Legal Backgrounder

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Returning the Mountain State to the Mainstream, West Virginia Adopts Sweeping Legal Reforms

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During its 2015 session, the West Virginia Legislature took action to improve the legal environment for business there. This Legal Backgrounder details three major categories that the legislation encompasses: (1) tort reform; (2) employment law reform; and (3) consumer protection reform. With these sweeping changes, the West Virginia Legislature seeks to improve the economic climate and bring business back to the Mountain State.

Tort Reform

Comparative Fault. The premise behind House Bill 2002 is that a tortfeasor should only be responsible for his or her share of any damages. Previously, all defendants were both jointly and severally liable, and any defendant at least 30% responsible could be on the hook to pay the entire damages award if the other defendants were unable to satisfy their portion. Moreover, in certain circumstances, the plaintiff, after six months of unsuccessful collection efforts, could petition the court to require a defendant at least 10% responsible to pay the entire damages award.

Under House Bill 2002, liability for defendants is several only.[1] Moreover, this legislation allows the jury to allocate fault to non-parties and settled-parties in the litigation, thus allowing a jury to allocate fault to *all* interested parties. Therefore, each defendant is only responsible for his or her true share of any damages. Further, this legislation requires a finding of fault of 51% to preclude plaintiff from any recovery.[2] While the plaintiff can still petition the court to reallocate part of the uncollected judgment from insolvent defendants, such reallocation is limited to each defendant's percentage of fault.

Punitive Damages. West Virginia has seen its fair share of punitive damage awards that greatly exceed any relationship to the compensatory damages in the case. For example, on June 18, 2014, the West Virginia Supreme Court of Appeals in *Manor Care, Inc. v. Douglas*[3] reduced a jury's previous punitive award of $80 million to $31,978,521.93—an amount that was a ratio of 7:1 in punitive to compensatory damages.

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[1] One of the exceptions to this general rule exists when evidence establishes that defendants conspired to deliberately injure the plaintiff.

[2] Previously, plaintiff was precluded from recovery if he or she was 50% or more at fault.

[3] 763 S.E.2d 73 (W. Va. 2014).

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The new law caps punitive damage awards[4] at the greater of four times the compensatory damages or $500,000. The $31,978,521.93 punitive award in *Manor Care* would have been reduced to $18,378,460.88 under the new law, a difference of more than $13.5 million. Further, this bill increases the burden of proof plaintiffs must meet in order to receive punitive damages.

Premises Liability. Senate Bills 3 and 13 reestablish common-law premises liability in West Virginia. Prior to their passage, the West Virginia Supreme Court of Appeals eliminated the open and obvious doctrine[5] through judicial decree in *Hersh v. E-T Enterprises, Limited Partnership* and, instead, imposed an affirmative duty on owners to remedy their properties from all known hazards.[6] Senate Bill 13 overturns this decree and codifies the open and obvious doctrine into West Virginia statutory law. Moreover, under Senate Bill 3, landowners owe no duties to trespassers, which the *Hersh* decision left open. Senate Bill 3 limits a landowner's liability to a trespasser to only those situations in which the landowner intentionally or wantonly injures the trespasser.

Choice of Law. Before the enactment of House Bill 2726, out-of-state plaintiffs and plaintiffs' attorneys flocked to West Virginia and crowded the courts' dockets to pursue product-liability cases because West Virginia's choice-of-law provision barred application of the learned intermediary doctrine as a matter of public policy.[7] Therefore, by filing in West Virginia, non-resident plaintiffs avoided this affirmative defense in pursuing a product-liability case. House Bill 2726 eliminates the substantive advantage for non-resident plaintiffs to file product-liability cases in West Virginia by finding that the public policy of this state is to apply the law of the state where the plaintiff's injury was sustained.

Revised Uniform Arbitration Act. Senate Bill 37 amends West Virginia's Arbitration Act to modernize procedures and follow the 2000 Revised Uniform Arbitration Act. For decades, the West Virginia Supreme Court of Appeals viewed arbitration as hostile to the judicial process, and no amendment had been made to the West Virginia Arbitration Act since 1931.[8] Senate Bill 37 recognizes the import of arbitration in resolving disputes.

In an April 24, 2015 opinion in *Schumacher Homes of Circleville, Inc. v. Spencer*,[9] the West Virginia Supreme Court of Appeals suggested that soon-to-be-enacted West Virginia Code § 55-10-8(c), which required courts to determine the enforceability of an arbitration agreement, is preempted by the Federal Arbitration Act and the United States Supreme Court's decision in *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010). Accordingly, Senate Bill 37 will likely face a preemption challenge early on.

Expansion of the Medical Professional Liability Act. Senate Bill 6 expands the Medical Professional Liability Act to other health-care professionals. Specifically, the Legislature enlarged the definitions of "health-care provider" and "health care" to cover most, if not all, employees working in the health-care industry including, among others, pharmacists, EMTs and nursing care workers. Additionally, this legislation created a rebuttable presumption that staffing was appropriate if the nursing home met the State's minimum staffing criteria. The Legislature enacted these changes, in part, to address an increase in litigation brought against West Virginia nursing homes.

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[4] In addition to capping punitive damage awards, Senate Bill 421 also creates special procedures to bifurcate the punitive damage phase from the liability phase of a trial.

[5] The open and obvious doctrine shields a premises owner from liability for injuries persons sustained from hazards that are obvious, reasonably apparent, or as well known to the person injured as they are to the owner.

[6] 752 S.E.2d 336 (W. Va. 2013)

[7] *See* syl. pt. 1, *State ex rel. Johnson & Johnson Corp. v. Karl*, 220 W. Va. 463, 647 S.E.2d 899 (2007) ("Under West Virginia products liability law, manufacturers of prescription drugs are subject to the same duty to warn consumers about the risks of their products as other manufacturers. We decline to adopt the learned intermediary exception to this general rule.").

[8] *See Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203-04 (U.S. 2012) ("West Virginia's prohibition against predispute agreement to arbitrate personal-injury or wrongful-death claims against nursing homes is a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA [Federal Arbitration Act].").

[9] 2015 WL 1880234 (W. Va. Apr. 24, 2015).

The "Creating Asbestos Bankruptcy Trust Claims Transparency Act" and the "Asbestos and Silica Claims Priorities Act". These two laws are aimed at preventing asbestos claimants and their attorneys from recovering fraudulent or duplicative awards. Prior to their passage, asbestos claimants commonly sought compensation in the courts against solvent companies, while simultaneously requesting relief from asbestos bankruptcy trusts. Under the first new law, claimants must disclose existing or potential asbestos litigation in bankruptcy trust claims at least 120 days before trial. If the claimant reveals to the court that the claimant may possess a cognizable claim against an asbestos trust, the court has discretion to stay a plaintiff's asbestos suit until the claimant proceeds on the disclosed claim. Further, 90 days before trial, the defendant can move to stay the litigation, based on plaintiff's failure to disclose a potential pending claim.

The second law establishes medical criteria and procedures for asbestos or silica claims. It prohibits: (a) consolidation of cases for trial except those relating to the exposed person and members of the household; (b) class actions; (c) any award of damages for fear of increased risk of future disease; and (d) provides for a statute of limitations for these claims.

Non-Partisan Election of Judges. House Bill 2010 implements non-partisan election of judges. Previously, West Virginia was one of seven states that elected its judicial officers through a partisan ballot process. West Virginia voters will now elect judges in the primary election in May, rather than the general election in November. This change enables newly-elected judges to participate in the National Judicial College before taking the bench.

Employment Law

Wage Payment Collection Act. Senate Bill 12 allows employers to pay terminated workers during the next pay period. Prior to this legislation, West Virginia law required an employer to pay a terminated worker within three days of their termination. If the employer failed to pay the worker in this short period, the statute allowed the worker to file suit and recover three times their wages in damages, as well as attorneys' fees. This law resulted in a great deal of litigation and losses to employers. Under Senate Bill 12, if the employer maintains its regular payroll processes following the termination of its employee, no violation of the Wage Payment Collection Act exists.

Duty to Mitigate Damages in Employment Claims. Senate Bill 344 codifies a duty for terminated employees to mitigate their past and future wages, regardless of whether the employer fired the employees with malicious intent. Formerly, West Virginia was the only state in the country that permitted a "double recovery" to aggrieved employees who could show that their termination occurred maliciously. This double recovery occurred because no affirmative duty existed to mitigate damages and, therefore, the courts excluded evidence of subsequent salary. Now, employees have an affirmative duty to mitigate their damages, regardless of whether their termination occurred maliciously. Moreover, under this new legislation, the trial judge makes preliminary rulings on the appropriateness of the remedy of reinstatement or front-pay award. If the court decides to award front pay, the judge, not the jury, determines the amount of this award. This dramatic change returns West Virginia to the mainstream regarding this employment law principle.

Deliberate Intent. Unlike most states, West Virginia recognizes a cause of action for deliberate intent.[10] Previously, the concept of deliberate intent stripped an employer of its workers' compensation immunity and made the employer susceptible to a judgment if plaintiff proved five statutory requirements or if the plaintiff proved the employer acted with the specific intent to injure the plaintiff. House Bill 2011 amends the deliberate intent statute to strengthen the actual knowledge requirement recently weakened in a West Virginia Supreme Court of Appeals ruling.[11] Under this legislation, plaintiffs can no longer satisfy the knowledge element through

[10] A minority of states recognize an independent tort for deliberate intent. These states include Ohio, Florida, Maryland, Washington, and Connecticut.

[11] *See McComas v. ACF Indus.*, 232 W. Va. 19, 29, 750 S.E.2d 235, 245 (2013) (Loughery, J. dissenting) ("The majority's opinion constitutes but yet another step toward its ultimate goal of rendering our 'deliberate intent' statute a meaningless codification of simple workplace negligence standards.").

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constructive knowledge of intermediary and lower-level employees concerning an unsafe working condition. Further, the statute defines serious injury to mean an impairment of at least 13% permanent physical injury and requires more detailed proof of the unsafe working condition and its causal connection to the accident.

Consumer Protection and Foreclosures

Finally, the Legislature amended West Virginia's Consumer Credit Protection Act (WVCCPA) and eliminated a judicially-created affirmative defense of fair market value as an offset in collection proceedings.

WVCCPA. In recent years, plaintiffs brought a wave of lawsuits in West Virginia under the WVCCPA alleging abusive debt-collection practices. State courts had long addressed key WVCCPA issues on a case-by-case basis, depriving defendants of clear guidance on when a pattern or practice of calling borrowers constituted an "abusive practice." Senate Bill 542 now defines oppressive and abusive conduct to mean "[c]alling any person more than thirty times per week or engaging any person in telephone conversation more than ten times per week . . . ."

Another significant change in the WVCCPA requires debtors to provide written notice of representation of counsel, in order for a violation of West Virginia Code § 46A-2-128(e) to occur.[12] Before this amendment, a plaintiff needed only to inform a debt collector of their retention of counsel orally.[13] This created "he said/she said" evidentiary problems in determining whether plaintiff had actually informed the collector of counsel's representation. The amendment, requiring receipt of a written document, will reduce the frequency of litigation under West Virginia Code § 46A-2-128(e).

Additionally, the law caps penalties at $175,000 per individual and requires all causes of action for alleged violations of the WVCCPA to be brought within four years of the violation. Prior to this change, an individual could initiate a cause of action within four years of the alleged violation or within one year of the individual's last loan payment or consumer transaction, thus leaving the lender or debt collector susceptible to potential claims for years or decades.

This amended legislation also contains specific venue provisions. Under the new venue statute, proper venue exists where the plaintiff has, or last had, legal residence in West Virginia, in the county in which the debt collector resides, or where the debt collector maintains its principal place of business.

Foreclosure Defense. Senate Bill 418 legislatively overturns the West Virginia Supreme Court of Appeals' decision in *Sostaric v. Marshall*.[14] In *Sostaric*, the Supreme Court of Appeals found that a debtor could assert as an affirmative defense the fair market value of its residence to offset additional money owed on a delinquent note. Senate Bill 418 eliminates this defense.

Conclusion

These legal reforms bring significant change to West Virginia's legal and business climate. Prior to these reform efforts, West Virginia, unfairly or not, received consistent criticism that its legal system treated corporate citizens unfairly. The new laws should begin easing this concern, as they provide more transparency and uniformity to West Virginia law. Although the ultimate impact of these reforms remains to be seen, a powerful message has been sent: West Virginia is committed to providing all of its citizens—individuals and corporate entities alike—a fair legal environment. These reform measures should foster further economic growth and help the Mountain State reach its economic peak.

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[12] The written representation must clearly state the attorney's name, address, and telephone number and must be transmitted through the debt collector's registered agent or to the debt collector's principal place of business.

[13] Moreover, plaintiff did not need to provide any additional information to be afforded the protections of the WVCCPA.

[14] 766 S.E.2d 396 (W. Va. 2014).

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