarceneaux@lgcr.com*

Michael E. Caryl
Bowles Rice LLP — *mcaryl@bowlesrice.com*

Bryan Cokeley
Steptoe & Johnson PLLC — *bryan.cokeley@steptoe-johnson.com*

Teresa J. Dumire
Kay Casto & Chaney PLLC — *tdumire@kaycasto.com*

Lee Murray Hall
Jenkins Fenstermaker PLLC — *lmh@jenkinsfenstermaker.com*

Ronda L. Harvey
Bowles Rice LLP — *rharvey@bowlesrice.com*

Mark H. Hayes
Robinson & McElwee, PLLC — *mhh@ramlaw.com*

Timothy E. Huffman
Jackson Kelly PLLC — *ehuffman@jacksonkelly.com*

Thomas J. Hurney
Jackson Kelly PLLC — *thurney@jacksonkelly.com*

Andrew T. Kirkner
Dinsmore & Shohl LLP — *andrew.kirkner@dinsmore.com*

Stuart A. McMillan
Bowles Rice LLP — *smcmillan@bowlesrice.com*

Ashley Hardesty Odell
Bowles Rice LLP — *ahardestyodell@bowlesrice.com*

Jill Cranston Rice
Dinsmore & Shohl LLP — *jill.rice@dinsmore.com*

Floyd "Kin" Sayre
Bowles Rice LLP — *ksayre@bowlesrice.com*

Mychal S. Schulz
Babst Calland, P.C. — *mschulz@babstcalland.com*

Marc E. Williams
Nelson Mullins Riley & Scarborough, LLP — *marc.williams@nelsonmullins.com*

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Williams v. Tucker
2017 W. Va. Lexis 501 (W.Va. 2017)

What the Court was Asked to Decide:

The Circuit Court of Putnam County entered an Order denying an injunction and ordering arbitration because the court reasoned that Mr. Williams's defenses to the arbitration were themselves arbitrable. Mr. Williams asserted that the second arbitration was barred because the claims were precluded as an impermissible collateral attack on the prior arbitration award that had been confirmed by the Circuit Court of Kanawha County and that the Tuckers had waived their right to a second arbitration. However, the Tuckers argued that they had not waived their right to a second arbitrate and the issue of preclusion of the prior judgment and determination of whether they waived their rights to arbitrate are questions for an arbitrator, rather than the court. The questions presented on appeal were "[w]hether the defenses of waiver and estoppel are to be determined by the court and, if so, whether the court should have enjoined the arbitration on the grounds of waiver or estoppel."

What the Court Decided:

The Supreme Court of Appeals of West Virginia reversed the Circuit Court's Order that compelled the parties to arbitrate their dispute and remanded for "the entry of an order enjoining the Tuckers from pursuing further arbitration and for any other proceedings consistent with [its] opinion." It determined that an arbitration agreement itself is a contractual matter and thus should be governed by state contract law. Therefore, the right to arbitration, as with any contract, can be waived because waiver is a general contract defense used to invalidate contracts. The Court further held that by looking at the totality of the circumstances, the Tuckers waived their right to a second arbitrate with the AAA by commencing proceedings with FINRA.

Facts:

In September 2007, the Tuckers entered into an Asset Management Agreement ("Agreement") with Mr. Williams before investing with Mr. William's investment firm. Among other things, the Agreement specifically provided that the arbitration of disputes "shall be settled by arbitration in accordance with the rules then in effect of the American Arbitration Association" ("AAA"). In 2011, the Tuckers commenced an arbitration alleging that Mr. Williams had breached their contract and made unsuitable investments after their account balance declined twenty-nine and one-half percent. Although the Agreement required binding arbitration in accordance with the rules of the AAA, the Tuckers instituted arbitration proceedings before the Financial Industry Regulatory Authority, Inc. ("FINRA"). However, the Tuckers withdrew their arbitration demand before Mr. Williams responded.

Although FINRA acknowledged withdrawal of the claims, the dispute remained a matter of record relating to Mr. Williams's registration with the Central Registration Depository ("CRD"). Because of this, Mr. Williams instituted expungement proceedings with FINRA. Not only did the Tuckers consent to jurisdiction, they declined to participate in the proceeding and did not oppose expungement. The arbitration panel rendered an arbitration award in favor of Mr. Williams. Mr. Williams then confirmed the FINRA award with the Kanawha County Circuit Court. The Tuckers accepted service, but did not file a responsive pleading and again did not oppose the expungement. Therefore, the court entered an Agreed Order Granting Motion to Confirm Arbitration Award.

Four years later, the Tuckers filed a second arbitration demand asserting the same claims as before, however, this time they filed it with the AAA. In response, Mr. Williams demanded withdrawal of the arbitration proceeding and the Tuckers refused. Mr. Williams filed a motion in the Circuit Court of Putnam County for a preliminary and permanent injunction preventing a second arbitration arguing waiver and preclusion issues. The Tuckers responded that they had not waived their right to arbitrate, and the preclusion and determination of waiver are questions for an arbitra-

tor, not the court. The court denied the injunction and ordered arbitration, reasoning that Mr. William's defenses to the arbitration were themselves arbitrable. Mr. Williams appealed.

Holding:

Justice Walker begins her opinion by establishing that a court, rather than an arbitrator, should determine whether the Tuckers waived their contractual right to arbitrate. Walker stated that it is the court's role to evaluate the enforceability of an arbitration agreement under state contract law. Walker cites previous case law to establish two threshold questions: "(1) Under state contract law, is there a valid, irrevocable, and enforceable arbitration agreement between the parties? And, (2) Does the parties' dispute fall within the scope of the arbitration agreement?"

Walker believed that the issue of waiver closely related to the threshold question of enforceability of a contract. Thus, because an arbitration agreement is a contract, state contract law should be applied. In examining this issue further, the Supreme Court referred to Syllabus Point 6, *Parsons v. Halliburton Energy Services, Inc.*, 237 W. Va. 138, 785 S.E.2d 844 (2016) recognizing that "[t]he right to arbitration, like any other contract right, can be waived."

Next, the Supreme Court turned to whether the Tuckers, in fact, waived their right to arbitrate. To consider this, the Supreme Court looked to the "totality of the circumstances" and if "the defaulting party has acted inconsistently with the arbitration right." Justice Walker closely mirrored the reasoning set forth in *Parsons*, stating that a party should have knowledge, or constructive knowledge, of the agreement they signed. However, the Supreme Court distinguished this case from *Parsons* because rather than analyzing the effect of a party participating in litigation on the right to arbitrate, the Court looked to the effect of instituting a prior arbitration on the right to arbitrate.

Even though the Tuckers asserted their claims in arbitration, the Court found that they still acted inconsistently with their right to arbitrate under the Agreement. The Agreement specifically dictated that the Tuckers must resolve their issues in arbitration before the AAA. The Tuckers had erroneously pursued their claim with FINRA and then they later withdrew that claim without pursuing it.

Further, although Mr. Williams is a FINRA member and bound by FINRA's rules and arbitration provisions, the parties explicitly contracted around the obligation to arbitrate with FINRA in the Agreement. The Tuckers did not have dual rights to arbitrate under both FINRA and the AAA and by filing with FINRA, the Tuckers demonstrated conduct inconsistent with their right to arbitrate under the AAA. Walker cited policy stating that, "[t]o allow a party to simply walk away from a binding, irrevocable arbitration with no consequence defeats the purpose of arbitration and is unduly prejudicial to the other parties to the arbitration who are trying to get the matter resolved." Syl. Pt. 1, *Crihfield v. Brown,* 224 W. Va. 407, 686 S.E.2d 64 (2009) Therefore, the Court held that because the Tuckers withdrew their FINRA arbitration and not only declined to participate in the expungement proceedings, but also explicitly stated they did not oppose the expungement and signed the Agreed Order entered by the Circuit Court of Kanawha County, the Tuckers waived their right to pursue any future arbitration for the same claims under the Agreement.

Impact on Business:

The Supreme Court's willingness to examine the totality of the circumstances and find that the issue of waiver is a contract issue to be resolved by the Court is consistent with public policy that favors enforcement of arbitration provisions. This opinion shows the Supreme Court's willingness to look at this issue under contract law and not allow a party multiple "bites at the apple" to file a second arbitration and attempt to re-litigate a matter that has already been resolved.

G & G Builders, Inc. v. Lawson
794 S.E.2d 1 (W.Va. 2016)

What the Court was Asked to Decide:

The Circuit Court of Cabell County entered an Order denying the petitioner's motion to dismiss the counterclaim filed by the respondents and to compel arbitration. The petitioner asserted that the circuit court erred in finding that arbitration provisions were not binding upon the respondents because they were not attached to the Agreement. The sole question on appeal is whether there is a basis upon which to conclude that Mr. Lawson had the requisite knowledge of hidden provisions to establish consent to be bound to arbitration.

What the Court Decided:

The Supreme Court of Appeals of West Virginia affirmed the Circuit Court's Order that denied compelling the parties to arbitration because the Supreme Court concluded that the respondent did not have the requisite knowledge to agree to arbitration because the full contents of the General Conditions were never provided to him. Therefore, there was no agreement between the petitioner and the respondent to arbitrate their dispute because there was no provision in the agreement requiring the respondent to acknowledge the General Conditions; the respondent's affidavit stated that he never saw the General Conditions prior to litigation; and the reference to the General Conditions did not ensure that the respondent was aware of the arbitration provision.

Facts:

The petitioner, through a representative, and Mr. Lawson entered into a twelve-page American Institute of Architects (AIA) Document A111-1997 form construction agreement ("Agreement"). Both the petitioner and Mr. Lawson signed the Agreement. Although Mr. and Mrs. Lawson were identified collectively on the Agreement as the "Owner," only Mr. Lawson signed the Agreement. Mr. Lawson claims that that arbitration was never mentioned during discussions about this agreement.

The first page of the Agreement states that "General Conditions of the Contract for Construction is adopted in this document by reference." Although the Agreement contains references to the General Conditions it does not explicitly reference any arbitration provision in the General Conditions. Further, the General Conditions were not attached to the Agreement.

On March 20, 2014, the petitioner instituted a civil action in the Circuit Court of Cabell County against the Lawsons alleging breach of contract and unjust enrichment. At this time, arbitration was not mentioned in the petitioner's complaint, nor did the petitioner file a motion to stay the action pending arbitration. The respondents filed their answer in the circuit court and denied the petitioner's entitlement to a judgment against them. They asserted a counterclaim against the petitioner for breach of contract, including allegations of defects in the construction and overcharges under the Agreement. In response, the petitioner filed a motion to dismiss and to compel arbitration. The Lawsons opposed the motion stating that Mrs. Lawson could not be compelled to arbitration because she did not sign the agreement. Further, the Lawsons asserted that the arbitration provision was not properly incorporated by reference into the Agreement and that Mr. Lawson was never provided a copy of the General Conditions nor advised of the requirement to arbitrate.

The Circuit Court held a hearing on the petitioner's motion to dismiss and compel arbitration of the counterclaim. By order, the court denied the motion, finding that an agreement to arbitrate did not exist and thus the parties cannot be compelled to arbitrate. Further, the word "arbitration" did not appear anywhere in the Agreement.

Holding:

The petitioner asserts that the parties' Agreement clearly referenced the General Condi-

tions, which were simply described. The petitioner claims that the Lawsons had a duty to read the Agreement, and thus should have obtained all the documents comprising the contract before signing. On the other hand, the Lawsons maintained that the language in the Agreement does not clearly indicate intent to incorporate the entirety of the General Conditions. They assert the issue is not whether a party has a duty to read the contract he has signed, but whether the incorporation of the General Conditions was proper.

Justice Loughry began his analysis with public policy analysis citing *Parsons v. Halliburton Energy Services, Inc.,* 237 W.Va. 138, 146, 785 S.E.2d 844, 852 (2016) "[b]oth federal and state laws reflect a strong public policy recognizing arbitration as an expeditious and relatively inexpensive forum for dispute resolution." Further, he asserts that a party cannot be compelled to arbitrate a claim or dispute without an agreement to arbitrate.

In the case at hand, Justice Loughry found that the Circuit Court appropriately addressed the threshold issue of whether a valid arbitration clause existed between the parties by concluding that Mr. Lawson did not have the requisite knowledge of the contents of the General Conditions because they were never provided to him and therefore he could not consent.

The Supreme Court of West Virginia previously held that "in the law of contracts, parties may incorporate by reference separate writings together into one agreement. However, a general reference in one writing to another document is not sufficient to incorporate that other document into a final agreement." *State ex rel. U-Haul Co. v. Zakaib,* 232 W. Va. 432, 444, 752 S.E.2d 586, 598 (2013). The court uses a three-prong test set forth in U-Haul, in its analysis of the case at hand. ("To uphold the validity of terms in a document incorporated by reference, (1) the writing must make a clear reference to the other document so that the parties' assent to the reference is unmistakable; (2) the writing must describe the other document in such terms that its identity may be ascertained beyond doubt; and (3) it must be certain that the parties to the agreement had knowledge of and assented to the incorporated document so that the incorporation will not result in surprise or hardship.). Id. at 598.

There was no provision in the Agreement requiring Mr. Lawson to acknowledge that he had received, read, or agreed to the General Conditions, nor was there any allegation that the petitioner expressly delivered the General Conditions to Mr. Lawson. But rather Mr. Lawson filed an affidavit stating he never received nor was he aware of the arbitration agreement and the word "arbitration" does not appear anywhere in the parties" Agreement. Therefore, the Supreme Court found that the requirements for incorporation by reference were not satisfied. The reference to the General Conditions was not detailed enough to ensure that Mr. Lawson was aware of the General Conditions and its terms, including the arbitration provision.

The Supreme Court noted that the third prong of the *U-Haul* test is the most problematic for the petitioner. This is because the petitioner did not provide Mr. Lawson with the General Conditions either before or after he signed the Agreement. Therefore, the Supreme Court could not conclude that when Mr. Lawson executed the Agreement, he "possessed the requisite knowledge of the contents of the [General Conditions] to establish [his] consent to be bound by its terms, which terms include the arbitration [provisions] sought to be enforced by" the petitioner.

Impact on Business:

In light of the Supreme Court's prior decision in *U-Haul*, the decision in this case is not surprising. However, this decision is a cautionary tale for all businesses, particularly construction businesses that rely on the AIA agreement. Any time that a business choses to rely upon a separate agreement with an arbitration clause, it should be sure to provide a party with that separate provision and require them to sign off on it. Otherwise, the party seeking to enforce the arbitration provision will be unable to enforce it, as was the case here and in *U-Haul*.

Citibank, N.A. v. Perry
797 S.E.2d 803 (W.Va. 2016)

What the Court was Asked to Decide:

The Circuit Court of Boone County entered an Order holding that Citibank Services, Inc. ("Citibank") had implicitly waived its right to arbitrate by filing a debt collection action in circuit court and taking action in furtherance of that suit. Citibank asserted that the circuit court erred in finding that Citibank waived its right to arbitrate Mr. Perry's counterclaim because Citibank had a clear contractual right to seek arbitration at any time. The sole question on appeal was whether Citibank, in fact, waived its arbitration rights regarding the counterclaim in this matter.

What the Court Decided:

The Supreme Court of Appeals of West Virginia reversed the Circuit Court's Order that denied the bank's motion to compel arbitration and stay its debt collection action. It determined that Citibank did not implicitly waive its contractual right to arbitration of the counterclaim merely through court action and inactivity because it found no evidence that Citibank intentionally relinquished a known right.

Facts:

Mr. Perry was issued a Citibank MasterCard account in January 1998. The Citibank Card Agreement ("Agreement") governing Mr. Perry's account included an arbitration agreement stating that, "[n]o portion of this arbitration provision may be amended, severed or waived absent a written agreement between you and us."

In September 2010, Citibank filed a debt collection action against Mr. Perry in the Circuit Court of Boone County. Mr. Perry answered *pro se* on October 1, 2010 admitting to the debt. In response, Citibank filed a motion for judgment on the pleadings. However, there was never a ruling on this motion and a period of inactivity ensued for more than three and one-half years.

On December 4, 2014, Citibank sent its first set of discovery requests to Mr. Perry and Mr. Perry obtained counsel. In compliance with the scheduling order Mr. Perry filed an answer to Citibank's complaint and a class counterclaim alleging that Citibank had violated the West Virginia Consumer Credit and Protection Act. Citibank timely filed a motion asking the court to compel arbitration and stay the proceedings. Following a hearing, the circuit court concluded that Citibank had implicitly waived its right to arbitration of the counterclaim by filing suit in circuit court, litigating its disputes with Mr. Perry in that court, agreeing to an amended scheduling order that allowed counterclaims, issuing fact witness disclosures, requesting judgment on the pleadings, and waiting nearly five years before seeking to invoke its contractual right to arbitrate. Citibank appealed.

Holding:

Citibank argued that under traditional rules of contract application, its clear contractual right to seek arbitration of the counterclaim at any time, prior to judgment or trial, must be recognized because the Agreement lacked ambiguity. Further, Citibank asserted that language in the Agreement allowed Citibank to delay enforcing a right without waiving that right. On the other hand, Mr. Perry argued that Citibank's actions in court and extreme delay clearly demonstrate waiver.

The Supreme Court applied standard contract law pertaining to waiver, regardless of the "no waiver clause" in the Agreement. Under West Virginia waiver law, "a party [must] intentionally relinquished a known right." Syl. pt. 2, in part, *Ara v. Erie Ins. Co.,* 182 W. Va. 266, 387

S.E.2d 320 (1989). Moreover, in making this analysis the Court focuses on the conduct of the party against whom waiver is sought, and further requires that party to either intentionally relinquish a known right or relinquish a known right through the totality of the circumstances. See, Syl. pt. 2, *Parsons v. Halliburton Energy Services,* Inc., 237 W. Va. 138, 785 S.E.2d 844 (2016).

The Supreme Court found no evidence that Citibank intentionally relinquished a known right. Even though Citibank filed a debt collection action in circuit court and Mr. Perry filed an answer, the motion for judgment on the pleadings was never ruled upon. Further, after a long period of inactivity Mr. Perry filed his class counterclaim and significantly changed the character of the proceeding from a debt collection case to a potential class action lawsuit. Finally, Citibank filed its motion to compel arbitration in a timely manner after the filing of the class counterclaim and it moved to stay the circuit court action. Because of these circumstance, the Court did not find evidence that Citibank's conduct, in totality, demonstrated an intent to relinquish a known right. Further, because Mr. Perry also significantly delayed filing his counterclaim, Citibank was not solely at fault for the lengthy duration of inactivity. Therefore, the Court did not find any waiver by Citibank and it reversed the Circuit Court's holding.

Impact on Business:

The Supreme Court reached the proper result in concluding that the arbitration clause was enforceable under the unique facts in this case and its decision is consistent with public policy that favors enforcement of arbitration provisions. This opinion shows the Supreme Court's willingness to carefully look at the arbitration issues in the case and apply the proper law when appropriate.

Salem International University, LLC v. Bates
793 S.E.2d 879 (W.Va. 2016)

What the Court was Asked to Decide:

The Circuit Court of Harrison County entered an Order denying Salem's motion to stay the proceedings pending the arbitration of claims brought by several former nursing students after the nursing school lost accreditation. The sole issue on appeal was whether the Circuit Court erred in ruling that the arbitration agreement did not contain an enforceable class action waiver.

What the Court Decided:

The Supreme Court found that when reading the provisions of the arbitration agreement it acts as a class action waiver barring the Respondents from seeking judicial relief as a class. Therefore, the Circuit Court erred in denying Salem's motion to stay proceedings pending arbitration. Since there was no cross-assignment of error challenging the Circuit Court's determination that the arbitration agreement in the students' enrollment agreements was otherwise valid, it was found to be enforceable.

Facts:

The Respondents are former students in Salem's nursing program. Upon enrolling at Salem, each student signed enrollment agreements containing an arbitration clause. In August 2013, the Respondents filed a putative class action complaint against Salem alleging that they were unable to complete their coursework because the nursing program lost its accreditation.

In February 2014, Salem filed a motion to stay proceedings pending arbitration. In that motion, Salem contended that each student agreed under their enrollment agreement to arbitrate their claims against Salem through the American Arbitration Association ("AAA"). In the Respondents' reply to Salem's motion, they asserted that the arbitration agreement was unenforceable because (1) Salem had not complied with any of the requirements of the AAA provision, (2) the arbitration agreement exempted class actions from arbitration, and (3) the arbitration agreement was procedurally and substantively unconscionable.

As a result, the Circuit Court entered an order for additional briefing asking each party to specifically address:

> whether a Court [may] order arbitration in a putative class action if the arbitration agreement states that class actions cannot be arbitrated; if the arbitration clause does not indicate that arbitration is mandatory, but is only invoked if one of the parties demands arbitration, may a court order arbitration; and are plaintiffs' claims covered by the arbitration agreement?

The parties responded and the Circuit Court held a hearing on the issues presented.

The Circuit Court ultimately denied Salem's motion to stay proceedings pending arbitration. The Circuit Court addressed the single issue of "whether this otherwise valid arbitration agreement acts as a class action waiver, barring the plaintiffs from seeking judicial relief as a class." The Circuit Court relied primarily on previous case law stating that parties are only bound to arbitrate when there is a clear and unmistakable writing they have agreed to arbitration. See: *Marmet Health Care Center, Inc. v. Brown,* 565 U.S. 530, 132 S. Ct. 1201, 182 L. Ed. 2d 42 (2012) ("An agreement to arbitrate will not be extended by construction or implication."). In this case, the Circuit Court found the language of the agreement to be ambiguous and concluded that because there is not a clear and unmistakable class action waiver, the Circuit Court would not extend the agreement to act as one. Next, the Circuit Court focused on the ambiguity within the contract and

therefore construed it against Salem. As a result, the Circuit Court denied Salem's motion to stay proceedings pending arbitration. Salem timely appealed the Circuit Court's order.

On appeal, the Respondents contended that the arbitration agreement as a whole was not valid because if the class action waiver is deemed valid, then a fundamental inequity exists in the parties' rights, which renders the arbitration clause unconscionable. Further, the Respondents argued that the arbitration agreement with a class action waiver is procedurally and substantively unconscionable. Finally, the Respondents argued that arbitration was not appropriate because the Respondents' claims fell outside of the scope of the arbitration agreement.

Salem stated that the Circuit Court found the arbitration agreement valid by referring to it as an "otherwise valid arbitration agreement." However, Salem conceded that the Circuit Court did not give a detailed analysis of the agreement's validity. Finally, Salem argued that the Respondents could not challenge the validity of the arbitration agreement because the "Respondents failed to cross-assign as error before this Court the Circuit Court's determination that the arbitration agreement was valid except for its ambiguity regarding the Respondents' right to bring class action litigation."

Holding:

The Supreme Court began by stating that its analysis was solely limited to whether the Circuit Court erred in ruling that the arbitration clause was not enforceable because it contained a class action waiver. It stated that any challenges to the arbitration agreement's validity were not under its subject matter jurisdiction.

In its analysis, the Supreme Court cited to *Trans-Allegheny Interstate Line Co. v. Daugherty,* 2013 W. Va. LEXIS 1365 (2013) (memorandum decision), in which the Supreme Court declined to address a cross-assignment of error that was not presented with the required specificity. However, in this case, no cross-assignment of error was presented to challenge the Circuit Court's determination that the arbitration agreement at issue was otherwise valid. Therefore, the Supreme Court stated that it could address whether the arbitration agreement contains an enforceable class action waiver.

Salem argued that the Circuit Court erred in finding ambiguous language in the arbitration agreement. Salem argued that the agreements expressly stated that claims "may not be joined or consolidated with claims brought by or against any other person." Salem argued that using the terms "join" and "consolidate" in their plain meaning, and reading them together, with the requirement that claims be submitted to "individual arbitration," means that claims may only be brought on an individual basis, and not as part of a class action.

Salem also stated that the language "the arbitrator shall have no authority to arbitrate claims on a class action basis" is consistent with the above-stated provisions. Salem argued that these two provisions should be interpreted together to conclude that class action claims are effectively waived under the agreement. Otherwise, "the second portion of the sentence would be rendered meaningless in violation of a fundamental rule of construction." Finally, Salem argued that the Supreme Court should not allow the litigants to avoid arbitration merely by making their claims in a class action.

The Respondents argued that the agreement allowed for multiple reasonable interpretations regarding the availability of a class action and that the agreement contradict itself by requiring all claims to be subject to arbitration but also removing class actions from the jurisdiction of the arbitrator.

In its analysis, the Supreme Court determined that the contract language was ambiguous. Therefore, it looked to *Local Division No. 812 v. Transit Authority,* 179 W. Va. 31, 34-35, 365

S.E.2d 76, 79-80 (1987), where the Supreme Court had established a rule that arbitration agreements should be read in favor of arbitration. Upon application of this policy to the arbitration agreement in this case, the Court found that the agreement was not ambiguous because it required claims be submitted for "individual" arbitration and clearly stated that "the arbitrator shall have no authority to arbitrate claims on a class action basis," and that claims "may not be joined or consolidated with claims brought by any other person." Justice Benjamin opined that the plain language indicates that the Respondents were clearly precluded from bringing a class action against Salem.

Finally, Justice Benjamin emphasized as significant the fact that the arbitrator had no authority to arbitrate claims on a class action basis and this language appeared in the same sentence as the clause prohibiting claims from being joined or consolidated. When read together, the Supreme Court concluded that the arbitrator had no authority to arbitrate claims on a class action basis and because the claims cannot be joined, there was a valid and enforceable waiver of the right to bring class actions.

Impact on Business:

This is another significant decision for businesses in West Virginia. Our Supreme Court has been strong in enforcing arbitration clauses, including class action waivers. The Supreme Court has been sending a very strong signal to the Circuit Courts that arbitration clauses, including class action waivers should be enforced. This decision should be good for business in the future.

West Virginia CVS Pharmacy, LLC v. McDowell Pharmacy, Inc., et al.
796 S.E.2d 574 (W.Va. 2017)

What the Court was Asked to Decide:

This appeal arises from a dispute between a pharmacy network administrator and several West Virginia pharmacies. The Circuit Court of McDowell County entered an order that refused to compel arbitration. On appeal, the Supreme Court was asked whether: (1) a contractual choice of law provision should be enforced; (2) under the law of the State of Arizona, arbitration agreements were adequately incorporated by reference into the subject contracts; and (3) if the incorporation of the rules of the American Arbitration Association ("AAA") into an arbitration agreement is sufficient to demonstrate that the contracting parties have clearly and unmistakably agreed to a delegation provision contained therein.

What the Court Decided:

The Supreme Court found that the Circuit Court erred in each of the above stated questions because the parties delegated questions of arbitrability to the arbitrator.

Facts:

Caremark offers pharmacy benefit management ("PBM") services to insurers, third party administrators, business coalitions, and employer sponsors of group health plans. Among the services offered by Caremark are the administration and maintenance of pharmacy networks.

Six pharmacies, referred to as the Direct Contract Pharmacies, entered into and signed a Provider Agreement with Caremark. The "Provider Agreement" contained a choice of law provision and stated that "[t]his Agreement, the Provider Manual, and all other Caremark Documents constitute the entire agreement between Provider and Caremark, all of which are incorporated by this reference as if fully set forth herein and referred to collectively as the 'Provider Agreement' or 'Agreement.'" Under the referenced "Provider Manual," arbitration is governed by the rules of the American Arbitration Association ("AAA"). Three remaining pharmacies, referred to as "Indirect Contract Pharmacies," did not have signed agreements directly with Caremark. However, the agreements contained an arbitration clause stating that the AAA rules governed arbitration.

In August of 2011, the Pharmacies (both Direct and Indirect Contract Pharmacies) filed a complaint against CVS/Caremark seeking injunctive relief for violations of West Virginia Code. After an attempted removal to and remand from federal court, CVS/Caremark filed a motion to dismiss the complaint and to compel arbitration. After three years of discovery, the circuit court heard arguments on CVS/Caremark's motion and denied the same by order.

Holding:

First, the Supreme Court acknowledges that the provider agreements contained clauses specifying that Arizona law governs the contract. The circuit court did an analysis of the choice of law and concluded that there was no substantial relationship between the provider agreements and the State of Arizona, and thus applied West Virginia law. On appeal, CVS/Caremark argued that the circuit court erred in disregarding Arizona law and instead applying West Virginia law to CVS/Caremark's motion to compel arbitration. CVS/Caremark stated that it had substantial ties to Arizona through the deposition of its Director of Network Account Management and Compliance and asserts that the arbitration agreement should be enforced under Arizona law.

The Supreme Court decided that Arizona law applies because there is sufficient evidence in the record submitted on appeal to meet the General Electric test. Syl. pt. 1, *General Elec. Co. v. Keyser*, 166 W. Va. 456, 275 S.E.2d 289 (1981) ("[a] choice of law provision in a contract will not

be given effect when the contract bears no substantial relationship with the jurisdiction whose laws the parties have chosen to govern the agreement, or when the application of that law would offend the public policy of this state."). Further, the "Provider Manual" directs pharmacies to contact Caremark at its Scottsdale, Arizona, address for various reasons. Therefore, the Supreme Court found a substantial relationship to Arizona allowing it to apply Arizona law in the case.

Next, the Supreme Court analyzed whether the delegation provision of the arbitration agreement is properly incorporated by reference into the agreement. The Court cited *Rent-A-Center, W., Inc. v. Jackson,* 561 U.S. 63, 68-70, 130 S. Ct. 2772, 2777-78, 177 L. Ed. 2d 403 (2010) (internal citations omitted), stating that "when a dispute arises over the enforceability of a delegation provision, the question becomes whether the parties clearly and unmistakably agreed to the provision." The Court further cited a two-prong test for the determination of this question: (1) "whether there is an agreement to arbitrate between the parties; and (2) whether the agreement covers the dispute."

Therefore, the Supreme Court analyzed whether the parties "clearly and unmistakably chose to submit to the arbitrator certain gateway issues pertaining to their agreement to arbitrate." To assess this, the Court looked at three issues: (1) the arbitration agreement as to the Direct Contract Pharmacies; (2) the arbitration agreement as to the Indirect Contract Pharmacies; and (3) incorporation of the delegation provision.

First, the three Direct Contract Pharmacies each signed an agreement containing a clause referencing separate documents. The Supreme Court found that, under Arizona law, the arbitration agreement was incorporated by reference because the reference was clear and unequivocal and was called to the attention of the other party. Under Arizona law, Caremark may amend the Provider Agreement by giving notice to the Provider of the terms of the amendment and specifying the date the amendment becomes effective. The record showed that Caremark followed the amendment procedure and that the Provider Manual, containing the arbitration agreement, was mailed to, and received by, each of the Direct Contract Pharmacies in advance of its effective date. Therefore, the Court concluded that, under Arizona law, the arbitration agreements were incorporated by reference into the provider agreements. Therefore, the Direct Contract Pharmacies "clearly and unmistakably agreed to the arbitration clause included in the CVS "Provider Manual.'"

Next, the Court looked to the Indirect Contract Pharmacies. The Indirect Contract Pharmacies did not execute a provider agreement directly with Caremark. However, Caremark ultimately became the successor to the rights and obligations set out in the provider agreements executed between PCS and the Indirect Contract Pharmacies. Therefore, Caremark took the step of expressly agreeing that its business relationship with the Indirect Contract Pharmacies would be governed by their provider agreement, which contained an arbitration provision on its face. Therefore, the Court found that the Indirect Contract Pharmacies clearly and unmistakably agreed to the arbitration provision included in their respective contracts.

Finally, the arbitration clause incorporated into the agreements of the Direct Contract Pharmacies and provided that "[a]ny and all disputes in connection with or arising out of the Provider Agreement by the parties will be exclusively settled by arbitration before a single arbitrator in accordance with the rules of the American Arbitration Association." This arbitration clause in the provider agreements governing the Indirect Contract Pharmacies stated similar requirements. Further, the AAA rules contained a delegation provision stating that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim."

Although the circuit court concluded that the parties did not effectively delegate issues pertaining to the scope or validity of the arbitration agreement to the arbitrator, it relied incorrectly on West Virginia law Further, the circuit court characterized the Plaintiff Pharmacies as being unsophisticated. However, the Supreme Court decided that as the Pharmacies are businesses, they

"necessarily possess some level of experience in corporate dealings." Even if they were unsophisticated, lack of expertise would not absolve them from application of the AAA rules. Therefore, the Court concluded that the incorporation of the AAA rules into the arbitration agreements constitutes clear and unmistakable evidence that the parties have agreed to delegate questions of arbitrability to the arbitrator.

Impact on Business:

The Supreme Court's willingness to examine the totality of the circumstances and find that the arbitration provisions in various contracts were enforceable strengthens the strong public policy that favors enforcement of arbitration provisions. This opinion is also significant because the Supreme Court was willing to enforce the delegation clause based upon reference to the AAA rules, and it did not require more specific language to be stated in the contracts.

Citizens Telecommunications Co. (dba Frontier) v. Sheridan
799 S.E.2d 144 (W.Va. 2017)

What the Court was Asked to Decide:

The Circuit Court of Lincoln County denied a motion to compel arbitration in a putative class action filed by Michael Sheridan and others (Respondents), finding that: 1) Respondents had never assented to the arbitration provision; 2) the arbitration provision was illusory and lacked consideration; 3) the arbitration provision did not include claims that predated its adoption; and 4) the arbitration provision was unenforceable because it prohibited class-wide injunctive relief.

Petitioner Frontier appealed, and asked the Supreme Court to reverse the ruling of the Circuit Court, and remand the case with an order enforcing the arbitration provision and compelling arbitration.

What the Court Decided:

The Supreme Court of Appeals of West Virginia reversed the order from the Circuit Court of Lincoln County and remanded the case with instructions to order arbitration on an individual basis.

Facts:

The Respondents, including Sheridan, subscribed to Frontier's residential "high-speed Internet service" between 2007 and 2010. The subscription service was governed by "Terms and Conditions" published on Frontier's website. At the time of subscription, the Terms and Conditions did not include a dispute resolution provision, but did provide that the Terms and Conditions could be modified with notice to customers. If a customer continued to use the service after notice of a proposed change, the modified Terms and Conditions were considered accepted by the customer. In 2011, Frontier added a binding arbitration provision to its Terms and Conditions, along with other waivers. In 2012, Frontier revised the arbitration provision further to make it more "customer friendly." On both occasions, customers were given notice of the proposed modification through their billing statements, and once in a subsequent paper insert with their bill.

In 2014, Respondents filed a putative class action alleging that Frontier failed to provide internet service at the advertised speeds, and purposefully throttled the internet speed. Frontier sought dismissal of the lawsuit, or in the alternative, a stay and an order compelling arbitration. Respondents opposed the motion to dismiss and resisted arbitration contending that they had never received adequate notice of changes to the Terms and Condition, because Frontier buried the notice in multi-page billing statements, and therefore, Respondents could not be deemed to have agreed to the provision. The Circuit Court denied the motion to dismiss and motion to compel arbitration and Frontier appealed.

Holding:

In the opinion written by Justice Walker, she considers each of the four findings of the Circuit Court upon which it based its ruling.

First, the Supreme Court addressed the issue of mutual assent and concluded that the Terms and Conditions were not a "browsewrap agreement" ("a contract arising in the context of Internet Commerce that is formed when one accepts it merely by browsing a website."), but were instead a unilateral contract ("where one party makes a promissory offer and the other accepts by performing an act rather than by making a return promise.") and should be construed under traditional contract law. The Court concluded that Frontier presented its Terms in Conditions as a condition of providing service, and that the Respondents accepted the Terms and Conditions by using and paying for

the service. The Supreme Court also concluded that Frontier provided reasonable written notice to its customers, and Respondent assented to the changes by continuing to subscribe and use the service.

Second, the Supreme Court addressed the Circuit Court's finding that the arbitration provisions were illusory and lacked consideration. The Supreme Court rejected the Circuit Court's conclusion and found that for the first modification to the Terms and Conditions, "the mutual commitment to arbitrate was sufficient consideration for the modification." For the second modification, the Court noted that Frontier, in making the arbitration provision more user friendly, had taken on additional burdens while providing customers with additional benefits and that constituted adequate consideration.

Third, the Supreme Court considered whether the arbitration provision was binding on claims that pre-existed its inclusion in the Terms and Conditions. In rejecting the Circuit Court's finding, the Supreme Court relied on the language of the arbitration provision, prior precedent and the Federal Arbitration Act (FAA), which specifically authorizes parties to agree to arbitrate "an existing controversy." Finding that the arbitration provision clearly and explicitly provided application to pre-existing disputes, the Supreme Court rejected the lower court's conclusion.

Fourth and finally, the Supreme Court examined whether the arbitration provision was unenforceable given its prohibition on class-wide injunctive relief. The Supreme Court, relying on its own precedent and the FAA, concluded that it is permissible for parties to an arbitration provision to agree to waive class-wide injunctive relief, and found the Circuit Court's holding to the contrary in error.

Impact on Business:

This is a very significant decision from our Supreme Court. The Supreme Court rejected all four of the premises upon which the Circuit Court based its order, reversed the decision and remanded the case with instructions to compel arbitration on an individual basis. The decision follows precedent under the FAA by enforcing the arbitration provisions in this business setting and it properly concludes that there was adequate consideration for the arbitration provision, that the arbitration could apply to pre-existing disputes and that arbitration could be required on an individual and not a class wide basis. This will be a beneficial case for business in the future.

Blackrock Capital Investment v. Fish
799 S.E.2d 520 (W.Va. 2017)

What the Court was Asked to Decide:

Whether indemnification clauses in an agreement between a parent company and its subsidiary were unfair and unconscionable.

What the Court Decided:

The Supreme Court of Appeals of West Virginia found elements of procedural and substantive unfairness in the indemnification and non-liability clauses. The agreements were oppressive, unfair and unconscionable, and, therefore, unenforceable.

Facts:

Tremont Associates, LLC and Blackrock Kelso Capital Corporation acquired a plant in Cumberland, West Virginia, that processed powdered titanium and zirconium. Tremont and Blackrock created AL Solutions as a subsidiary that would be the owner and operator of the plant. The parties executed several agreements, including an indemnification agreement requiring AL Solutions to indemnify Tremont and Blackrock "from any and all losses, claims, damages, and liabilities" arising out of the agreements or the "rendering of any other advice or performance of any other service." Tremont and Blackrock would not be held liable to AL Solutions "in contract or tort or otherwise" for anything arising out of the agreements. At the time of the signing of the agreements, AL Solutions did not have independent counsel, nor was it allowed to negotiate the agreement.

After an explosion and fire at the processing plant, which resulted in the death of three employees and injuries to others, the family of the employees brought a suit against AL Solutions for various injuries and wrongful death. AL Solutions filed a crossclaim against its parent companies, Tremont and Blackrock, over the management agreements which AL Solutions claimed were unconscionable and unenforceable. The circuit court granted partial summary judgment to AL Solutions, finding that the indemnification and no-liability clauses were procedurally and substantively unconscionable. Blackrock appealed.

Holding:

The Court found that the agreements among the parties were substantively unconscionable because the agreements were unreasonably favorable to Tremont and Blackrock and had the "harsh effect … that [Blackrock and Tremont] had no responsibility to adequately perform under the agreement." The agreements lacked any mutuality of obligation. Also, the agreements "…prevent AL Solutions from suing Blackrock, even if Blackrock refused to perform" any of its services. "The presence of these clauses … does not reflect the freedom of contract, but rather shows that AL Solutions was a hapless pawn destined for sacrifice on the altar of corporate law."

The Court further found that the agreements were procedurally unconscionable. The attorneys working for Blackrock and Tremont drafted the three agreements, and AL Solutions had no legal representation in signing the agreements. Furthermore, AL Solutions did not bargain for the non-liability clauses. Blackrock and Tremont "effectively contracted with themselves through exclusive control, authority, and dominion" over AL Solutions, primarily to insulate themselves from all liability.

Impact on Business:

This case removes the veil of protection that parent companies often seek when operating

under a subsidiary. Here, the Court found it unfair and unjust to remove all liability from parent companies, especially when their actions resulted in injuries to employees. This case places more of a burden on companies to assume greater risks in operating various businesses.

Webb v. North Hills
2017 WL 2493768 (W. Va. 2017)

What the Court was Asked to Decide:

The West Virginia Supreme Court of Appeals was asked to decide whether the circuit court erred in finding sufficient evidence to pierce the corporate veil of Webb Construction.

What the Court Decided:

The Court held that the circuit court's piercing of the corporate veil of Webb Construction without evidence was clear error and reversed the circuit court's decision.

Facts:

The dispute between the parties arose from an oil and gas lease. North Hills, the lessor, discovered that Webb Construction, the lessee, was using an unproductive well to store certain fluids pursuant to permits issued by the West Virginia Department of Environmental Protection. As noted in the dissent authored by Justice Loughry and joined by Justice Walker, the dispute was fact intensive. North Hills filed a Petition for Declaratory Judgment and injunctive relief against Webb Construction and its sole shareholder and President, Danny Webb. Ultimately, the circuit court ruled that the oil and gas lease was terminated. However, the circuit court also found sufficient evidence to pierce the corporate veil of Webb Construction, allowing North Hills to recover directly from Mr. Webb.

Holding:

The Court upheld all of the circuit court's rulings regarding the application of the oil and gas lease, albeit for somewhat different reasons. However, the Court held that, after close reading of the evidentiary hearing transcripts, there was insufficient evidence to allow for piercing the corporate veil. Recognizing the presumption that corporations are separate from their shareholders and that a corporate entity should only be disregarded to allow for individual liability of shareholders in exceptional circumstances, the Court found that the circuit court did not pay the requisite and particular attention to the factual details warranting the equitable remedy of piercing the corporate veil. In determining whether to pierce the corporate veil of any corporation, courts are required to consider nineteen (19) factors as part of a "totality of the circumstances test," including *inter alia* commingling of funds, diversion of funds, and utter disregard of corporate formalities. Here, the Court concluded that the record did not establish that "Mr. Webb exercised such dominion and control over Webb Construction with such unity of interest and ownership that the separate personalities of the two no longer exist[ed] and that an inequitable result would occur if the acts or omissions alleged were treated as those of Webb Construction alone."

Impact on Business:

This case is good for businesses in that it reinforces the long-standing presumption that business owners are not personally liable for the business's liabilities, barring exceptional circumstances.

Sigman v. Discover Bank
WL 1345247 (W.Va. 2017)

What the Court was Asked to Decide:

Whether the circuit court erred in granting Discover Bank's Rule 12(b)(6) motion for failure to state a claim under the West Virginia Consumer Credit Protection Act ("WVCCPA"), whether the circuit court erred in barring the petitioner's negligence claim, and whether the circuit court erred in finding that the continuing tort doctrine does not apply in defamation actions.

What the Court Decided:

The Court agreed with the circuit court in finding that the petitioner failed to state a claim under the WVCCPA. The Court also decided that the petitioner's negligence claim was without merit. The Court also agreed that the circuit court did not err in finding that the continuing tort doctrine does not apply in defamation actions.

Facts:

Discover Bank filed a complaint against Sigman to recover a credit card debt. The circuit court granted a judgment in favor of Discover Bank, and the bank recorded a judgment a lien on Sigman's property. On March 30, 2012, Discover Bank and Sigman agreed to settle the debt for much less than the judgment. On July 25, 2013, Discover Bank informed Sigman that his payment was received, and "that the account had been settled."

However, Discover Bank's lien was not released. On September 25, 2015, Sigman drafted a letter to Discover Bank, requesting that the lien be released. Sigman then filed a complaint against Discover Bank. On the same date, the lien was released. Sigman filed an amended complaint asserting (1) violations of the WVCCPA for falsely representing the status of a debt due to the failure to release the lien; (2) common law negligence; (3) common law defamation for failing to release the lien; and (4) an action to release the lien. The circuit court granted Discover Bank's motion to dismiss.

Holding:

First, the Court found that the circuit court did not err in finding that petitioner failed to state a claim under the WVCCPA, because there was no debt and therefore no debt collector. Sigman did not – and could not – allege the existence of a debt that Discover Bank was attempting to collect. In fact, the basis of Sigman's claim was that Discover Bank improperly attempted to collect a debt that did not exist. The plain language of the WVCCPA requires a debt and attempted collection by a debt collector.

Second, the Court found that the circuit court did not err in barring Sigman's common law negligence claim. In rejecting Sigman's claim, the Court noted that West Virginia Code Section 38–12–10 establishes a mechanism for recovery of damages against a party for failure to release a recorded lien. The Court stated it is a mainstay of Anglo-American jurisprudence that the common law gives way to a specific statute that is inconsistent with it: when a statute is designed as a revision of a whole body of law applicable to a given subject, it supersedes the common law.

Third, the Court found that the circuit court did not err in finding that the failure to release the lien did not implicate the continuing tort doctrine in defamation cases, and therefore Sigman's claim was outside the statute of limitations. The concept of a continuing tort requires a showing of repetitious, wrongful conduct. When the lien was recorded, it was true and accurate. The fact that it was not released did not extend the claim.

Impact on Business:

This is a memorandum decision that is good for debt collectors because the Court declined to extend or broaden the application of the WVCCPA. The Court also provided limitations on common law claims and continuing torts which will restrict claimants in WVCCPA cases and other types of litigation.

Young v. EOSCCA
800 S.E.2d 224 (W.Va. 2017)

What the Court was Asked to Decide:

Whether the plaintiff was a "consumer" under the West Virginia Consumer Credit Protection Act ("WVCCPA").

What the Court Decided:

The plaintiff did not owe a debt to the debt collector and, therefore, she could not pursue a claim for unlawful debt collection practices under the WVCCPA.

Facts:

The defendant had been calling the plaintiff's home, although plaintiff admittedly did not speak to defendant (she simply noted the calls on her Caller ID). During discovery, it was learned that the defendant was calling to locate another individual who had a debt with AT&T. They were not calling the plaintiff, as she did not owe a debt to AT&T. Instead, the defendant was attempting to locate James Young, who may have been the plaintiff's husband, son or grandson. So the crux of the case was whether plaintiff was a "consumer" under the WVCCPA when she herself did not owe a debt to the defendant.

Holding:

The plaintiff argued that she should qualify in a generic fashion as a consumer because she owed money to creditors other than AT&T. The Supreme Court of Appeals of West Virginia rejected the plaintiff's argument and said that her attempt to cast herself as a "consumer" under the Act failed because the statutes at issue are clear that the individual seeking civil recovery must owe or allegedly owe the debt at the center of the collection activity. The Legislative design of the Act in terms of connecting the prohibited debt collection practices to the specific debt at issue is readily apparent. The statutory definition leaves no doubt that a "consumer" seeking recovery under the provisions of West Virginia Code § 46A-5-101(1) "for any prohibited debt collection practice" must be obligated or allegedly obligated to owe the specific debt at issue.

The record was clear that the plaintiff was neither obligated to AT&T on the debt at issue nor was she ever advised by its debt collector (EOS) that she was obligated on the subject debt. Only those persons meeting the specific statutory definition of "consumer" may bring a private cause of action under the WVCCPA.

Impact on Business:

This is a favorable case for any business engaged in debt collection, because it limits and restricts the class of debtors who can pursue claims for unlawful debt collection under the WVCCPA.

Quicken Loans v. Walters
2017 WL 2626559 (W. Va. 2017)

What the Court was Asked to Decide:

Whether the circuit court erred (1) in allowing the jury to consider whether Quicken Loans violated the "illegal loan" provision of the West Virginia Residential Mortgage Lender, Broker and Servicer Act; (2) in finding that Ms. Walters prevailed and was entitled to recover attorney fees, and (3) in offsetting only a portion of jury verdict with the settlement funds received from third parties, part of which included payments for attorney fees.

What the Court Decided:

The West Virginia Supreme Court of Appeals held that the illegal loan provision of the West Virginia Residential Mortgage Lender, Broker and Servicer Act applied to primary loans. The Court also held that the circuit court did not err in finding that Ms. Walters prevailed, even though the jury's verdict was only $2,000 more than Quicken Loans settlement offer. Lastly, the Court directed the circuit court to hold an evidentiary hearing to determine the reasonableness of the attorney fee award subject to a different method for determining offsets.

Facts:

Ms. Walters contacted Quicken Loans in hopes of refinancing her home for a lower interest rate and mortgage payment. As a part of the loan approval process Quicken Loans contracted with Kirk Riffe for an appraisal of the home. Riffe valued the home at $152,000.00, however the home was only worth $64,000.00. After experiencing financial difficulty Ms. Walters was not able to make the regularly payments. Ms. Walters filed a lawsuit against Quicken Loans asserting unconscionable inducement, violation of the "illegal loan" provisions of the West Virginia Residential Mortgage Lender, Broker and Servicer Act, and fraud. Ms. Walters also filed claims against Riffe and Bank of America, but settled with those defendants prior to trial. Quicken Loans filed a motion for judgment on the pleadings, arguing the "illegal loan" claim failed as a matter of law because the statute on which the claim was based, West Virginia Code § 31–17–8(m)(8), applies only where there are two or more mortgages on the property whose aggregate total exceeds the property's fair market value." The circuit court denied the motion and allowed the jury to consider the alleged violations.

The circuit court dismissed Ms. Walters claim against Quicken Loans for unconscionable inducement, and the jury found in favor of Quicken Loans on the fraud claim. The jury found in favor of Ms. Walters on the "illegal loan" claim and awarded her $27,000.00 in compensatory damages. In post-trial proceedings, the circuit court found that Ms. Walters prevailed on her claim and was entitled to attorney fees, even though the compensatory damages award was completely offset by pre-suit settlements. After applying offsets from the pre-suit settlements of attorney fees, the circuit court awarded over $155,000 in attorney fees to Ms. Walters. Quicken Loans, appealed.

Holding:

First, regarding Quicken Loans' argument that the "illegal loan" provision of the of the West Virginia Residential Mortgage Lender, Broker and Servicer Act did not apply, the Supreme Court stated "we cannot find, and indeed cannot envision, any basis for concluding that the Legislature intended the statutory prohibition to extend only to second or subsequent loans where, as here, it specifically included primary loans within the statute's ambit." The Court further noted that the policy behind the statute was to protect consumers. Thus, the Court held that the "illegal loan' provisions apply to any primary or subordinate mortgage loan that exceeds the fair market value of the property at the time the loan is made, either singly (in the case of a first or consolidation mortgage loan), or in combination with any outstanding balances of any existing loan.

Second, with respect to attorney fees, the Court rejected Quicken Loans' argument that Ms. Walters did not prevail at trial even though the $27,000.00 compensatory damages award was only slightly more than Quicken Loans' pre-suit settlement offer and the entire compensatory damages award was offset by other defendants' settlement payments. The Court noted that Quicken Loans only settlement offer of $25,000 shortly before trial was not "reasonable" because despite minimally covering damages, it did not cover any fees and expenses over the course of the three-year litigation. The jury awarded more in damages than Quicken Loans had offered to pay, albeit not much more. The Court concluded that the circuit court was more familiar with the litigation and did not abuse its discretion in finding that Ms. Walters prevailed.

Third, the Court found the circuit court erred in the amount of attorney fees awarded, and that it improperly applied the offset of settlement amounts to attorney fees. The circuit court should have held an evidentiary hearing which allowed Quicken Loans to challenge the plaintiff's fee evidence and cross examine witnesses. In determining the appropriate fee award and offset, the circuit court was directed to: (1) determine which portion of the fees claimed could be fairly attributed to the success of her "illegal loan" claim; and (2) offset the total amount of the prior settlements against the total compensatory damages (i.e. the jury's verdict and the circuit court's award of costs and fees).

Impact on Business:

This case is not good for banks and financial organizations. Justices Ketchum and Loughry disagreed with the majority' application of the "illegal loan" provisions, and further noted in their dissents that Ms. Walters received more than $150,000.00 in attorney's fees despite not being able to recover from Quicken Loans for violation of the statute. Although the Court decided that Ms. Walters prevailed and was entitled to fees, the Court's direction as to calculation of the attorney fee award is somewhat favorable to businesses. However, business defendants in civil litigation with fee shifting components will be held responsible for the plaintiff's attorney fees, even if the plaintiff was not able to recover substantial compensatory damages.

Valentine & Kebartas, Inc. v. Gary J. Lenahan
2017 WL 2626387 (W.Va. 2017)

What the Court was Asked to Decide:

Whether the Circuit Court of Raleigh County erred in granting judgment following a bench trial to a debtor in an action alleging that a collector's 250 attempts to call the debtor during an eight-month period was abuse or unreasonable oppression with intent to annoy, oppress, or threaten in violation of the West Virginia Consumer Credit and Protection Act (the "WVCCPA")?

What the Court Decided:

The Supreme Court of Appeals of West Virginia reversed the Circuit Court's ruling granting judgment to the debtor and found that the debtor failed to provide evidence of intent to annoy, oppress, or threaten in violation of the WVCCPA.

Facts:

The debtor, Gary J. Lenahan ("Mr. Lenahan"), owed $1,349.53 on his account with ADT, a home security system provider. ADT sold the delinquent account to Valentine & Kebartas ("V&K"), a third-party debt collector. Though Mr. Lenahan informed ADT that he denied owing the debt, he never notified V&K. Upon purchasing the account, V&K initiated collection efforts by letter to Mr. Lenahan notifying him of its intent to collect the debt. Thereafter, V&K made telephone calls to Mr. Lenahan using an auto dialer. V&K provided testimony regarding programing the auto dialer calls to comply with the law and to maximize the chances to actually reach a consumer. In Mr. Lenahan's case, the auto dialer was programed not to leave a message.

The number of calls placed to Mr. Lenahan ranged from twenty-two during the first fifteen day period, seventeen calls over the next three days, and 211 calls over the following eight months. The calls were placed between the times 8:00 a.m. to 9:00 p.m., and never more than six times per day. Mr. Lenahan never answered any of the 250 calls, and did not contact V&K to dispute the debt. Though the phone number used by V&K was to Mr. Lenahan's cell phone, it was the number that Mr. Lenahan provided to ADT, which in turn provided to V&K.

Mr. Lenahan filed suit against V&K alleging violation of the WVCCPA, West Virginia Code § 46A-2-125. This section of the WVCCPA forbids a debt collector from "causing the telephone to ring . . . repeatedly or continuously . . . with the intent to annoy, abuse, oppress or threaten any person at the called number." W.Va. Code § 46A-2-125(d). After a bench trial, the circuit court ruled that the unanswered calls made by V&K to Mr. Lenahan violated the WVCCPA and awarded him $75,000.00 in damages.

In its ruling, the circuit court found that the first twenty-two calls to Mr. Lenahan did not violate the WVCCPA; however, the court further found that V&K "ramped up" its collections with the seventeen calls made over the following three days. The court could not fathom any other reason for V&K increasing the volume and frequency of calls other than to harass or oppress him into answering the telephone calls. Therefore, the court ruled that each call after the first twenty-two violated the WVCCPA.

Holding:

The Supreme Court of Appeals of West Virginia reversed the Circuit Court's ruling granting judgment to the debtor by finding that the debtor failed to provide evidence of intent to annoy, oppress, or threaten in violation of the WVCCPA. The Supreme Court found that this issue was a matter of first impression. The Court focused its attention on whether the volume of calls alone to Mr. Lenahan constituted abuse or unreasonable oppression under the WVCCPA. In analyzing the

lower court's ruling, the Supreme Court noted that the circuit court did not reference any evidence when it found that there could be no legitimate purpose served by V&K increasing the volume of its calls to Mr. Lenahan. It was this finding alone that the lower court used to base its conclusion that V&K harassed or oppressed Mr. Lenahan in an attempt to get him to answer the calls.

In reviewing the various federal court cases interpreting this particular provision of the WVCCPA, the Supreme Court observed that those cases involved evidence other than the mere volume of calls to suggest abuse. The cases finding a violation of the WVCCPA involved situations where the debtor received numerous calls after informing the creditor they had retained counsel or the creditor used abusive language. In fact, one court noted that there is a two-step analysis under this section of the WVCCPA; that is, the debtor must first establish that the creditor caused the telephone to ring "repeatedly or continuously" and, second, to show intent to annoy, abuse, oppress or threaten the consumer.

The Supreme Court also compared federal court decisions interpreting a nearly identical provision under the FDCPA. Those courts found that daily phone calls, without other abusive conduct, are insufficient to raise a triable issue. In fact, one court noted that a remarkable volume of calls are allowed under the FDCPA. In conclusion, the Supreme Court found that the weight of federal authority requires some evidence of intent to establish liability.

Turning to the WVCCPA, the Supreme Court agreed with the federal courts' interpretation of the nearly identical provision in the FDCPA. It found that the volume of calls in this case did not establish intent in violation of the WVCCPA. The Supreme Court noted that Mr. Lenahan could have answered one of the calls and informed V&K that he disputed the debt, and that the record was devoid of any evidence contradicting V&K's stated intention to collect the debt (that the calls continued because Mr. Lenahan never answered and never informed V&K that he disputed the debt). Rather, the circuit court made an inference of intent to "harass or oppress" based on its own belief that there could be no legitimate purpose served by V&K increasing the volume of calls to Mr. Lenahan. That inference was made solely on the volume of calls and on no other evidence. Some evidence of V&K's intent to annoy, abuse, oppress or threaten Mr. Lenahan is necessary in order to find liability under the WVCCPA.

Finally, the Supreme Court reminded the lower courts that it is the plaintiff's burden to prove intent to annoy, abuse, oppress or threaten. Likewise, it stated that "it is erroneous as a matter of law to impose a duty on a debt collector to discontinue debt collection efforts based solely on the fact that the consumer does not want to be contacted after a certain period of time that is subjectively known only to the consumer."

Impact on Business:

This decision is favorable to creditors and their assignees by reasserting the elements of proof in WVCCPA cases. It is reasonable to expect debtors to communicate with debt collectors to inform them of any dispute to a claim. Merely remaining silent, and counting the number of calls, is insufficient to impute some nefarious intent on the part of the creditor. However, this case does not give creditors carte-blanche to make as many calls as they want to debtors. Instead, debtors must prove that creditors intended to annoy, abuse, oppress or threaten them by continuously and repeatedly making those telephone calls. It is unreasonable for debt collectors to be held liable to consumers who specifically refuse to communicate, and to expect the debt collector to stop attempting to collect the debt merely because the debtor refuses to communicate. Debt collectors should have a policy in place for making collection calls to debtors that complies with the law and includes the time, place, and frequency of its calls. Obviously, debt collectors should never engage in annoying, abusive, oppressive, or threatening behavior in their attempts to collect debts.

GMS Mine Repair and Maintenance, Inc. v. Miklos
798 S.E.2d 833 (W.Va. 2017)

What the Court was Asked to Decide:

Whether the circuit court failed to implement case management procedures provided under the West Virginia Rules of Civil Procedure in denying the request of GMS Mine Repair and Maintenance, Inc. for a stay of class discovery pending resolution of a threshold legal issue.

What the Court Decided:

The Supreme Court of Appeals of West Virginia decided that the circuit court should have stayed class discovery pending its ruling on a motion for summary judgment.

Facts:

The respondent, Jeffrey Miklos, filed a putative class action claim, alleging that GMS Mine Repair failed to pay him and other similarly situated employees their final wages within the time period mandated by the West Virginia Wage Payment and Collection Act, West Virginia Code § § 21–5–1 et seq. Mr. Miklos served discovery requests with his Summons and Complaint, including requests for all GMS Mine Repair employees who were discharged in the last five years.

GMS Mine Repair answered the discovery requests relevant to Mr. Miklos's individual claim, but objected to the class discovery as being overly broad, unduly burdensome, and premature. Specifically, GMS Mine Repair asserted that the class discovery should be stayed pending the threshold legal issue of statutory construction that could be dispositive of the entire claim. GMS Mine Repair filed a motion to stay class discovery pending the circuit court's ruling on the central legal question. The circuit court denied the request to stay class discovery, finding that GMS Mine Repair waived its objections to class discovery, as they were untimely raised, and, further failed to meet its burden of demonstrating why such discovery should not proceed.

Holding:

The West Virginia Supreme Court concluded that the circuit court should have employed Rule 16 to provide meaningful case management, which should have included resolving a potentially dispositive issue before requiring class discovery. In the absence of a properly conducted case management or discovery conference, or entry of a Scheduling Order, the circuit court's refusal to defer class discovery pending the determination of a "narrow and fundamental dispositive legal issue in this 'litigation' was an abuse of the circuit court's discretion. The Court also held that the circuit court's waiver ruling and finding that GMS Mine Repair had no excuse for not timely responding were exceptionally harsh, particularly when GMS Mine Repair conferred in good faith with opposing counsel to resolve the class discovery dispute, and fully answered the discovery directed to Mr. Miklos's claim.

The Court held that Mr. Miklos would not be prejudiced by a stay of class discovery, and the stay would not deny him the opportunity to brief and argue the potentially dispositive threshold issue of statutory construction.

Impact on Business:

This is a good case for business because it empowers circuit courts to restrict and limit needless discovery when a case may be disposed of in the early stages of litigation. This decision will save businesses significant legal expenses and restrict the filing of frivolous cases which businesses often settle simply to avoid costly discovery.

Thomas Memorial Hospital v. Nutter
238 W.Va. 375 (Nov. 7, 2016)

What the Court was Asked to Decide:

The Court was asked to decide three issues: (1) whether the circuit court's verdict that found Herbert J. Thomas Memorial Hospital Association ("Thomas Memorial") wrongfully discharged a nurse in a manner designed to undermine public policy; (2) whether Thomas Memorial had intentionally inflicted emotional distress on the nurse and had defamed her; (3) whether Thomas Memorial failed to pay the nurse her full wages.

What the Court Decided:

The Court reversed the $1,004,900 jury verdict against Thomas Memorial. The Court found no evidence to support the jury's conclusion that the hospital wrongfully discharged the nurse in order to jeopardize or undermine a specific public policy. The Court also found insufficient evidence that the discharge was intended to inflict emotional distress upon the nurse. Further, the Court found that the nurse's claim for defamation was barred by a one-year statute of limitation. Moreover, the Court found that the circuit court should have granted judgment as a matter of law to the hospital on these three allegations.

As for the final issue, whether the nurse was due unpaid wages from the hospital, the Court found that the circuit court's conduct and rulings during the trial (including the way it asked over 300 questions of the witnesses) undermined the reliability of the jury's verdict. Therefore, the Court reversed the jury's verdict on unpaid wages and remanded the case for a new trial on that single issue.

Facts:

Plaintiff Susan Nutter is a registered nurse. In August 2008, she was hired by the defendant, Thomas Memorial. This case arose from Nutter's firing in November 2009. Nutter was hired to work as a "charge nurse" in the geriatric psychiatric unit. In February 2009, Thomas Memorial placed Nutter on an improvement plan, due to her being "unable to complete tasks in a timely manner; orders not signed off timely; nursing documentation incomplete; [and] lack of daily progress notes." Nutter successfully completed her improvement plan in May 2009.

On November 12, 2009, Thomas Memorial asserted Nutter falsified a Patient Education Form for each of nine patients. Thomas Memorial asserted that Nutter documented care that was not given. After learning of these falsified documents, the nurse manager spoke with several staff members and patients.

Based upon her investigation, the nurse manager concluded that Nutter falsely documented care. The Chief Nursing Officer and Human Resources Manager agreed. The Chief Nursing Officer reported Nutter to the West Virginia Board of Examiners for Registered Professional Nurses ("the Board"). The Board ultimately sent a letter to Nutter advising her that no action would be taken against her license. Nevertheless, the Board "caution[ed Nutter] to review [her] current practice for measures of improvement related to documentation."

On August 11, 2011, Nutter filed a *three count* complaint against Thomas Memorial. An eight-day jury trial on Nutter's complaint ensued. At the conclusion of Nutter's case in chief, and again at the close of all the evidence, the hospital moved for judgment as a matter of law. The circuit court denied the motions. The circuit court then instructed the jury on *four causes of action* against Thomas Memorial. In addition to the three causes of action asserted in Nutter's complaint, the circuit court instructed the jury it could consider whether Nutter had been defamed by Thomas Memorial's letter to the Board of Nursing.

Thereafter, the jury awarded Nutter $998,000.00 for past and future lost wages, emotional distress, and for damages to her reputation. Additionally, the jury awarded Nutter $6,900.00 as "wages not paid" for the charge nurse differential. The circuit court entered judgment on the verdict, and defendant Thomas Memorial timely filed a post-trial motion asking for judgment as a matter of law under Rule 50(b) of the West Virginia Rules of Civil Procedure. In the alternative, the hospital asked for a new trial under Rule 59(e). Subsequently, the circuit court denied the defendant's post-trial motions. Thomas Memorial appealed to the West Virginia Supreme Court of Appeals.

Holding:

First, the Court found no evidence of wrongful discharge. The Court stated that there must be some elaboration upon the employer's act that jeopardizes public policy and bears a nexus to the plaintiff's discharge. The Court held that there was no evidence specifically demonstrating whether and how a public policy was being broken or undermined by the hospital's actions.

Thomas Memorial's second assignment of error was that the circuit court erred in refusing to grant its motion for judgment as a matter of law on the plaintiff's claim that the hospital intentionally inflicted emotion distress upon her. The Court noted that the law permits a plaintiff to recover damages from a defendant "who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress"[1] to the plaintiff. The Court held that Thomas Memorial's actions were not so extreme and outrageous as to support a jury verdict. Therefore, the Court found that the circuit court should have granted the hospital's motion for judgment as a matter of law and dismissed the plaintiff's cause of action for intentional infliction of emotional distress.

The Court noted that Nutter filed a three-count complaint. At trial, however, the circuit court permitted Nutter to assert a fourth cause of action, defamation, and instructed the jury on this fourth action. The Court opined that regardless of whether a cause of action was expressly or implicitly contained within Nutter's complaint, it agreed with Thomas Memorial that a defamation cause of action never should have been presented to the jury. The Court went on to state that Nutter's cause of action for defamation was barred by the one-year statute of limitations.[2]

The fourth assignment of error concerned the jury's award to the plaintiff of $6,900 for unpaid wages. The Court held that it did not have confidence in the jury's verdict and was greatly troubled by the circuit court's conduct during the trial below. In sum, the Court held that the review of the record showed numerous abuses of the circuit court's questioning of witnesses. It also showed an abuse of discretion in the admission, or refusal to admit, evidence favorable to the defense. Taking the record as a whole, the Court found the jury's entire verdict to be inherently unreliable. Therefore, the Court found that the circuit court's judgment regarding the plaintiff's wage claim must be reversed, and the wage claim remanded for a new trial.

Impact on Business

The most immediate impact that this decision has on business is that it constitutes reasoned judicial oversight of a flawed process below. The Court rightly parsed through the weakness of the plaintiff's claims, the insufficient of her evidence, and the prejudicial effect of the trial court's misconduct.

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1 *See Harless v. First Nat. Bank in Fairmont*, 169 W.Va. 673, 289 S.E.2d 692 (1982).

2 *See* W.Va. Code § 55-2-12(c).

Martinez v. Asplundh Tree Expert Co.
WL 2626648 (Jun. 16, 2017)

What the Court was Asked to Decide:

The Court was asked to decide two certified questions from the United States District Court for the Northern District of West Virginia. The Court considered whether two recently enacted statutes relating to damages – West Virginia Code §§ 557E-3 (mitigation of damages) and 55-7-29 (punitive damages) – apply in a trial conducted after the effective date of the statutes when the underlying facts in the case occurred prior to that effective date.

What the Court Decided:

The Supreme Court ruled in the affirmative on both certified questions. First, the Court found that West Virginia Code § 55-7E-3 is a remedial statute that does not affect a vested right. Because it neither diminishes substantive rights nor augments substantive liabilities, it is not subject to a retroactivity analysis under Syllabus Point 2 of *Public Citizen, Inc. v. First Nat. Bank in Fairmont*.[1] The Court went on to hold that West Virginia Code § 55-7E-3 abrogates Syllabus Point 2 of *Mason County Board of Education v. State Superintendent of Sch*.,[2] and its progeny. Accordingly, its provisions are applicable irrespective of when the cause of action accrued or when the claim or suit is filed. Thereby an affirmative duty is imposed on a plaintiff to mitigate any claim for past and/or future wages and requiring an award, if any, of back pay and front pay to be reduced by the amount of interim earnings or the amount that could have been earned with reasonable diligence by the plaintiff.

Turning to the second certified question, the Court found that West Virginia Code § 55-7-29 is similar to West Virginia Code § 55-7E3 in that both address the process for consideration of damages at trial. In reliance on the same authorities cited in the Court's discussion of the first certified question, it found that West Virginia Code § 55-7-29 is a remedial statute that does not impact a vested or substantive right. Accordingly, its provisions are applicable irrespective of when the cause of action accrued or when the claim or suit is filed. As such, West Virginia Code § 55-7-29 is not subject to a retroactivity analysis under Syllabus point 2 of *Public Citizen*.

Facts:

Petitioner, Helio Martinez, was employed by Respondent Asplundh Tree Expert Co. ("Asplundh") to perform tree cutting services from 2011 until he was discharged on September 13, 2013, for the alleged theft of a cellphone charger. Although Mr. Martinez later denied any wrongdoing, he claimed that he was not provided an opportunity to respond to the accusation of wrongdoing. Mr. Martinez's entire work crew was terminated as a result of the alleged theft of the cell phone charger from the truck of a competitor.

Agents for Asplundh testified that that the video surveillance upon which the decision to fire Mr. Martinez was based did not show him stealing the cell phone charger. Mr. Martinez is an American citizen originally from Puerto Rico. He worked on a four-person work crew first assigned to work in Pennsylvania but then transferred to work in West Virginia by Asplundh. Mr. Martinez's work crew was comprised entirely of Hispanic individuals and, according to Mr. Martinez, they were treated less favorably than other work crews. Moreover, he alleged that at least one member of Asplundh management referred to them as the "Mexican crew," even though none of the crew members were of Mexican descent.

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1 480 S.E.2d 538, 198 W.Va. 329 (1996).

2 295 S.E.2d 719, 170 W.Va. 632 (1982).

Following his discharge, Mr. Martinez filed a complaint against Asplundh with the West Virginia Human Rights Commission ("Commission"). The Commission subsequently issued a Notice of Right to Sue on December 30, 2014. On January 25, 2015, Mr. Martinez filed a civil action against Asplundh alleging that he was wrongfully discharged from employment in violation of the West Virginia Human Rights Act, §§ 5-11-1 through -20 (2013) (the "Human Rights Act"). Mr. Martinez claims that he was unlawfully discriminated against on the basis of race, national origin and/or ancestry.

By order entered on January 1, 2017, the federal district court certified the following questions to this Court:

1. Does W.Va. Code § 55-7E-3, which abrogates *Mason County Bd. of Educ. v. State Superintendent of Sch.*, 170 W.Va. 632, 295 S.E.2 719 (1982), apply to a wrongful discharge case under the West Virginia Human Rights Act, W.Va. Code § 5-11-9(1), where the plaintiff employee was discharged on September 3, 2013, the effective date of the statute is June 8, 2015, and this case is set for trial after June 8, 2015?

2. Does W.Va. Code § 55-7-29, which limits punitive damage awards, apply to a wrongful discharge case under the West Virginia Human Rights Act, W.Va. Code § 5-11-9(1), where the plaintiff employee was discharged on September 3, 2013, the effective date of the statute is June 8, 2015, and this case is set for trial after June 8, 2015?

Holding:

The West Virginia Supreme Court of Appeals held that West Virginia Code § 55-7E-3 is a remedial statute that does not impact a vested right. The statute is not subject to a retroactivity analysis under Syllabus Point 2 of *Public Citizen* because it neither diminishes substantive rights nor augments substantive liabilities.[3] The Court noted that retroactivity ought to be judged with regard to the act or event that the statute is meant to regulate. On that point, the Court reasoned that West Virginia Code § 55-7E-3 clearly regulates the award of back pay and front pay at trial in an employment case. The Court stated that when an intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive . . . ." *State ex rel. Ocwen Loan Servicing, LLC v. Webster*.[4]

Furthermore, the Court recognized that "[i]n general, statutes dealing with a remedy apply to actions tried after their passage even though the right or cause of action arose prior thereto."[5] The Court held that West Virginia Code § 55-7E-3, abrogating Syllabus Point 2 of *Mason County Board of Education v. State Superintendent of Sch.*[6] and its progeny is a remedial statute that does not impact a vested or substantive right. Accordingly, the Court found that its provisions are applicable irrespective of when the cause of action accrued or when the claim or suit is filed, thereby imposing an affirmative duty on the part of the plaintiff to mitigate any claim for past and/or future wages and requiring an award, if any, of back pay and front pay to be reduced by the amount of interim earnings or the amount that may be earned with reasonable diligence by the plaintiff.

Turning to the second certified question, the Court found that West Virginia Code § 55-7-29 is similar to West Virginia Code § 55-7E3 in that both address the process for consideration of damages at trial. In reliance on the same authorities cited in the Court's discussion of the first certified question, the Court held that West Virginia Code § 55-7-29 is a remedial statute that does

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3 *See Public Citizen* at note 1.

4 752 S.E.2d 372, 382, 232 W. Va. 341 (2013).

5 Sutherland Statutory Construction § 60:1 (7th ed. 2016).

6 295 S.E.2d 719, 170 W.Va. 632 (1982).

not impact a vested or substantive right. Accordingly, its provisions are applicable irrespective of when the cause of action accrued or when the claim or suit is filed. As such, West Virginia Code § 55-7-29 is not subject to a retroactivity analysis under Syllabus Point 2 of P*ublic Citizen*.[7] The Court noted that the Supreme Court of the United States explained in *Landgraf*:

> Even absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations. When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive.[8]

Therefore, a plaintiff has no right, much less a vested right, to an award of punitive damages prior to trial. Thus, the Court answered both the first and second certified questions in the affirmative.

Impact on Business:

Punitive damages and the "malicious discharge theory" have been a thorn in the side of West Virginia employers for years. The Legislature made some needed reforms in 2015. This decision gives immediate impact to those reforms rather than deferring them for later application to causes of action accruing after 2015. Consequently, cases currently in the courts of West Virginia will get the benefits of these new statutes.

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7 *See Public Citizen* at note 1.

8 *Landgraf*, 511 U.S. at 273.

CONSOL Energy, Inc. v. Michael Hummel, et. al.
238 W.Va. 114 (2016)

What the Court was Asked to Decide:

The issue the Court was asked to decide was whether CONSOL or whether its subsidiary, Consolidated Coal Company, underwent a "change in control" so as to accelerate the vesting of the plaintiffs' Restricted Stock Units ("RSUs") under CONSOL's Equity Incentive Plan and Award Agreement ("Plan").

What the Court Decided:

The Court held that CONSOL's sale of Consolidated Coal Company constituted a "change in control" under CONSOL's Plan. The change in control accelerated the vesting of the plaintiffs' RSUs. Accordingly, the July 27, 2015, order of the Circuit Court of Marshall County granting summary judgment for the plaintiffs was affirmed.

Facts:

The plaintiffs are coal miners who were employed by CONSOL's subsidiary, Consolidated Coal Company, or by one of Consolidated's own subsidiary corporations. Each plaintiff worked at one of five underground mines in northern West Virginia. The plaintiffs were participants in CONSOL's Plan. Under the Plan, the plaintiffs were awarded units of CONSOL's common stock which vested in three equal, annual installments, measured from the award date, over the plaintiffs' period of continued employment. Only CONSOL, and not the affiliates, issued the stock under the Plan.

CONSOL's Plan provided the Board of Directors with broad discretion in the administration of the Plan and employee RSU awards. The Plan also defined certain terms and phrases. Addressing "change in control," Section 12 provided that "in the event that the Company engages in a transaction constituting a Change in Control, the Board shall have complete authority and discretion, but not the obligation, to accelerate the vesting of outstanding Awards and the termination of restrictions on Shares."

When RSUs were awarded, CONSOL gave each plaintiff an Award Agreement entitled "Letter Regarding Restricted Stock Unit Award Under CONSOL Energy Inc. Equity Incentive Plan ('Plan')." Each Award Agreement included terms and conditions and set forth the award date, the number of awarded shares, and the vesting schedule. Upon receipt of an Award Agreement, each plaintiff was required to sign the Agreement and return it to CONSOL. The Award Agreement included both a non-competition covenant and a covenant that the plaintiff would not disclose confidential information or trade secrets of CONSOL and its affiliates.

Central to this action were four potential "events" set forth in the Award Agreement which resulted in accelerated vesting of RSUs awarded under the Plan. Acceleration, as to the first three events, was triggered by "Separation from Service with the Company" due to (1) the attainment of age 62, (2) the attainment of age 55 in relation to early retirement or incapacity or (3) the death or a reduction in force. The fourth potential event listed in the Award Agreement which resulted in the accelerated vesting of RSUs, and the focus of the controversy herein is the "completion of a Change in Control."

On December 5, 2013, CONSOL sold Consolidated Coal Company and Consolidated's subsidiaries to Ohio Valley Resources, Inc. and Ohio Valley's parent company, Murray Energy Corporation. The plaintiffs were employees of Consolidated Coal Company or its subsidiaries. At the time of the sale, the plaintiffs had been awarded RSUs. The plaintiffs asserted that they were entitled to the accelerated vesting of the unvested portion of the RSUs pursuant to the Award

Agreement. The plaintiffs' argued that a "change in control" occurred when CONSOL sold Consolidated Coal Company. CONSOL, however, maintained that the sale did not constitute a "change in control" under the Award Agreement or the Equity Incentive Plan. Consequently, CONSOL declined to accelerate the awarded but unvested RSUs and declared that the unvested RSUs were forfeited.

Holding:

The Court affirmed the circuit court's judgment holding that "uncertainties in an intricate and involved contract should be resolved against the party who prepared it."[1] The Court found that CONSOL was the preparer of the Plan. Furthermore, the Court explained that the Award Agreements, signed by the plaintiffs and returned to CONSOL prior to the sale to Murray Energy Corporation, set forth the award date, the number of awarded shares, and the vesting schedule. Thus, the time had passed for CONSOL to exercise its discretionary authority to alter the terms of the plaintiffs' Award Agreements. The circuit court determined that each plaintiff earned and was promised RSUs which had not been paid at the time of the sale of Consolidated Coal Company on December 5, 2013. The Court agreed and found that CONSOL's assertion to the contrary was without merit.[2]

The Court opined that the phrase "change in control" under CONSOL's Plan necessarily included CONSOL's subsidiary, Consolidated Coal Company. As such, the December 5, 2013, sale of Consolidated Coal Company and related assets to Murray Energy Corporation triggered the accelerated vesting of the plaintiffs' RSUs. Consequently, CONSOL's failure to accelerate the RSUs and its declaration that the RSUs were forfeited constituted a breach of contract. Accordingly, the July 27, 2015, order of the Circuit Court of Marshall County granting summary judgment for the plaintiffs was affirmed.

Impact on Business:

This decision, although adverse to the employer in question, does not have a negative impact on employers generally. Rather, the decision is limited to its facts. The decision is a cautionary tale to employers, however, that courts will look for ambiguities in employment documents and construe them against the employer.

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1 *See Charlton v. Chevrolet Motor Co*., 115 W.Va. 25, 174 S.E. 570 (1934).

2 *See Goldhirsch v. St. George Tower and Grill Owners Corp*., 142 A.D.3d 1044, 37 N.Y.S.3d 616 (2016).

Metz v. Eastern Associated Coal, LLC
799 S.E.2d 707 (W.Va. 2017)

What the Court was Asked to Decide:

The Supreme Court of Appeals of West Virginia was called on to answer two certified questions:

1. Does the limitations period in an employment discrimination case start when an individual first learns that he or she was an unsuccessful job applicant?

2. Does the discovery rule toll the statute of limitations until the individual learns of the alleged discriminatory motive underlying the adverse employment decision?

What the Court Decided:

The Court answered the first certified question in the affirmative. Syllabus Point 2 states, "the statute of limitations for employment discrimination cases brought to enforce rights under the West Virginia Human Rights Act, W. Va. Code §§ 5–11–1 to –20 (2013) including allegations of discriminatory failure to hire, begins to run from the date a plaintiff first learns of the adverse employment decision."

The Court answered the second question in the negative. Syllabus Point 3 states, "the statute of limitations for employment discrimination cases brought to enforce rights under the West Virginia Human Rights Act, W. Va. Code §§ 5–11–1 to –20 (2013), including allegations of discriminatory failure to hire, is not tolled by the discovery rule until the plaintiff learns of the alleged discriminatory motive underlying the employment decision."

Facts:

Plaintiff, Henry Metz, was an active member of the United Mine Workers of America. As a union member, Metz had to designate jobs for which he sought consideration when the position was available. On July 23, 2012, Metz applied for the position of mechanic trainee at the Federal No. 2 mine owned by Eastern Associated Coal ("EAC"), the defendant. Mr. Metz was informed on July 23, 2012, that he did not receive the job; however, he did not know until January 15, 2014, that the basis for the employment decision may have been because of his age.

On March 19, 2014, Mr. Metz filed a charge with the EEOC, alleging that EAC had violated the Age Discrimination in Employment Act ("ADEA"). Mr. Metz instituted a civil action in the Circuit Court of Monongalia County, where he claimed that EAC had committed age discrimination in violation of the ADEA and the West Virginia Human Rights Act. ("HRA"). However, on December 21, 2015, EAC successfully removed the action to federal court on federal question jurisdiction. Mr. Metz then amended his Complaint to remove the ADEA claim to get back into the state court.

On March 7, 2016, EAC filed an Amended Motion to Dismiss, seeking dismissal of Mr. Metz's civil action under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure for failure to bring forth a suit within two years of the alleged discriminatory act. During the hearing on EAC's motion to dismiss, EAC moved to certify the issue of whether the limitations period is tolled under the HRA until plaintiff learns of the prospective employer's discriminatory acts.

Holding:

The Court analyzed prior cases involving wrongful discharge in which the statute of limitations begins to run once the employee is made aware of the employer's termination decision. The

Court also analyzed cases nationwide finding that in failure-to-hire cases, the date on which the employer's hiring decision is made known is the reference point from which the limitation period is calculated. *Nat'l R.R. Passenger Corp v. Morgan,* 153 L.Ed.2d 106 (U.S. 2002). The Court then held the statute of limitations for employment discrimination cases brought to enforce rights under the HRA, including allegations of discriminatory failure to hire, begins to run from the date an employee first learns of the adverse employment decision.

However, the Court held that the statute of limitations in discriminatory failure to hire cases is not tolled until an employee discovers the alleged discriminatory motive underlying the employment decision. The Court rejected Mr. Metz's argument that unsuccessful job applicants do not sustain an employment-related injury until they learn of the employer's unlawful bias. The Court also rejected Mr. Metz's argument that actual knowledge of the discriminatory animus is a necessary part of the employment discrimination claim. The Court also recognized that public policy does not favor a discovery rule in such cases, because the purpose of the statute of limitations is to "compel the bringing of an action within a reasonable time." *Johnson v. Nedeff,* 452 S.E.2d 63, 69 (W. Va. 1994).

Impact on Business:

This case is very good for employers because the Court refused to extend the discovery rule in failure-to-hire discrimination claims. By not extending the discovery rule, the Court protected employers from having to deal with stale discrimination claims that may have accrued many years before a suit is filed.

Contraguerro v. PPG Industries Inc and Gastar Exploration
800 S.E.2d 891 (W. Va. 2017)

What the Court was Asked to Decide:

Did PPG Industries Inc. ("PPG"), which held the "executive right" to lease the mineral interests beneath the 105.9 acre tract of land at issue, need to obtain the consent of the Plaintiffs, who held a ¼ non-participating royalty interest in that property, before PPG could permit the "pooling" of the mineral interests beneath the property?

What the Court Decided:

In a unanimous opinion issued only 8 days after oral argument, the Court rejected both the plaintiffs' contention that non-participating royalty interest holders must "consent" before their interests are pooled with other property for mineral production purposes and the "cross-conveyance" theory (sometimes called the "Texas Rule") upon which the right to consent is based.

Facts:

The Plaintiffs collectively held a ¼ non-participating royalty interest in a 105.9 acre tract of land (the "Property"). PPG held (and still holds) the "executive right" to the oil and gas royalty interests in the Property, meaning that PPG retained the right to lease the mineral interests in the Property.

Exercising this "executive right," PPG entered a lease with Gastar Exploration USA, Inc. ("Gastar") that covered 3,285.6874 acres, including the 105.9 acre Property in which the Plaintiffs claimed an interest (the "Gastar Lease"). Among other things, the Gastar Lease permitted Gastar to "pool" mineral interests in property covered by the Gastar Lease, including the mineral interests under the Property. Gastar, in turn, recorded a "Designation of Pooled Unit" and "Amendment to Designation of Pooled Unit" for a unit named the "Wayne/Lily Drilling Unit" in Marshall County, which encompassed ~700 acres, including the Property.

Pursuant to the Gastar Lease and the pooling designations, Gastar drilled eight (8) natural gas wells within the drilling unit. Gastar escrowed production royalties attributable to the ¼ non-participating royalty interest held by the Plaintiffs pending confirmation of who, exactly, is entitled to those payments. Importantly, Plaintiffs only owned a ¼ non-participating interest in the oil and natural gas beneath the Property. They did not own the surface of the Property, and none of them lived on the Property. Plaintiffs' ¼ non-participating interest in the oil and gas rights associated with the 105.9 acres, collectively, represented a 3.78% ownership in the 700 acre Wayne/Lily Unit.

The Plaintiffs filed a complaint against PPG and Gastar alleging that PPG, as the executive interest holder, had to obtain the consent of the ¼ non-participating royalty interest holders to allow the pooling of the mineral interests with others. Because PPG did not obtain the consent of the Plaintiffs, the Plaintiffs believed that Gastar's pooling designations were invalid.

Holding:

In the states that follow the Texas Rule, pooling in effect conveys property rights between and amongst all property owners in a pool such that each property interest holder has a joint or undivided property interest in all the properties that constitute the pool. Other states follow the so-called "contract" theory of pooling, by which a pooling designation represents a contractual arrangement only.

The Court expressly rejected the Texas Rule: "The cross-conveyance theory resulting in such a joint or undivided property interest is rejected." Instead, the Court held that "pooling results

in a consolidation of contractual and financial interests regarding the drilling and production of oil and gas from the combined parcels of land." As a result,

> [w]here a lessee designates tracts of land for pooling regarding horizontal drilling and production of oil and gas from the Marcellus Shale Formation, which includes nonparticipating royalty interests, consent or ratification by the holders of the nonparticipating royalty interests to the pooling is not required, where the holders of the nonparticipating royalty interests have conveyed the oil and gas in place and the executive leasing rights thereto to the lessor.

In rejecting the Texas Rule, the Court clearly stated that non-participating royalty interest holders have a non-possessory right only in property and that, when pooled, "[t]here was no merger of titles, and the NPRI holders did not acquire an undivided property interest in the" other tracts that made up the designated pool. The Court expressly held that the non-participating royalty interest holders had no right to "consent" to pooling or any other lease term.

Impact on Business.

This decision represents a significant win for (1) the holders of the executive right to lease property that includes mineral rights and (2) lessors who seek to develop minerals pursuant to lease agreements that include the right to pool property in which non-participating royalty interest holders hold an interest. Had the consent of non-participating royalty interest holders been required before property could be pooled, lessees and lessors would have been forced to identify, find, and negotiate with non-participating royalty interest holders, which would have meant tremendous delay and cost before pooling could be effected.

In a broader sense, the Court's decision in *Contraguerro* and in *Leggett* represent a Court that is willing to fashion judicial rulings that facilitate natural resource production and that seek to modernize West Virginia oil and natural gas law.

Leggett v. EQT Production Company
2017 W. Va. LEXIS 407 (W.Va. 2017)

What the Court was Asked to Decide:

Does the use of the term "at the wellhead" in W. Va. Code § 22-6-8, West Virginia's Flat Rate Royalty Statute, allow the calculation of royalties for wells subject to the Flat Rate Statute using the "net back" method of calculation, by which producers deduct certain post-production expenses from royalty payments?

What the Court Decided:

In a much-publicized decision written by Chief Justice Loughry, the Court decided, in a 4-1 vote, that the term "at the wellhead" as used in the Flat Rate Royalty Statute allows the use of the net back method to calculate royalties.

Facts:

The Leggetts owned a 75% undivided interest in the gas estate of a 2,000-acre tract of land in Doddridge County, West Virginia. Certain wells on the property are "flat-rate" wells, i.e. wells for which the gas lease provides for payment of a sum certain per well, per year.

In 1982, the Legislature enacted the predecessor of the current Flat Rate Royalty Statute, which provided that permits for flat-rate wells will not be issued unless the lessee (usually a production company) swore, by affidavit, that it will pay the lessor no less than one-eighth "of the total amount paid to or received by or allowed to [the lessee] at the wellhead for the oil or gas so extracted, produced or marketed[.]"

EQT Production Company and affiliated companies ("EQT"), the lessee under the gas lease with the Leggetts, deducted certain costs from royalty payments made on flat rate wells, including costs incurred for the gathering and transporting of the gas to the interstate pipeline. In particular, EQT took the full price it obtained by selling the gas at the interstate pipeline and deducted "some" of the costs ("midstream" costs or "post-production" costs) incurred after the gas is extracted, but before it reaches the market at the pipeline. EQT maintained that the only way to capture the statutorily-required "wellhead" price is to utilize this so-called "net-back" or "work-back" method, which deducts post-production expenses from the sales price to duplicate the "wellhead" price.

The Leggetts filed a civil action against EQT and contended that neither the Flat Rate Royalty Statute nor West Virginia common law permits deduction or allocation of costs for purposes of royalty calculation under the Flat Rate Royalty Statute.

Holding:

Notably, this decision reversed the Court's decision in late 2016, which found the net back method to calculate royalties under the Flat Rate Royalty Statute to be impermissible. *Leggett v. EQT Production Company,* 2016 W. Va. LEXIS 890 (Nov. 17, 2016) (*"Leggett I"*).

The Court's decisions in *Leggett I* and the subsequent rehearing necessarily involved the Court's decision in *Tawney v. Columbia Natural Resources, L.L.C.*, 219 W. Va. 266, 633 S.E.2d 22 (2006), in which the Court held that post-production expense deductions on royalties paid pursuant to the terms of gas leases -- and not subject to the Flat Rate Royalty Statute -- were not permitted under West Virginia common law. Specifically, the Court held in *Tawney* that the phrase "at the wellhead" in a gas lease was "ambiguous," which in turn meant that the phrase should be strictly construed against the author of the lease agreement pursuant to standard contract interpretation principles, which the Court determined was the lessors/producers. Using these principles,

the Court in *Tawney* strictly construed the term "at the wellhead" against the leasee/producer to find that post-production expenses were not permitted under the lease agreements.

In *Leggett I,* the Court brushed aside the fact that the contract interpretation principles used in Tawney were inapplicable to discerning the "intent" of the Legislature in passing the "ambiguous enactment"; i.e., the Flat Rate Royalty Statute's use of the term "at the wellhead." Finding that the "same words -- 'at the wellhead' -- used in the same industry context are as ambiguous in the Flat Rate Royalty Statute as they are in a lease[,]" the Court determined in *Leggett I* that "traditional rules of statutory construction" required it to find that, as a "remedial" statute "indisputably enacted to right past wrongs[,]" the Flat Rate Royalty Statute requires that a 1/8 royalty payment subject to the statute "not be diluted by costs and losses incurred downstream from the wellhead before a marketable product is rendered."

Upon a motion for reconsideration, the Court (with Justice Beth Walker taking the place of Justice Brent Benjamin following the 2016 election) reversed itself and held that the phrase "at the wellhead" is not ambiguous simply because the Flat Rate Royalty Statute fails to fully outline allocation of post-production costs. The Court held that that phrase "at the wellhead" in the Flat Rate Royalty Statute was "clearly indicative of a legislative intention to value the royalties paid pursuant to the statute based on the unprocessed wellhead price," which in turn allowed post-production expenses to be deducted because such deductions were not prohibited by the plain language of the statute.

Impact on Business:

At first blush, Leggett would appear to impact only the oil and natural gas industry, and only those producers that make royalty payments under the Flat Rate Royalty Statute. Both the rationale used by the Court to reverse its earlier decision, however, and its application of the rules of statutory construction have a broader impact for business.

This decision shows that the present Court tends to strictly apply the plain language of a statute, even if that language was crafted at time when an industry impacted by the statute was vastly different. Upon rehearing, the parties and amicus curie spent a tremendous amount of effort detailing how deregulation of the natural gas industry in the 1990s fundamentally altered the production, transportation, and valuation of natural gas, including how the point at which natural gas is "valued" shifted from the point "at the wellhead" to where it enters transmission pipelines.

The Court also noted that "the fact that the statute is remedial in purpose is an inadequate basis upon which to exceed its stated goal" and that prohibiting the deduction of post-production costs from royalty payments under the Flat Rate Statute did not address "the evil intended to be suppressed" through the statute, which is "the payment of flat-rate royalties, which are not volume-based—no more, no less."

In short, the *Leggett* decision reveals a Court intent on applying the plain language of a statute and limiting the scope of judicial activism under the guise of effectuating a "remedial" statute.

Dan Ryan Builders, Inc. v. Crystal Ridge Development, Inc.
2017 WL 2537018 (W. Va. 2017)

What the Court was Asked to Decide:

Whether a West Virginia circuit court should apply federal law to determine any preclusive effect of federal court action and whether builder's claims were barred by *res judicata* (claim preclusion).

What the Court Decided:

West Virginia law determines preclusive effect of federal court actions and builder's claims were barred by *res judicata*.

Facts:

This case arises from alleged defects in the construction of a residential development, specifically claims that the builder's negligence in excavation and site development caused subsidence and landslides in the development. The homeowners filed suit against the builder in state court. The builder, in turn, filed suit in federal court against the company it hired to perform excavation in the development. The excavation company then filed a third-party complaint in the federal court case against the engineer who prepared the site development plans.

Then, sometime later, the builder filed a third-party complaint against the excavation company and the engineer in the previously-filed state court case initiated by the homeowners. The federal court claims proceeded to a bench trial, after which the federal district court dismissed the builder's negligence claims, finding they were really breach of contract claims. The federal district court's decision was affirmed by the Fourth Circuit, the federal appellate court. This prompted the excavation company and engineer to file motions for summary judgment in the state court action, asking the circuit court to grant judgment in their favor on the builder's third-party claims on the basis of *res judicata*. The circuit court granted summary judgment and the builder appealed, arguing that the federal court rulings did not impact their claims for contribution from the excavation company and engineer for the homeowner's negligence claims.

Holding:

The West Virginia Supreme Court of Appeals held that *res judicata* applied and the federal court determination had a preclusive effect on the builder's contribution claims. First, because the federal court applied state law, the rules of *res judicata* would also be dictated by state law, and the federal rules of *res judicata* would not apply. West Virginia law requires three elements for *res judicata* to apply: (1) final adjudication on the merits, (2) an action involving the same parties or persons in privity with the parties, and (3) identical causes of action. However, whether causes of action are identical depends on the facts giving rise to the action. If the same evidence would support both actions, *res judicata* applies. Even though the builder's federal court claims sounded in contract, and the third-party claims in state court sounded in negligence (i.e. contribution), the evidence supporting both actions was the same and the builder's state court third-party claims were barred by *res judicata*.

Impact on Business:

This case provides clarification and certainty regarding the preclusive effect of claims for businesses litigating in multiple venues.

Minnich v. MedExpress Urgent Care, Inc.
796 S.E.2d 642 (W.Va. 2017)

What the Court was Asked to Decide:

Whether a patient's injuries from a slip and fall in a medical examination room prior to seeing a nurse or doctor give rise to a premises liability claim or a claim under the provisions of the Medical Professional Liability Act ("MPLA").

What the Court Decided?

The Court upheld the summary judgment issued by the circuit court, finding that the MPLA applies, but ruled that the plaintiff may amend the Complaint to assert an MPLA claim.

Facts:

On January 25, 2013, Mr. Minnich went to MedExpress with his wife to seek medical care for possible pneumonia. A medical assistant employed by MedExpress escorted the Minnichs to the examination room and instructed Mr. Minnich to sit on the examination table. After the medical assistant exited the room Mr. Minnich attempted to climb onto the examination table. During his attempt to access the examination table, Mr. Minnich fell back into Mrs. Minnich and onto the floor. Consequently, both suffered injuries because of the fall. Ninety days later, Mr. Minnich died due to his injuries from the fall.

On August 14, 2013, Mrs. Minnich filed a wrongful death claim against MedExpress, asserting negligence based on theories of premises liability. MedExpress filed a motion for summary judgment, asserting that the claim was subject to the MPLA and was not a premises liability issue. On December 1, 2014, the circuit court entered summary judgment as to the premises liability claim in favor of MedExpress and instructed Mrs. Minnich to amend her Complaint. Mrs. Minnich appealed.

Holding:

The West Virginia Supreme Court of Appeals found that the medical assistant was an employee of the health care facility, rejecting Mrs. Minnich's argument that the intake medical assistant was not a "health care provider" as defined in the MPLA because she was not licensed. Analyzing the facts, the Court found, "integral to the diagnosis and examination of a patient by a medical professional is the component of the health care visit that customarily precedes the actual physical examination. Consequently, we have little difficulty viewing the question by the medical assistant of the Minnichs and the taking of vital signs that occurred prior to the fall as transpiring during the course of or 'within the context of the rendering of medical services.'" The Court also noted that the complaint raised the issue of the clinical expertise of the medical assistant. The Court agreed with the trial court's ruling that, absent expert witness' testimony, a jury will be unable to determine whether the medical assistant breached the duty of care owed as a "health care provider" to Mr. Minnich.

Impact on Business:

This is a good decision in which the Court provides a broad definition of "health care provider," bringing more cases within the scope of the MPLA. Moreover, the Court took a strong stance on tactical pleading, holding that even though the case was pled as a premises liability claim, the MPLA applied.

Government Employees Insurance Co. (GEICO) v. Sayre
2017 W.Va. LEXIS 412 (W.Va. 2017)

What the Court was Asked to Decide:

Is an insured entitled to stack underinsured motorist coverage for every vehicle covered by a single policy where the insured received a multi-car premium discount and the policy contains language expressly limiting the insurer's ability regardless of the number of vehicles insured under the policy?

What the Court Decided:

No, when an insured purchases a multi-car insurance policy that contains enforceable anti-stacking language, the insured is only entitled to recover up to the policy limits set forth in the single policy endorsement.

Facts:

On August 21, 2008, the decedent, Robert Keith Sayre, died from injuries sustained in a car accident as a guest passenger in a vehicle driven by Richard Ryan Smith, who also died in the accident. The cause of the accident was determined to be the negligence of both drivers, and both vehicles were driven by underinsured motorists. Mr. Sayre filed the initial wrongful death suit individually and as administrator of the estate of his son, the decedent.

Plaintiff/Petitioner GEICO asserted that the underinsured ("UIM") per person policy limit of $20,000 applied, and the policy only covered people insured under the policy. Mr. Smith, the driver of the car, was not insured under the GEICO policy, and liability is not based upon the number of underinsured motorists involved in a crash. Mr. Sayre maintained, on the other hand, that the policy stated that the limits of liability shall apply separately to each vehicle and because they were two underinsured motorists involved in the accident, the UIM limit of $20,000 to both, so GEICO should pay $40,000.

The Circuit Court of Jackson County (Judge Nibert) ruled that because there were two underinsured motorists involved in the accident, the UIM policy would cover both people. Previous court decisions have held that the anti-stacking language in an insurance policy is valid.

Holding:

Reversing summary judgment against GEICO, the Supreme Court held that because Mr. Sayre purchased a singular insurance policy from GEICO to insure his two vehicles, he had only purchased one UIM policy to be added to his policy. The Court issued a new syllabus point:

> An insured is not entitled to stack underinsured motorist coverage for every vehicle covered by a single policy where the insured received a multi-car premium discount and the policy contains language expressly limiting the insurer's liability regardless of the number of vehicles insured under the policy.

Impact on Business:

This decision prevents claimants from stacking insurance claims to get more money than the insurance policy allows. If the Court would have allowed Mr. Sayre to collect $20,000 for every person in the vehicle, then the insurer – and other insurers – would be forced to pay damages for which they did not collect premiums or otherwise contemplate when underwriting the policy. This decision avoids double dipping by claimants.

Upton v. Liberty Mutual Insurance
2017 W. Va. LEXIS 275 (W. Va. 2017)

What the Court was Asked to Decide:

Did the circuit court grant summary judgment without careful consideration of the damages that had been reported as one incident by the homeowner, but which were treated as two separate claims by the insurance company?

What the Court Decided:

The court decided that summary judgment was proper; the damage that involved the exterior doors from a break-in and damage from a water leak in the kitchen were two separate occurrences, and could be treated as such by the insurance company in regards to deductibles.

Facts:

According to the plaintiff, he returned home on the morning of August 24, 2009 to find that someone had broken into his house by damaging the exterior doors. He also discovered water on his kitchen floor from a "minute" crack in a pipe fitting under his sink. Petitioner reported both problems to respondent, his homeowner's insurance carrier. Petitioner's policy required a $5,000 per occurrence deductible. Respondent requested that petitioner file two different claims, one for the doors and one for the water damage in his kitchen. Petitioner refused because he found both problems at the same time. Respondent treated the problems as two separate occurrences because there was no evidence that someone broke into the house and then went a caused a small minute crack on the pipe.

The parties each hired a separate contractor to appraise the damage to the petitioner's home. Both contractors found that that the damage to the exterior doors came to an amount less than the $5,000 per occurrence deductible, thus Respondent paid nothing for the door damage. Respondent's contractor appraised the damage of the kitchen at $15,523.69 and the Petitioner's contractor appraised the damage at $18,385.60 plus repair work for the granite countertops at $3,662.06. Respondent ultimately paid a total of $11,175.07 for the water damage after applying the $5,000 deductible to that occurrence.

In July of 2010, Petitioner filed a civil action against respondent in the Circuit Court of Mason County, asserting causes of action for breach of contract, bad faith, fraud, and professional negligence. Petitioner alleged that Respondent attempted to coerce him into filing a separate claim for the water damage so that it could reduce the amount owed by applying the deductible twice.

Respondent moved the action to federal court and it was later remanded to the circuit court. Discovery did not begin until 2013 and the circuit court did not enter a scheduling order until July of 2014 where a discovery completion deadline was set for April 30, 2015. Scheduling order also directed the parties to file a pretrial memorandum. Both pretrial memorandums listed the Petitioner's contractor as a witness. Petitioner also filed various motions to have Respondent comply with his discovery request. Respondent responded with a motion to bifurcate Petitioner's cause of action for breach of contract from his claims for bad faith, fraud, and professional negligence.

Following the close of discovery, Respondent filed a motion for partial summary judgment arguing that there is no issue of material fact and that (1) no rational jury could find for Petitioner on his claims for bad faith, fraud, and professional negligence; and (2) the maximum amount that Petitioner could recover for breach of contract claim was $3,796.43 plus interest. Petitioner filed a response and then Respondent filed a reply to Petitioner's response. Petitioner filed a response to the reply on the same day that the circuit court held a hearing on the parties' various motions. The court declined to answer Petitioner's motions, finding that he had failed to properly serve them.

Petitioner objected and the court further found that the parties still needed to engage in mediation. The circuit court continued the trial date set forth in scheduling order and order that mediation begin.

After mediation proved unsuccessful, the circuit court held a hearing where they found that the case was not progressing. The parties were disputing over the petitioner's discovery requests for information relating to his claims of bad faith, fraud, and professional negligence. The circuit court found that it was the best way to move forward by ruling on the Respondent's motion for partial summary judgment and if necessary its motion to bifurcate the causes of action. The circuit court found that because the cost of fixing the exterior door was below the $5,000 deductible, the Respondent owed the Petitioner nothing for that occurrence. In construing the evidence in the light most favorable to the non-moving party, the court found that the total estimate for the kitchen work was $22,372.66. From this amount the court subtracted the deductible and the amount already paid by the Respondent, and found for a maximum amount that Petitioner could recover for the breach of contract claim was $6,197.59, plus interest.

Following the circuit court's order, Petitioner filed a motion to disqualify the judge from presiding over the case but failed to submit a copy of his motion to the judge. This motion was denied by the Chief Justice of the West Virginia Court of Appeals. Respondent then filed a motion to dismiss, stating that it had tendered a check to the Petitioner for $6,197.59 plus applicable interest, in the total amount of $9,088.21. Circuit court granted Respondent's motion and dismissed the parties' case with prejudice. The dismissal order was entered while the Petitioner's motion to disqualify the judge was still pending and so the Petitioner filed a supplemental motion for disqualification. This was again denied by the Chief Justice. Petitioner now appeals the circuit court's decision.

Holding:

Given the Petitioner's contractor's testimony that the minute crack found in the kitchen pipe was not consistent with typical vandalism, this Court held that the circuit court's finding that whoever damaged the exterior doors did not also damage the pipe. The Respondent did not error in treating the Petitioner's claim as two separate occurrences despite his refusal to file two separate claims and was entitled to summary judgment on the Petitioner's claims alleging that the Respondent mishandled his insurance claim. The circuit court correctly found that the Respondent did not violate the West Virginia Unfair Trade Practices Act when they made two separate claims out of the exterior doors and water damage in the kitchen. This Court also affirmed the circuit court's finding of the Respondent's confession of finding and tendered check in the amount of $9,088.21 to be most favorable to the Petitioner. The Court also affirmed the dismissal for the Petitioner's motions to disqualify the judge from the case.

Impact on Business:

Insurance companies can make sure that they are not overpaying on insurance policies when occurrences that do not happen from the same act aren't filed as one claim in order to avoid a deductible charge twice. When a business finds multiple damages on their property, they have to prove if they all arose from the same occurrence or if they are separate damages and they are liable for the deductible for each occurrence. This will force the insured to report their claims as they arise instead of waiting until they have several in hopes that they can file one large claim.

American National Property & Casualty Co. v. Clendenen
793 S.E.2d 899 (W. Va. 2016)

What the Court was Asked to Decide:

The court considered two certified questions from the U.S. District Court for the Northern District of West Virginia:

1. Applying West Virginia public policy and rules of contract construction, do the unambiguous exclusions in American National's policy for bodily injury or property damage "which is expected or intended by any insured even if the actual injury or damage is different than expected or intended," and "arising out if any criminal act committed by or at the direction of any insured," and the unambiguous exclusion in Erie's policy for "bodily injury, property damage, or personal injury expected or intended by 'anyone we protect'. . .," preclude liability coverage for insured who did not commit any intentional or criminal act?

2. If so, do the unambiguous severability clauses in the insurance policies, which state that the insurance applies separately to each insured, prevail over the exclusion and require the insurers to apply the exclusions separately to each insured, despite the intentional and criminal actions of co-insureds?

What the Court Decided:

The court answered the first certified question in the affirmative and the second certified question in the negative.

Facts:

Two teenage girls, Shelia Eddy and Rachel Shoaf, murdered their friend Skylar Neese. Sheila and Rachel picked up Skylar and drove her to a remote location outside of Brave, Pennsylvania, where they stabbed Skylar to death and hid her body. Skylar's body was discovered six months later, and Shelia and Rachel eventually confessed to, and were convicted of, her murder.

Skylar's parents, Respondents David and Mary Neese, filed a wrongful death action in the Circuit Court of Monongalia County, West Virginia, against Sheila Eddy, Tara Clendenen, Rachel Shoaf, and Patricia Shoaf, to recover damages in connection with Skylar's death. The Neeses asserted, among other things, that Mrs. Clendenen and Mrs. Shoaf had been negligent in their supervision of their daughters, Shelia and Rachel.

Not a party to the state court action, American National Property and Casualty Company ("ANPAC") and Erie Insurance Property and Casualty Company ("Erie") filed declaratory judgment actions in the U.S. District Court for the Northern District of West Virginia seeking a determination that the homeowners insurance policies do not provide coverage for the claims being asserted in the Complaint, and that the insurers have no duty to defend or indemnify Sheila Eddy, Tara Clendenen, Patricia Shoaf or Rachel Shoaf in that case. The actions were consolidated by the federal court.

ANPAC and Erie filed motions for summary judgment in the consolidated declaratory action, arguing that no coverage existed under their homeowners policies because the policy exclusions for intentional and criminal acts unambiguously exclude coverage. The Neeses filed a cross-motion for summary judgment, arguing that Mrs. Clendenen and Mrs. Shoaf were entitled to coverage under their homeowners policies because Skylar's death was an accident, and thus, an "occurrence" from the viewpoint of Mrs. Clendenen and Mrs. Shoaf, and the exclusions in the homeowner's policies regarding a criminal and intentional act conflict with the severability clauses, thereby creating an ambiguity that must be resolved in favor of the defendants. They did

not argue that the exclusions and severability clauses themselves are ambiguous, but that ambiguity results when one applies the severability clause to the exclusions.

Patricia Shoaf filed a cross-motion for summary judgment against Erie arguing that she does not fall within the exclusions of the policy, that the severability clause protects her from exclusion, and that Erie owes her coverage under the personal injury portion of her policy for various torts allegedly pleaded in the state court case. While the Neeses and Mrs. Clendenen conceded that Shelia and Rachel, the two teenage girls, were not entitled to defense and indemnification because of their criminal actions, Mrs. Shoaf argued that she believed coverage existed for the claims against her and Rachel.

In March 2016, Judge Keeley ruled that (1) the death of Skylar Neese was an "occurrence" from the perspective of Tara Clendenen and Patricia Shoaf under the ANPAC and Erie policies; (2) that under the respective exclusions, Shelia Eddy and Rachel Shoaf were not entitled to defense and indemnification for their intentional, criminal acts; (3) that as conceded by the parties, the respondents are not entitled to coverage under any of the automobile insurance policies; (4) that neither Patricia nor Rachel Shoaf are entitled to defense and indemnification under the personal injury portion of the Erie homeowner's policy, and (5) that the language of the exclusions and severability clauses in the relevant homeowner's policies is not ambiguous." The federal court was unclear how, under West Virginia public policy and rules of contract constructions, the exclusions and severability clause in the policies would be prioritized to determine if coverage would be available to Mrs. Shoaf and Mrs. Clendenen in the state court action. Therefore, the federal court opted to certify these questions to the West Virginia Supreme Court.

Holding:

The first certified question asks if, whether applying West Virginia public policy and rules of contract construction, do the unambiguous exclusions for intentional or criminal conduct preclude liability coverage for insured who did not commit any intentional or criminal act? The Court answered in the affirmative, determining that language in an insurance policy should be given its plain, ordinary meaning. ANPAC and Erie excluded coverage because an intentional or expected act was committed by "any insured" or "anyone. . . protected." Unambiguous intentional/criminal acts exclusions have been held consistent with public policy in other jurisdictions irrespective of whether the insured seeking coverage is accused of intentional, criminal, or just negligent conduct. The majority of courts have held that unlike the phrase, "the insured," the phrase "any insured" unambiguously expresses a contractual intent to create joint obligations and to prohibit recovery by an innocent co-insured. The court concluded that both homeowners policies specifically excluded coverage of loss to any insured where the intentional acts by "anyone we protect" caused the loss. Thus, if any one insured violated the policy, coverage must be denied to all insureds. The exclusionary language is unambiguous, thus the applicable policy exclusions create joint obligations and prohibit coverage for the Neeses' claims against Tara Clendenen and Patricia Shoaf.

In regards to the second question, if the severability clauses have impact on the exclusionary language application, the court answered in the negative. As other courts have held, when applying the severability clause to the exclusions, the exclusionary language still prohibits coverage to the allegedly negligent co-insureds. Because the damages claimed against Tara Clendenen and Patricia Shoaf all arose from the intentional and criminal conduct of their co-insureds, we conclude that coverage is excluded under these policies. The severability clauses are not in conflict with the exclusions.

Impact on Business:

Insurers price policies based on anticipated risk. Insurers exclude certain coverages which the insurer is either unable or unwilling to underwrite to keep costs low and accurately price insurance products for all policyholders, and insurers should not be liable for criminal activity.

Rector v. Rector and State Farm Fire & Casualty
2017 W. Va. LEXIS 342 (W. Va. 2017)

What the Court was Asked to Decide:

Is a husband who was negligently shot by his wife entitled to coverage for medical expenses and other damages from his homeowners and professional liability umbrella insurance policies?

What the Court Decided:

No, because the husband was the insured under the policy, and the policy contained exclusions from coverage for personal or bodily injury to the insured.

Facts:

State Farm provided a homeowners insurance policy for Robert and Kimberly Kay Rector's marital home, as well as a professional liability umbrella policy. Rector moved out of his marital home on July 17, 2015, and his wife, Kimberly Kay, continued to live there. Eighteen days later, Kimberly Rector shot Robert Rector in the abdomen as he was exiting a tavern.

Robert Rector filed this civil action seeking damages from his wife for her negligence in shooting him and seeking a declaratory judgment seeking coverage for his medical expenses and other damages under his State Farm insurance policies. Four days after Rector served initial discovery requests on State Farm, State Farm filed a motion for summary judgment on Count II, arguing that the petitioner was not entitled to coverage because both of his policies excluded coverage for "bodily injury or personal injury to any insured."

Rector responded, arguing that State Farm had not responded to his discovery requests and asked for further discovery. Rector sought to depose his wife so that he could prove he was not living in the marital home that was insured, and thus, since he was no longer living in the home, the insurance exclusions did not apply to him. State Farm then served petitioner with its response to his first set of discovery requests. The Circuit Court of Harrison County granted State Farm's Motion for Summary Judgment on Count II because State Farm properly denied coverage for the "bodily and personal injury to any insured" since the petitioner is the named insured under both policies. Rector appealed.

Holding:

The Court addressed four assignments of error in reaching its decision, the most pertinent two addressing Rectors' efforts to apply the severability clause and request the Court to revisit prior cases.

First, Rector argued that the circuit court failed to find that the severability clause operated to place his wife in the position of named insured and to eliminate petitioner's status as an insured. The Court had recently held in *Am. Nat'l Prop. & Cas. Co. v. Clendenen,* 793 S.E.2d 899 (2016) that "the purpose of a severability clause is to spread protection, to the limits of coverage, among all insured. The purpose is not to negate unambiguous exclusions." Thus, the Supreme Court held that Rector failed to support his claim, and the circuit court was correct in finding that the severability clause does not defeat the exclusion.

Rector also asked the Court to "reconsider" two cases, which it declined to do. First, Rector sought reconsideration of *Clendenen* and *Sayre ex rel. Estate of Culp v. State Farm and Casualty Company,* 2012 WL 3079148 (W. Va. 2012). In regard to *Clendenen*, petitioner maintains that the "criminal acts exclusion" precludes liability insurance coverage from compensating an injured party where a criminal statute has been violated. He argued that this violates public policy

favoring recovery for those injured by the negligence of another. *Clendenen,* however, addresses an insurance policy's "intentional or criminal acts exclusion" where in the present case, State Farm does not raise this exclusion. West Virginia's public policy does favor compensating persons who are negligently injured by others, but it also does not create insurance coverage where none exists. Therefore, the Court decided to not reconsider *Clendenen.* Rector similarly requested the Court to reexamine public policy in connection with its holding in *Sayre*, but the Court found that the bodily injury exclusion does not violate public policy because it does not hurt the public. The Court also declined to revisit its decision in *Sayre*.

The Court affirmed the summary judgment for State Farm.

Impact on Business:

Unambiguous exclusions in an insurance policy cannot simply be defeated with an argument of a severability clause. If an insurance company is clear in its policy about certain exclusions, then the Court will honor those because that is what the insured and the insurer agreed to when the parties entered into the insurance contract.

Erie Insurance v. Chamber
2017 W. Va. LEXIS 414 (W. Va. 2017)

What the Court was Asked to Decide:

Does an insurance policy's earth movement exclusion, which excludes coverage where earth movement was caused by "an act of nature or is otherwise caused", exclude coverage where the insured claimed that their property was damaged by a man-made excavation?

What the Court Decided:

The Court found that the "otherwise caused" language contained in the policy's earth movement exclusion clearly and unambiguously excluded coverage for earth movement, even where it was attributable to man-made conditions. As such, there was no coverage under the policy.

Facts:

Mr. and Mrs. Dimitri Chamber (the "Chambers") insured their commercial building with Erie Insurance ("Erie"). The Erie policy contained an "earth movement" exclusion that excluded coverage for the property where damaged occurred from earth movement "caused by an act of nature or otherwise caused." The policy did provide coverage for broken glass coverage, "But if Earth Movement,…, results in fire, explosion, sprinkler leakage, volcanic action, or building glass breakage, we will pay for the 'loss' or damage caused by such perils."

While the Erie policy was in place, the Chambers' building was damaged by a rock and soil slide from a hill behind the Chambers' property. The Chambers submitted a claim to Erie. During the course of Erie's investigation, an Erie adjuster examined the damage to the Chambers' property and observed that rock and soil had fallen down the slope behind the property. The adjuster met with the Chambers and discussed the insurance policy's exclusion of coverage for damage caused by a landslide. Erie subsequently denied coverage for the damage to the property based upon the policy's earth movement exclusion.

The Chambers filed a complaint against Erie and the adjuster in the Kanawha County Circuit Court, arguing that the earth movement exclusion was ambiguous and thus did not exclude coverage where earth movement, and the corresponding damage, were man-made. The Chambers sought damages for breach of contract, breach of covenants of good faith and fair dealing, and violations of the West Virginia Unfair Trade Practices Act, fraud and/or fraudulent misrepresentation by the adjuster and a declaratory judgment as to whether coverage exists.

Both parties hired experts to give opinions on the cause of the landslide. Erie's expert testified that the damage to the insured property was due earth movement that resulted from seasonal climate change. The Chambers' expert determined that the improper excavation of a highwall area caused the earth movement.

During a bench trial on the coverage issue, Erie argued that the alleged man-made nature of the earth movement was irrelevant under the language of the earth movement exclusion because damages due to earth movement, regardless of the cause, were excluded under the policy.

The circuit court granting declaratory judgment for the Chambers because the earth movement exclusion was ambiguous as to coverage for man-made earth movement. The circuit court reasoned that, when read in concert with the broken glass coverage in the policy, there was an ambiguity. The circuit court used this ambiguity to find coverage for the entirety of the loss. Because the exclusionary language was ambiguous, the circuit court held that the Chambers could reasonably expect coverage for the man-made earth movement in question.

Erie appealed to the Supreme Court of Appeals of West Virginia.

Holding:

The Court reversed the circuit court and held that the language of the earth movement exclusion was unambiguous and did not provide coverage for man-made or naturally occurring earth movement.

In finding that the language was unambiguous, the Court distinguished the language of the Erie earth movement exclusion from the language it found to be ambiguous in *Murray v. State Farm Fire & Casualty Co.*, 509 S.E.2d 1 (1998). In *Murray,* the Court held that policy language that excluded coverage for "external forces" was ambiguous because an insured could be unaware of what the term "external forces" encompassed. The Erie earth movement exclusion, however, excluded coverage "otherwise caused", a broad and all-encompassing term. The Court also noted that the "otherwise caused" language had been crafted by the Insurance Services Office as a purposefully simple, broad exclusion to coverage.

The Court also took issue with the circuit court's use of the broken glass coverage to find coverage for the entire loss rather than the limited portion of glass breakage damage. Instead, the Court held that the effect of an ensuing loss provision is to provide coverage for certain losses occasioned by events (i.e. the broken glass in a building hit by earth movement) as opposed to the excluded event itself.

To this end, The Court issued several syllabus points:

> An unambiguous ensuing or resulting loss clause of an exclusion contained in an insurance policy provides a narrow exception to the exclusion but does not revive or reinstate coverage for losses otherwise unambiguously excluded by the policy. Where an uncovered event occurs, an ensuing or resulting loss that is otherwise covered by the policy will remain covered, but the uncovered event itself is not covered.
>
> A provision in an insurance policy excluding a loss regardless of whether such loss is 'caused by an act of nature or is otherwise caused' is not ambiguous and excludes coverage for the whether it is caused by a man-made or a naturally-occurring event.

Impact on Business:

This decision should help provide insurers with comfort on exclusionary language. The decision means that insurers will not be held liable for damages when their policies clearly exclude particular coverages. In what has become a bit of a (long-overdue) trend lately, the Court simply enforced the plain language of the policy and did not attempt to find coverage where none existed. This shift allows insurers to write policies with premiums that are commensurate with the risk clearly outlined in the policy – a climate that will lead to more accurately priced insurance and lower premiums.

State ex rel. Universal Underwriters Ins. Co. v. Wilson
2017 W. Va. LEXIS 417 (W. Va. 2017)

What the Court was Asked to Decide:

Can a defendant that was actively being defended by their insurance company for an automobile related wrongful death claim brought by an unrelated party assert a cross-claim against their insurance company for not defending them properly in the ongoing litigation?

What the Court Decided:

A defendant insured cannot file a cross claim for bad faith against their insurer during the pendency of the underlying action where the insurer is defending the insured.

Facts:

Dan's Car World is a car dealership that purchased a comprehensive policy from Universal Underwriters, a subsidiary of Zurich Insurance ("Zurich"). The policy provided general coverage for auto related claims and a commercial umbrella policy.

In the summer of 2014, Dan Cava, the owner of Dan's Car World, allowed his son, Salvatore Cava, to use one of the cars on the lot for personal use. Salvatore Cava was involved in an auto accident with David Allen that ultimately resulted in Mr. Allen's death.

Following the accident, Zurich confirmed coverage for the auto-accident under its general coverage for auto related claims and tendered policy limits for this coverage to Mr. Allen's estate. Zurich denied additional coverage under the commercial umbrella policy. Mr. Allen's estate sued Salvatore Cava and Dan's Car World for negligence and wrongful death and also sued Zurich – seeking a declaratory judgment as to the applicability of the commercial umbrella coverage. Mr. Allen's estate then filed an amended complaint to name Dan Cava as an additional defendant. The Cavas then filed cross-claims against Zurich alleging that Zurich was acting in bad faith alleging: (1) Zurich had refused to offer more than the limits of the general coverage, (2) the defense counsel hired by Zurich to defend the Cavas was not adequately representing the Cavas, and (3) Zurich was engaging in litigation misconduct in its defense of the declaratory judgment action.

Zurich moved to dismiss the cross-claims under, arguing that the Cavas' bad faith claims against Zurich were premature because Zurich had retained defense counsel for the Cavas and no excess verdict had been entered, and further argued that its litigation conduct in the declaratory judgment action was subject to the litigation privilege and, therefore, not actionable. The Circuit Court denied the motion to dismiss based upon *State ex rel. State Auto Property Ins. Co. v. Stuck*y, 2016 W. Va. LEXIS 520, 2016 WL 3410352, (W.Va. 2016), which the Circuit Court found permitted bad faith claims to be raised by a first party insured, such as the Cavas, during the pendency of a third-party lawsuit against the insured. Zurich then sought a writ of prohibition from the WV Supreme Court, arguing that the Court's reasoning in *Noland v. Virginia Insurance Reciprocal,* 686 S.E.2d 23 (W.Va. 2009), along with the reasoning of the descending opinions in State Auto, dictated that the Cavas' cross-claims were premature because the underlying auto-accident case was ongoing and no verdict had been entered against the Cavas. In essence, Zurich argued that the Cavas' cross-claims were third-party bad faith claims and not cognizable under the Unfair Trade Practices Act or common law theories of bad faith.

Holding:

The Court held that the Cavas' claims against Zurich could not be asserted during the pendency of the litigation before the circuit court. Rather than assessing whether or not the cross-claims were impermissible third-party claims under the cases (*Noland* and *State Auto*), or if the

litigation privilege applied, the WV Supreme Court assessed whether the cross-claims were ripe for adjudication.

The Court articulated that there must be an underlying coverage claim to support a claim of bad faith against an insurer. In other words, if an insured alleges that an insurer is improperly addressing a claim, there has to be an actual claim underlying that charge. The Court further found that while the Cavas' complaints were styled as bad faith claims, they were in essence second guessing Zurich for defending itself in the declaratory judgment action and the counsel retained by the Cavas by Zurich.

The Court also distinguished the Cavas' claims from a situation in which an insurer did not offer a defense for its insureds in the underlying litigation. In that scenario, the bad faith claim could have been ripe. Finally, the court recognized that any harm that the Cavas might suffer would be contingent upon future events (i.e. a loss at trial) and thus, their bad claims against Zurich were not ripe.

Impact on Business:

The Court's decision represents a significant victory for insurers who faced potential suits by their insureds for bad faith during the pendency of a third-party claim or lawsuit against their insureds. While the Court did not explicitly reject the reasoning in *State Auto*, which arguably permits an insured to bring a cause of action for bad faith, either under the UTPA or common law, in the context of a third-party lawsuit prior to entry of an excess verdict, the Court did significantly narrow the ability of insureds to bring such causes of action. Further, the Court's reasoning suggests that it may, if presented with the appropriate opportunity, revisit its holding in *State Auto*.

State ex rel. Erie Insurance Property & Casualty Co. v. Nibert
2017 W. Va. LEXIS 67 (W.Va. 2017)

What the Court was Asked to Decide:

Can plaintiffs maintain a class action lawsuit because an insurer did not use the West Virginia Insurance Commissioner's prescribed UIM selection / rejection forms?

What the Court Decided:

No, proposed class members still need to satisfy the requirements of Rule 23. In this case, the plaintiffs did not satisfy the commonality requirement.

Facts:

Emily Elizabeth-Anne Hardman was killed in an automobile accident in Jackson County, West Virginia while riding as a passenger in a vehicle driven by Samuel Postlethwaite, who was also killed in the accident. Ms. Hardman's estate recovered the policy limits from Mr. Postlethwaite's insurer, Nationwide Insurance Company, and also sought underinsured motorist ("UIM") coverage from a policy maintained by her parents with Erie Insurance Property and Casualty Company ("Erie"). The estate sought the liability limits under the Erie policy on the theory that Erie's UIM coverage selection/rejection forms did not comply with the West Virginia Insurance Commissioner's prescribed form. The policy that Ms. Hardman's parents owned provided coverage in the amount of $20,000 per person, while the Erie policy had $100,000 per person limits. Erie declined to tender this liability limit and instead tendered the per person amount of $20,000 to Tamara Hardman on behalf of the Estate by way of interpleader.

The Hardman Estate filed a declaratory judgment action against Erie seeking a determination as to the amount of benefits available under the Erie policy and amended the complaint several times to seek the certification of a class on the basis that Erie's selection/rejection forms for UIM coverage that did not conform to the Insurance Commissioner's form. The Circuit Court of Jackson County certified the class, but Erie filed a petition for writ of prohibition to prohibit enforcement of the order. The Supreme Court issued a Memorandum decision granting the writ and ordered the Circuit Court to ensure the class met all of the requirements for a class action.

Meanwhile, The Hardman Estate amended their complaint again, this time seeking declaratory relief for their class action claim. The Circuit Court certified the class to include those who were insured under any Erie policy and who were injured by or suffered property damage caused by an act of an underinsured motorist, and who did not receive UIM coverage benefits at least equal to the liability stated in the policy declarations. Erie filed another writ of prohibition to prohibit the enforcement of the class action certification.

Holding:

This class action did not meet the commonality requirement of Rule 23, which requires a plaintiff to show that there are questions of law or fact common to the class (i.e., that class members have suffered the same injury). Resolving the common contentions of whether Erie made an "effective offer" to each of the members of the class and whether each class member's rejection of that offer was "knowing and informed" requires individual, fact-based determinations. The court determined that all purported class members would have to litigate the issue of whether Erie used an underinsured motorist coverage form that was not in compliance with the form required by the Insurance Commissioner, which would result in a loss of the presumption.

Impact on Business:

The Supreme Court upheld the string requirements of Rule 23. Class actions are extraordinarily expensive for businesses to defend, so it is imperative our courts not certify individual claims as classes.

Penn-America Insurance Co. v. Osborne
797 S.E.2d 548 (W.Va. 2017)

What the Court was Asked to Decide:

Does a defendant, who was not party to the lawsuit in which the consent judgment was entered, have to pay the consent judgment that was agreed upon by other parties, or is it entitled to summary judgment?

What the Court Decided:

Consent judgment is not binding on a defendant when it was not a party to the pre-trial settlement agreement where the consent judgement was made; thus, the defendant is entitled to summary judgment.

Facts:

Plaintiff Beecher Osborne injured his leg in a timbering accident while working for H&H Logging Company ("H&H"), on land owned by Heartwood Forestland Fund, IV, LP ("Heartwood") and leased by Allegheny Wood Products, Inc. ("Allegheny") for timber harvesting operations. Osborne filed claims against H&H, Heartwood and Allegheny. H&H maintained a general liability insurance policy with Penn-America that did not cover the deliberate intent claim that was filed against H&H. Therefore, H&H had to retain counsel at its own defense. Allegheny and Heartwood both requested defense from Allegheny's insurer, Liberty Mutual Insurance Company, which accepted coverage and provided a defense.

Counsel for Allegheny and Heartwood discovered that H&H was required to defend them because of their contract together. Their counsel wrote to H&H requesting that Penn-America, H&H's insurer, provide Allegheny and Heartwood with counsel. H&H did not pass this correspondence along to Penn-America, so Penn-America never learned of this request.

Thereafter, Osborne approached Allegheny and Heartwood about entering into a pre-trial settlement agreement. In the pre-trial settlement agreement, and with no notice to Penn-America, Osborne, Allegheny, and Heartwood stipulated to certain facts, including among other terms, that Penn-American breached is insurance contract by failing to provide a defense or coverage related to Osborne's claims, and that Allegheny and Heartwood suffered damages because they were compelled to expend resources to defend the case. In turn, Osborne would dismiss his allegations against Allegheny and Heartwood and consented to a $1 million judgement for Osborne's leg injury. They agreed to assign to Osborne any claims they may have had against Penn-America for failing to provide them a defense in the lawsuit, and Osborne agreed he would not execute on the $1 million judgement against Allegheny and Heartwood, but would collect judgment from Penn-America.

Osborne filed his new lawsuit against Penn-America, which denied liability on the assigned claim and noted that it had no notice of the parties' pre-trial settlement negotiations. The Circuit Court of Wyoming County (McGraw) granted summary judgment for Osborne, finding that Penn-America is liable to him for $1 million on the consent judgment. Penn-America appealed.

Holding:

The Supreme Court held that the pre-trial agreement between the Respondent and Allegheny and Heartwood is unenforceable against Penn-America because Penn-America was not a party to Osborne's lawsuit against Allegheny and Heartwood, nor was it given notice of the negotiation of the pre-trial settlement agreement. The Supreme Court also noted that the $1 million judgment was based on the liability limit of Penn-America's policy, not the actual valuation of Osborne's damages.

The Court also concluded that the assignment of Allegheny and Heartwood's claims to Mr. Osborne is void on the basis that holding an insurer liable for a judgment when the insured is not legally liable for the accident encourages collusion between the insured and the plaintiff to raid insurance proceeds. Here, it appeared that Allegheny and Heartwood sought to get themselves dismissed from the case while shifting liability to non-party Penn-America.

Impact on Business:

A party must be included in settlement agreement negotiations if they are to be liable to the negotiating parties.

Ashraf v. State Auto Property and Casualty Insurance Co.
799 S.E.2d 550 (W. Va. 2017)

What the Court was Asked to Decide:

The Supreme Court was asked to decide two certified questions by the Circuit Court of Marion County:

1. Where there is a covered total loss by fire under a fire insurance policy, may an insurer reduce the policy's limit of coverage for the insured premises by fifteen percent (15%) pursuant to a "vacancy" provision in the policy?

2. Does a fire insurance policy that includes a "pollutant clean up and removal" provision that provides that the insurer will pay the insured's expense to extract pollutants from land or water, provide coverage in excess of the "debris removal" coverage afforded by the policy for the removal of asbestos contained in a fire-damaged or destroyed structure?

What the Court Decided:

The Supreme Court affirmed the circuit court's decision, holding that a covered total loss could be reduced by fifteen percent (15%) where the policy contained a vacancy provision in the policy and where the insured premises was vacant. The Court further held that the "pollutant clean up and removal" provision did not extend coverage for the removal of asbestos above the "debris removal" coverage afforded by the policy.

Facts:

In 1997, Dr. Ashraf and his wife purchased a building in downtown Fairmont. After completing renovations to the building, Dr. Ashraf used the building as an assisted living facility until 2006, when the assisted living facility closed. The building was vacant from 2006 until October 29, 2012 when a fire destroyed the building.

At the time of the fire, Dr. Ashraf was the named insured on an insurance policy with State Auto Property and Casualty Insurance Company ("State Auto") that covered the building. The policy provided coverage for up to $420,228.35, with an additional $22,141.69 in coverage for personal property. In addition to the building and personal property coverages, the policy contained separate coverage for debris removal and pollutant removal.

The policy contained two vacancy provisions:

> Conditions suspending or restricting insurance. Unless otherwise provided in writing added hereto this Company shall not be liable for loss occurring
>
> (a) while the hazard is increased by any means within the control or knowledge of the insured; or
>
> (b) while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of sixty consecutive days; or
>
> (c) as a result of explosion or riot, unless fire ensues, and in that event for loss by fire only.
>
> …
>
> b. Vacancy Provisions
>
> If the building where loss or damage occurs has been vacant for more than 60 consecutive days before that loss or damage occurs:

(1) We will not pay for any loss or damage caused by any of the following even if they are Covered Causes of Loss:

(a) Vandalism;

(b) Sprinkler leakage, unless you have protected the system against freezing;

(c) Building glass breakage;

(d) Water damage;

(e) Theft; or

(f) Attempted theft.

(2) With respect to Covered Causes of Loss other than those listed in b.(1)(a) through b.(1)(f) above, we will reduce the amount we would otherwise pay for the loss or damage by 15%.

The policy contained the following pollutant removal provisions:

Pollutant Clean Up And Removal

We will pay your expense to extract "pollutants" from land or water at the described premises if the discharge, dispersal, seepage, migration, release or escape of the "pollutants" is caused by or results from a Covered Cause of Loss that occurs during the policy period.

* * *

This Additional Coverage does not apply to costs to test for, monitor or assess the existence, concentration or effects of "pollutants." But we will pay for testing which is performed in the course of extracting the "pollutants" from the land or water.

"Pollutants" was defined in the policy as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed."

After Dr. Ashraf reported the fire to State Auto, State Auto informed Dr. Ashraf that, pursuant to the vacancy provision contained in the policy, any amounts due under the policy would be reduced by 15% if the building had been vacant for more than sixty consecutive days preceding the fire. During the pendency of his claim, Dr. Ashraf demolished and removed the building.

In September 2013, State Auto sent Dr. Ashraf an advance of $25,000.00 and an accompanying letter, informing Dr. Ashraf that the remainder of the applicable coverage would be paid out at the conclusion of the investigation. On January 28, 2014, State Auto sent Dr. Ashraf $332,194.10 for building coverage and a separate $22,141.69 for personal property coverage. State Auto informed Dr. Ashraf that the building coverage had been reduced by 15% - or $63,034.25. State Auto further explained:

In Dr. Ashraf's case, the building satisfies the definition to be considered vacant. In fact, this building appears to have been vacant for almost six years before the loss occurred. The loss at issue was a fire and that qualifies as a covered cause of loss. Because the building was vacant at the time of the loss and because this was a covered cause of loss, then State Auto is permitted, by the terms of the policy, to reduce the amount they would "otherwise pay" by 15%.

State Auto then provided Dr. Ashraf with $10,000.00 in additional coverage for debris removal. State auto did not provide any coverage for pollutant removal. Dr. Ashraf contended that

he was owed an additional $30,000 in debris removal coverage and $4,925.00 for asbestos removal and testing.

On August 28, 2014, Dr. Ashraf filed an action with the Circuit Court of Marion County. Dr. Ashraf alleged that he was entitled to the full policy limit for building coverage and alleged that State Auto had improperly applied the 15% reduction under the vacancy clause. HE alleged that the policy was a "valued policy" under W. Va. Code § 33-17-9 which requires that the face value of the policy be paid out in the event of a total loss by fire. Dr. Ashraf also pointed to language contained in the policy that provided "In case of total loss by fire or other covered cause of loss, we will pay the Limit of Insurance stated in this Coverage Part applicable to the real property."

Dr. Ashraf also alleged that the pollutant removal provision of the State Auto policy covered asbestos and, thus, he was entitled to coverage for the costs associated with testing and removal of the asbestos found when the building was demolished. Here, Dr. Ashraf argued that any ambiguity in which "pollutants" were covered by State Auto's policy should have been resolved in his favor.

In response, State Auto argued that while the valued policy law contained in W. Va. Code § 3317-9 did require coverage for a total fire loss, it did not nullify the conditions and exclusions contained in a valued policy issued by an insurer. State Auto reasoned that the vacancy clause was merely an anticipatory limitation (as opposed to a denial of coverage) that contemplated by policy limits.

As to Dr. Ashraf's debris and pollutant coverage, State Auto argued that its pollutant coverage was limited to instances where pollutants were present in the "land or water" of an insured property, neither of which contemplated asbestos removal for a demolished building.

Holding:

The vacancy provision was a matter of first impression before the Court. The Court held that the valued policy law permitted the 15% vacancy reduction contained in the policy. The Court began by reciting the rationale for the valued policy law – an attempt by states to address Insurers' overvaluation of insurance policies and corresponding premiums and then challenging the value of a property when there is a loss. The Court then found that the 15% reduction did not violate the valued policy law because it was an "anticipatory limitation" that corresponded with the increased risk of loss brought on by extended vacancies.

The Court also found that the State Auto policy did not provide coverage for the asbestos testing and removal at the building. The Court pointed to the plain language of the policy which the Court interpreted to require a "discharge, dispersal, seepage, migration, release or escape of the pollutant into the land or water, caused by or resulting from a covered cause of loss, and the pollutant then extracted from the land or water." In finding that the asbestos was not a pollutant as defined in the policy, the Court discussed *Ruffin Road Venture Lot IV v. Travelers Property Casualty Co. of Am*., 2011 U.S. Dist. LEXIS 66095 (S.D. Cal. 2011). In *Ruffin*, an insured sought removal coverage under a pollutant removal policy where rocks and water had entered through an air conditioning unit. The pollutant removal provision in *Ruffin*, like the one before the court in Ashraf, provided coverage to remove pollutants from the "water or land" of the insured premises. The Court in *Ruffin* found that there was no coverage for the rocks and water because the air conditioning unit was self-contained and therefore not part of the land or water. The Supreme Court in Ashraf similarly held that the asbestos contained in the building – an analogous self-contained unit on the insured property, was not a pollutant within the limits of the policy.

Impact on Business:

The Court's decision represents the first valued policy related decision in a number of years. By permitting State Auto to reduce the building coverage by 15%, the Court provided a common sense interpretation of a historically strictly interpreted law. In addition, the Court's recognition and enforcement of a plainly-stated vacancy provision should also provide insurers and insureds alike that where an appropriate premium is charged and collected, the plain language of a policy will be enforced.

Mark W. Matkovich, State Tax Commissioner and Larry A. Hess, Assessor of Berkeley County, ***WV v. University Healthcare Foundation, Inc.***
795 S.E.2d 67 (W.Va. 2016). Rehearing denied January 4, 2017.

What the Court was Asked to Decide:

Whether the Business Court Division of the Berkeley County Circuit Court erred in ruling that each of the 18 separate condominium suites of a multi-unit building owned by a charitable foundation, whose sole charitable purpose was to support a charitable hospital, were exempt from ad valorem property tax, when for-profit healthcare providers, each functioning as a part of the hospital's healthcare program, occupied 3 of the suites, while the others were occupied by charitable healthcare organizations, either as divisions of, or entities affiliated with, the charitable hospital?

What the Court Decided:

Reversing the lower court, the Court held that, because 3 of the suites were occupied by for-profit healthcare providers, and 1 other housed the charitable hospital's Wellness Center, which provided preventive healthcare services to members of the public as well prescribed therapeutic services to its cardiac rehabilitation patients, none of the suites were exempt from tax. In doing so, the Court expressly acknowledged, but disregarded without explanation, the Assessor's land book listings of the suites as legally separate parcels, and his earlier treatment of most as exempt.

Facts:

The parties stipulated that:

(1) University Healthcare Foundation, Inc. (UHF) is a charity exempt from federal income taxes, the sole charitable purpose of which is to support the charitable functions of West Virginia Hospitals–East, Inc. (WVUH-E), also a charity exempt from federal income taxes;

(2) UHF owned certain improved real property in Berkeley County, West Virginia, being a part of WVUH-E's campus, and designated as the Dorothy McCormack Cancer Treatment and Rehabilitation Center (DMC), and consisting of various sub-parcels/suites separately identified by the Assessor on the land books as being a "common interest community" as defined in law;

(3) Three of the suites are occupied by: (A) a private physician whose presence in the DMC was, due to his capacity as director of WVUH-E's cardiac rehabilitation unit there, required by federal healthcare regulations; (B) a joint venture between a private cancer radiation therapy provider and UHF and (C) Patient Transport, a private entity under contract to provide transportation for WVUH-E's out-patients receiving treatment on its campus;

(4) The remaining 15 DMC suites were occupied by UHF, by University Healthcare Physicians (UHP), a federal income tax exempt affiliate of WVUH-E employing physicians to treat its patients, by the American Red Cross and by various departments of WVUH-E, including its Wellness Center, where its cardiac rehabilitation patients and members of the public were provided both therapeutic and preventive healthcare services.

The Business Court Division found that:

(1) The DMC, located on WVUH-E's campus, is an operational extension of the hospital as required by federal regulations for reimbursement of patient services and by CON rules;

(2) All DMC tenants provide healthcare services that primarily and immediately further WVUH-E's charitable purpose of improving the healthcare and well-being of the community;

(3) Since it was cost-prohibitive for WVUH-E to purchase the equipment, stay current

on best practices and treatments, and attract high quality oncologists, it could not independently provide radiation oncology services, so that Eastern Panhandle cancer patients had to go to other states for treatment, UHF built the DMC exclusively so WVUH-E could establish a radiation oncology department, for the operation of which the latter contracts with the private provider;

(4) UHF leases 1 of the other 15 suites in the DMC to WVUH-E for use as the latter's Wellness Center to primarily and immediately fulfills the charitable purpose of offering cardiac and physical rehabilitation services to the hospital's patients, and so members of the general public could improve their health through a hospital-supervised, preventive-health physical fitness program, and, thus, providing the community benefit of better healthcare outcomes;

(5) Such a program is particularly important in the Eastern Panhandle because West Virginia residents are some of the nation's most obese (behind only Louisiana and Mississippi), and the health of Berkeley County residents, in particular is among the bottom three counties in West Virginia; and, thus, the Wellness Center immediately supports WVUH-E's charitable mission and provides far more than mere recreational use to its members;

(6) Because federal law requires it to enter into arms-length agreements with physicians and other healthcare providers, at comparable market rental rates, in order to avoid self-referral penalties, UHF collects rent from each of the tenants in the DMC, other than the American Cancer Society, which rents are used to pay for the debt service and upkeep of the DMC, but if UHF were to realize any surplus revenue from rents collected from the DMC's tenants, it would be applied to maintain the property and to its charitable purpose of community healthcare;

(7) Likewise, were WVUH-E to realize surplus revenue from its operations, it is also required to be used for its charitable mission by replacing equipment, purchasing new technology, improving employee pay, and recruiting quality physicians;

(8) Both UHF and WVUH-E are required to report, on federal tax returns, as taxable, any income that is not directly related to fulfillment of its charitable purpose; but neither UHF nor WVUH-E have had to treat the rents collected from the DMC (including WVUH-E's Wellness Center) as taxable unrelated business income; and

(9) The operations of both UHF and WVUH-E serve to relieve the burdens on state and local government, by making charitable healthcare and preventive healthcare available to the community, but also by providing both significant well-paid employment in the community and specific logistical support to local law enforcement agencies.

Holding:

Chief Justice Loughry, writing for the divided Court, correctly cited the general rule that it is the "physical use" of property which, in part, determines its taxability. However, the Court then inexplicably held that, regardless of the role a tenant's physical use may play in the accomplishment of the landlord organization's charitable purpose, when a charitable organization's property is leased to a for-profit entity, the property is treated as being used for (the tenant's) profit. Thus, such property cannot satisfy the test for charitable tax exemption, precluding the use or leasing out of exempt property "for profit." W.Va. Code §11-3-9(a)(12).

By applying that holding to all eighteen of the suites in the DMC, despite the fact that all but three of them were leased to non-profit charitable entities, the Court ignored the legal effect, recognized by the Assessor, of their separate sub-parcel status, and, as to most of which the Assessor had previously found to be tax exempt due to the charitable status of their tenants.

Even more importantly, the Court's holding misapplied its own clearly implied rule of charitable property tax exemption that, when the property of a charitable organization is leased, its exemption from tax will turn, in part, on the relationship between the lessee's use and the landlord's charitable purpose. Thus, in the leading case on the question, the Court held, in effect, that, because the private, individual benefit, to the low-income seniors living in and renting apartments at below-market rates, was essential to the charitable purpose of the charitable landlord, the property was exempt. *Wellsburg Unity Apartments Inc. v. County Commission of Brooke County,* 503 S.E.2d 851 (1998).

Likewise, the Court's holding ignores and is directly at odds with applicable provisions of the legislative rules which have long governed such matters and which, unambiguously, and broadly define charitable purpose. W.Va. Code of State Regulations, §§110-3-1 et seq. Those rules also expressly provide that, so long as there is no private economic inurement beyond reasonable charges for rent or services, including those provided by for-profit individuals and entities, the existence of such charges for the use of the property of a charitable organization is entirely consistent with the tax exemption requirements. Indeed, the Court's holding to the contrary is made all the more troubling given that those rules were, by its own mandate, adopted decades ago to overcome the rampant arbitrariness and lack of uniformity that had, theretofore, characterized the application of charitable property tax exemptions in the several counties. *State ex rel. Cook v. Rose, State Tax Commissioner*, 299 S.E.2d 3 (1982), overruled on other grounds by *City of Morgantown v. West Virginia University Medical Corp.*, 457 S.E.2d 637 (1995).

Finally, apparently on the basis of facts involving the significant number of non-patients using WVUH-E's Wellness Center at the DMC for supervised preventive healthcare and the relative amount of square footage devoted to such use, the Court simply overruled the lower court's finding about the charitable nature of that facility's use. In doing so, notwithstanding the largely stipulated, well-supported and detailed operative facts presented in support of the lower court's finding on that factual question, along with the standard of review granting deference to such findings, absent clear error, the Court, by omitting any such finding of clear error, simply approached the entire issue as being one strictly of legal interpretation. Thus, the Court's majority appears to have arbitrarily substituted a new substantive legal concept of charitable purpose which effectively nullified the express legislative rules governing that question of law by overruling the lower court's faithful application of the same.

Impact on Business:

Although this case involves charitable, not-for-profit parties, because that is the income-tax status of most healthcare institutions, which, in turn, and in coordination with a vast array of for-profit entities (e.g. physicians, medical laboratories, etc.), represent approximately one sixth of our nation's and state's private economic activity, the adverse implications of this ruling for business is beyond question. Thus, with its muddling of the heretofore settled substantive rules governing charitable property tax exemptions, the Court invites a return to the arbitrariness and lack of uniformity which once characterized such questions, and which created significant uncertainty for private investments in the healthcare industry. Beyond healthcare, a straight-forward application of the Court's holding here would raise such questions as whether the exemption of the property of any charitable organization would be lost simply because it had granted a utility easement over that property to a for-profit provider of electric power.

University Park at Evansdale LLC v. Mark A. Musick, Assessor of Monongalia County
792 S.E.2d 605 (W.Va. 2016)

What the Court was Asked to Decide:

Whether the Monongalia County Circuit Court erred in ruling that the Monongalia County Commission, sitting as a Board of Equalization and Review (BER), had correctly sustained the proposed assessed value of the taxpayer's leasehold interest, and had correctly overruled the challenge to that value, on the grounds that the taxpayer's contention that, due to its terms, the leasehold had no taxable value and was, instead, a challenge to its legal taxability which had to be first presented to the State Tax Commissioner and not to the BER?

What the Court Decided:

Reversing the lower court, the Court held that, based on a straight forward reading of the applicable statutes, the taxpayer's challenge of the assessed value of its leasehold did not involve a question of legal taxability and that as a result, the taxpayer was correct in challenging the assessed value of its leasehold interest through the BER and was not required to present the question of legal taxability to the State Tax Commissioner.

Facts:

The taxpayer leases certain improved real property in Monongalia County from its owner, West Virginia University (WVU). The total usable space in the property consists of 97% dedicated to multiple student housing living units along with 3% designed as retail space. The housing units are leased back to WVU to offer housing to its students in the same manner as WVU-owned dormitories. Although the taxpayer retained the right to lease the retail space for its own account, among the terms of the lease is a provision which precludes leasing of the retail space to any tenant without the consent of WVU.

In placing a taxable value on the taxpayer's leasehold interest, the Assessor essentially ignored the fee ownership of WVU and used the methods for valuing commercial real property (e.g. cost, market, income, etc.) as if the taxpayer were, instead, an owner of the fee interest in the property. However, based on the limitation of its right to sublease the retail space to any tenant in the market place without WVU's consent, the taxpayer contended that, though legally taxable, its entire leasehold interest was worthless in the market. Thus, the taxpayer argued, due to the absence of free assignability, its leasehold interest had a value of $0 regardless of its other economic terms.

Holding:

Justice Workman, writing for a unanimous Court, reversed the lower court's ruling and remanded the matter for determination of the taxable value of the taxpayer's leasehold interest, if any. In doing so, the Court recognized that, while under the law, the fee ownership interest of WVU, as a unit of the State's government, is exempt from property tax, long-standing case law provides that when such public property is leased to a private, non-public tenant, the tenant's separate leasehold interest is legally taxable, barring the existence of some other express exemption (e.g. charitable, etc.)

However, the Court held that under both case law and express legislative rules promulgated by the State Tax Department, a privately-held leasehold interest, though legally taxable, only has separate value to tax if, due to its terms, it is a so-called "bargain lease." Indeed, there is a judicial presumption that absent proof of such separate value in a leasehold due to its unique terms, the entire value of leased property is attributed to the fee interest. A leasehold interest would be a bargain lease if: (a) it is freely assignable and (b) due to its favorable economic terms, a self-

interested purchaser, in the marketplace, would be willing to pay valuable consideration to acquire the tenant's rights in the leasehold.

In fairness to the lower court, the Court did acknowledge that the imprecise terminology it employed in an earlier case presenting similar circumstances likely contributed to the confusion about the important legal procedural difference between legal taxability and the absence of taxable value.

Impact on Business:

This clear, unanimous ruling returns much-needed certainty to an important legal issue which is regularly presented by the type of capital lease financing that is found in many public-private economic development projects around this state. Thus, whether overt payments-in-lieu-of-tax are used or not, the property tax treatment of the private industrial entities' leasehold interests in such projects is often essential to their decision to make the capital investment in question.

Although the Court in its decision did not actually apply the substantive rules for determining the absence of taxable value in a leasehold, whether due to the lack of assignability or the other factors contained in the Tax Commissioner's regulations addressing the same, by recognizing the principle underlying such a conclusion and by confirming the proper procedure to address that question, the Court's ruling provided much-needed predictability to developers and tax administrators, alike. Therefore, the Court's ruling is a most welcome clarification and confirmation of the legal treatment of such arrangements, and, as a result, it should foster continued and expanded use of such structures and the increased employment they bring.

BRG Associates, LLC v. Larry Hess, Assessor of Berkeley County
2017 WL 656999 (W.Va. 2017)

What the Court was Asked to Decide:

Whether the Berkeley County Circuit Court erred in ruling that the Berkeley County Commission, sitting as a Board of Equalization and Review (BER), had correctly sustained the proposed assessed value of the taxpayer's fee interest, and had correctly overruled the challenge to that value, on the grounds that the taxpayers failed to present clear and convincing evidence that respondent's valuation of the subject properties was erroneous?

What the Court Decided:

Affirming the lower court, the Court held that, based on a straight forward reading of the applicable statutes, the taxpayer's challenge of the assessed value found that the substantial evidence in the record showed that respondent's valuations of the subject properties using the cost method were not plainly wrong and found that petitioner failed to meet his substantial burden below of showing error with regard to the method by which respondent evaluated the subject properties.

Facts:

In March of 2012, petitioner purchased two office buildings (the "subject properties") located at 300 Foxcroft Avenue and 400 Foxcroft Avenue in Martinsburg, West Virginia. A January 17, 2012, appraisal (the "2012 appraisal") valued the properties together at $4,035,000. The appraisal was based on the income approach to valuation

Three years after the sale of the subject properties, Assessor valued the subject properties for Tax Year 2015 using the cost method of valuation at a total appraised value of $5,662,200. Taxpayer petitioned the Berkeley County Commission, sitting as the Board of Equalization and Review (the "BER"), for a review of the assessments.

The BER upheld respondent's valuation of the subject properties on the ground that respondent's use of the cost approach was appropriate because the use of the income or market approach was "not supported by the evidence."

Holding:

In a Memorandum Decision, the Court affirmed the lower court's determination that the taxpayer failed to meet its burden to show that the assessment was erroneous.

The Court recognized the different approaches to determining value, however, the Court declined to require the Assessor in determining the fair market value of property to look at alternative methods of valuation when the Assessor does not have sufficient data to perform the appraisal method.

Impact on Business:

The Court continues to allow County Assessors to ignore alternative valuation methodologies to the cost approach (i.e. income approach) to value commercial property when an Assessor does not attempt to get the required data to perform the appraisal.

Mark Matkovich, West Virginia State Tax Commissioner v. CSX Transportation, Inc.
793 SE 2d 888 (W.Va. 2016)

What the Court was Asked to Decide:

Whether the Kanawha County Circuit Court erred in ruling that the Tax Commissioner's allowance of a credit, to be applied to the use tax due from CSX Transportation, Inc. ("CSX") for sales taxes CSX paid to other states upon its purchases of motor fuel therein, coupled with a denial of such a credit for the sales taxes CSX paid to the cities, counties, and other localities of such states, unfairly discriminates against interstate commerce in violation of the dormant Commerce Clause. The circuit court further concluded that denying the credit for sales taxes paid to municipalities results in taxpayers potentially paying greater taxes on interstate purchases of motor fuel than on similar intrastate purchases. From this adverse ruling, the Tax Commissioner appeals to this Court.

What the Court Decided:

The Court held that a state tax on interstate commerce will not be sustained unless it: (1) has a substantial nexus with the State; (2) is fairly apportioned; (3) does not discriminate; and (4) is fairly related to the services provided by the State.

West Virginia imposes a motor fuel use tax on fuel used in the state. The tax also applies to the use of fuel within West Virginia but purchased outside the state. The tax is calculated based upon actual miles travelled within the state and the average cost of fuel. West Virginia allows taxpayers to credit taxes paid on that fuel to other states. The credit-enabling legislation explicitly includes states but fails to address municipalities. The Court found that CSX is entitled to a credit under W. Va. Code § 11-15A-10a (2003) for the sales taxes it paid to other states' subdivisions on its purchases of motor fuel therein.

Facts:

The facts giving rise to the case were not disputed by the parties. CSX operates an interstate rail transportation system. Although CSX is a Virginia corporation with its principal place of business in Jacksonville, Florida, CSX also operates trains and maintains rail yards throughout the State of West Virginia. In 2010, an auditor from the West Virginia State Tax Department ("Tax Department") met with a representative of CSX at one of its West Virginia rail yards to conduct a field audit. As a result of this meeting, the auditor determined that CSX imports fuel that it uses in West Virginia, and CSX was directed to begin paying the West Virginia Motor Fuel Use Tax ("use tax").

W. Va. Code § 11-15A-10a, affords taxpayers a credit for sales taxes paid to other states, which offsets the use tax a fuel importer must pay. Following the assessment, CSX filed amended use tax returns seeking a refund of the sales taxes it had paid on its motor fuel purchases to cities, counties, and localities of other states.

The Tax Commissioner rejected CSX's refund request. During the evaluation of CSX's refund request, auditors with the Tax Department concluded that CSX had been improperly calculating the sales tax credit it was entitled to claim.

Holding:

Justice Davis, writing for a unanimous Court, affirmed the lower court's ruling granting the refund request of CSX Transportation. In doing so, the Court recognized that, a state tax on interstate commerce will not be sustained unless it: (1) has a substantial nexus with the State; (2) is fairly apportioned; (3) does not discriminate; and (4) is fairly related to the services provided by the State. The Court found that CSX was entitled to a credit for the sales taxes it paid to other states' subdivisions on its purchases of motor fuel therein.

The West Virginia Supreme Court of Appeals explained that the Commerce Clause explicitly grants Congress the power "to regulate commerce with foreign nations and among the several states." The constitutional principle does not allow states to enact legislation that discriminates or inhibits interstate commerce. The Court found the tax failed the apportionment prong of the *Complete Auto* test to wit: In applying the *Complete Auto* test to the credit mechanism, the Court held that the credit was unconstitutional. The Court held that the credit must be applied to taxes paid to both state governments and municipal governments because otherwise an out-of-state taxpayer would be subjected to higher taxes than a local taxpayer purchasing and using the same fuel within West Virginia.

Impact on Business:

The Court ruling interprets the Commerce Clause. This case will impact all multistate corporations that pay sales and use taxes in West Virginia and other taxing authorities, including other states and their political subdivision. It provides that a business may be entitled to a credit for certain taxes paid to the other taxing authorities against their West Virginia taxes.

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1624 Kanawha Blvd. East • Charleston, WV 25311
Phone: 304.342.1115 • Fax: 304.342.1130

wvchamber.com