

W.Va. Ranked 4th.....p. 3
Voir Dire.....p. 3
\$196.2 Million Punitive Award.....p. 4
Discovery Proceeds.....p. 4
Scruggs Pleads Guilty.....p. 5
No Coverage for Death of Child.....p. 5
Commissioner Fines Insurers.....p. 6
Punitive Damage Decreasing.....p. 6
Court Overturns Common Law.....p. 7
Intoxication Exclusion Inapplicable.....p. 8
Claimants' Medical Expenses Rise.....p. 8
Dismissed Third Party Bad Faith.....p. 9
CSX Sued Over a Goose.....p. 9
Circuit Court Grants Judgement.....p. 9

MORE INFORMATION

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Insurer Prevails on Discovery Dispute

The U.S. District Court for the Northern District of West Virginia has ruled that an insurer defending a bad faith suit need only produce information of other similar suits. Thus, third party suits need not be disclosed in first party claims.

Magistrate Judge James Seibert reached this decision in *Murthy v Westbrook Cas. Ins. Co.*, Civil Action No. 5:07cv46, decided March 6, 2008). Murthy was a first party Shamblin claim filed by a physician against his malpractice insurer after an excess verdict was returned against the physician.

In his subsequent bad faith suit, the plaintiff sought: "Any and all civil actions filed" against the insurer in any West Virginia court alleging violations of W.Va.Code §33-11-4(9) in the handling of a claim asserted against an insured. Westbrook objected and provided only a listing of first party bad faith suits.

In denying the Plaintiff's Motion to Compel, the Magistrate Judge held: "It seems to the court that the elements of proof are different in first and third party bad faith claims. Therefore, what actions Defendant took in third party claims is not relevant to the issue of general business practice in first party claims."

The case settled one week later with no appeal to the District Judge.

West Virginia Ranked 4th Judicial Hellhole

West Virginia is no longer considered the worst jurisdiction in the nation. Per the 2007 Judicial Hellhole Report released in December by the American Tort Reform Association, that “distinction” is now held by South Florida. West Virginia, however, remains the only statewide hellhole.

The report states that West Virginia courts have “earned a reputation for anti-business rulings, massive lawsuits and close relationships between the personal injury bar, state attorney general and the judiciary. It is almost unique among the states in providing civil defendants with no assurance that they will receive appellate review.” The report criticized a Supreme Court opinion that places responsibility on physicians rather than pharmaceutical companies to warn patients of potential side effects of medications. Despite the ranking, the report also found “there are many judges that adhere to the law in West Virginia, as the judiciary’s handling of litigation stemming from a 2001 flood that was blamed on everyone but nature shows.”

The 2007 “Judicial Hellholes” per ATRA are:

1. South Florida
2. Rio Grande Valley and Gulf Coast, Texas
3. Cook County, Illinois
4. West Virginia
5. Clark County, Nevada
6. Atlantic County, New Jersey

“Dishonorable Mentions” are:

1. District of Columbia
2. Missouri Supreme Court
3. Michigan Legislature
4. Georgia Supreme Court
5. Oklahoma Supreme Court and Governor

In addition to these “negatives,” ATRA also identified “points of light” which, ironically, also included West Virginia.

The “points of light” are:

1. West Virginia’s Medical Malpractice Reforms
2. Ohio denying “fabricated claims”
3. Asbestos reforms
4. Florida overturning excessive verdicts
5. Mississippi Supreme Court
6. Ohio Supreme Court
7. Courts holding back public nuisance claims

ATRA is a non-profit organization headquartered in Washington, D.C. designed to educate the public about the civil justice system.



The Judicial Hellhole report is published annually to “identify areas of the country where the scales of justice are radically out of balance; and to provide solutions for restoring balance, accuracy and predictability to the American civil justice system,” the report states. The report is focused on the judiciary and the introduction to the report states: “The focus of this report is squarely on the conduct of judges who do not apply the law evenhandedly to all litigants, and do not conduct trials in a fair and balanced manner.” The project is not an effort to obtain a special advantage for defendants or to criticize the service of those who sit on juries, the report states.

continued from page 2 - WV Ranked 4th Judicial Hellhole

A separate study, conducted by two political science professors at West Virginia University, challenges the data used by ATRA in making its rankings asserting that the notion of an explosion of “frivolous lawsuits” in West Virginia is inaccurate. The in-state report found stable trends in caseload, frequent use of out-of-court settlement and few trials. The study concludes that many suits are the “result of weak or ineffective government regulation” and questions whether “better state enforcement of auto insurance coverage requirements, more traffic police, more intensive regulation of worker safety, ... better inspection of potentially dangerous products and medical practices, more professional fire departments and more fire marshals [and] the reconstruction of unsafe roads” would cause lawsuits to drop in West Virginia.

Insurers May Be Discussed in *Voir Dire*

Insurers utilizing captive law firms in West Virginia will now have their identity revealed to potential jurors in voir dire. In reaching this ruling, the West Virginia Supreme Court held in *State ex rel. Nationwide v Karl*, (No. 33651, W.Va., filed February 14, 2008), that such information is important in the jury selection process to identify potential juror bias.

However, in order to minimize any potential for juror bias arising from the association of captive counsel with an insurer, the Court has required separate *voir dire* questions regarding the insurer.

In writing for the majority, Justice Brent Benjamin held the purpose of *voir dire* is to elicit information to afford the parties an intelligent exercise of peremptory challenges. A proper subject of questioning, the Court held, is whether a potential juror has a relationship with a law firm involved in the litigation or one of its employees.

The Karl Court rejected Nationwide’s argument that disclosure of the insurer’s name would violate Rule 411 of the West Virginia Rules of Civil Procedure holding: “*Voir dire* is not the taking of evidence nor does the language of Rule 411 itself prohibit the mention of insurance for a purpose other than to prove that a person acted negligently or wrongfully.” Rule 411 states:

Evidence that a person was or was not insured against liability is not admissible upon the issue of whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, if controverted, or bias or prejudice of a witness.

The Court, however, recognized that revealing the existence of a liability insurer could lead a juror to assume that liability insurance is available to satisfy a verdict. Thus, the Court held that separate and distinct questions must be posed concerning a potential juror’s affiliation with counsel and then a question as to affiliation with the captive law firm of the insurance company.

In a footnote, the Court stated: “We observe that the issue of whether captive law firms should be permitted in West Virginia is not an issue in this proceeding seeking extraordinary relief. We do, however, take this opportunity to express our serious reservations with the practice of the use by insurance companies of in-house attorneys to represent its insureds and the operation of captive law firms in West Virginia.”

\$196.2 Million Punitive Award Upheld

Harrison County Circuit Court Judge Thomas Bedell has upheld a \$196.2 million punitive damages award against DuPont returned last fall in a class-action pollution case.

Bedell denied post-trial motions and also ordered DuPont to set aside nearly \$130 million for a medical monitoring plan. The plan, to be operated on a pay-as-you-go basis, will be administered by an Alabama law firm appointed by the Court.

The case stems from a class of 10 residents of Smelter, WV who alleged DuPont deliberately dumped heavy metals at an industrial site in Harrison County. In October, 2007, a jury awarded \$55.5 million for property damage, awarded medical monitoring for 7,000 people for 40 years and then awarded \$196.2 million in punitive damages.

DuPont said in a prepared statement it was disappointed by the ruling and plans to appeal to the West Virginia Supreme Court. "The scientific evidence simply does not warrant medical monitoring. We believe the evidence ... shows that there is no increased risk of disease to the class members," DuPont General Counsel Stacey J. Mobley said in the statement.

Discovery Proceeds Against Insurer Simultaneous with Claim Against Insured

The West Virginia Supreme Court has now permitted discovery against insurers in direct actions by third party claimants to proceed while the underlying claim is pending. In *State ex rel. Nationwide v Kaufman*, (No. 33652, W.Va., filed January 25, 2008), the Court denied a petition for writ of prohibition filed by Nationwide.

In *Kaufman*, a plaintiff was injured in a motorcycle accident. Nationwide accepted liability and paid 100% of the property damage. In exchange, the plaintiff tendered title and Nationwide sold the motorcycle and plaintiff's helmet for salvage. Thereafter, the plaintiff presented a bodily injury claim against the Nationwide insured. Nationwide again investigated the loss and, with additional information, denied liability. The plaintiff then sued the insured.

A discovery dispute soon arose and the trial court ordered production of the insured's statement from the claim file. However, *sua sponte*, the trial court also ordered production of the entire claim file. When it was not produced, the plaintiff amended his Complaint

to bring a direct action against Nationwide for spoliation, waiver and estoppel.

Nationwide moved to bifurcate and stay discovery on the direct action pending resolution of the bodily injury claim against the insured. The Circuit Court of Kanawha County denied the motion to stay discovery and took under advisement the motion to bifurcate. Nationwide then pursued a Petition for Writ of Prohibition against Judge Kaufman. The insured joined in the Petition due to the order compelling production of the claim file which contained attorney-client privileged materials.

The Supreme Court, however, denied the Petition and in so doing set forth new standards for trial courts to consider when ruling on motions to stay discovery against insurers in direct but non-bad faith cases when the insured and insurer are both defendants.

The party seeking to stay discovery has the burden of proof on the issue.

Scruggs Pleads Guilty to Bribery

Richard “Dickie” Scruggs, once known as the “Tort King” for his involvement in tobacco litigation and most recently Hurricane Katrina litigation, plead guilty to bribery in Mississippi on March 14.

Scruggs and associates, including his son Zachary, were indicted in November in the U.S. District Court for the Northern District of Mississippi for conspiring to bribe circuit court Judge Henry L. Lackey in the amount of \$40,000.00 for a favorable ruling in a case involving more than \$26.5 million in attorney fees in a Katrina-related settlement with State Farm.

At a hearing before U.S. District Judge Neal Biggers, Scruggs admitted he was involved in “earwigging” Judge Lackey. When pressed, he stated:

COURT: So you agree - - are you telling me that you did join the conspiracy, and you did furnish some money to give to Judge Lackey in return for him issuing an order in your favor in this case? Is that what you’re saying? Do you disagree with that?

SCRUGGS: That’s what I’m saying.

Scruggs faces up to five years in prison and \$250,000 in fines and is expected to surrender his law license. Two others, attorney Timothy Balducci and former Mississippi auditor Steve Patterson, previously plead guilty and agreed to assist federal prosecutors. Zachary Scruggs remains a defendant and is set to go to trial in late March.

Darren McKinney, spokesman with the American Tort Reform Association, said he hopes the plea serves to shed light on a court system in Mississippi that “is rightfully notorious for this type of thing — this overly cozy relationship between plaintiffs’ attorneys and judges. We hope this successful prosecution will encourage other state and federal prosecutors to look at these attorney-judge relationships.”

The Mississippi State Bar has now petitioned the Mississippi Supreme Court to have Scruggs disbarred.

No Coverage for Sexual Molestation Death of Child

In granting summary judgment to an insurer, the U.S. District Court for the Southern District of West Virginia has held that a policy which bars coverage for sexual molestation is clear and unambiguous and must be enforced as written.

In *Westfield Ins. Co. v Merrifield*, Civil Action No. 2:07cv0034 (decided February 5, 2008), Judge Joseph Goodwin reviewed Westfield’s “Homepak” policy in light of allegations against a physician and his wife for medical negligence and civil conspiracy.

The underlying claim arose following the death of a three-year-old. His Estate claimed the child died from physical and sexual abuse. The Merrifields’ son was subsequently convicted of first degree murder, death of a child by guardian or custodian and sexual abuse by a guardian. The Estate, however, also claimed that Dr. and Mrs. Merrifield were liable for the child’s death because Dr. Merrifield was negligent in his treatment of the child and did not report the abuse to authorities; the Estate claimed Mrs. Merrifield gave untruthful information to the West Virginia Department of Health and Human Resources during its investigation.

Westfield refused to defend or indemnify Dr. or Mrs. Merrifield and filed a declaratory judgment action concerning exclusions in their homeowners’ policy which the District Court upheld.

As to Dr. Merrifield, the Court found that the claims did not constitute an “occurrence.” Moreover, the Court found that even if the acts did constitute an “occurrence,” such were excluded by a professional services exclusion.

As to Mrs. Merrifield, the Court concluded that the alleged acts of conspiring to withhold information from DHHR was likewise excluded from coverage because the policy did not apply to bodily injury “arising out of sexual molestation, corporal punishment or physical or mental abuse.” The bodily injury to the child, the Court held, arose from sexual molestation, not from the negligent or intentional acts of the insureds.

Commissioner Fines Insurers

Per a recent media report, West Virginia Insurance Commissioner Jane Cline fined five insurance companies for the sum of \$47,500.00 for Unfair Trade Practices Act violations in 2007.

Cline assessed the biggest fine against State Auto Property and Casualty Company for failure to send notices of delay in investigation of claims and for improper claim denial notices. As a result, she fined State Auto \$24,500.00.

Cline classified the other fines as “routine” which included \$7,000.00 against Municipal Mutual of West Virginia for improper cancellations, failure to notify producers who were terminated for cause and permitting business to be submitted by agents not appointed by the company.

Other fines assessed were:

West Virginia Insurance Company - \$6,000 for business submitted by agents not appointed by the company and improper claim denial notices;

Highmark West Virginia d/b/a Mountain State Blue Cross/Blue Shield - \$5,000 for failure to timely respond to the Commissioner regarding complaints;

Panhandle Farmers Mutual Insurance Company of West Virginia - \$1,000.00 for failure to properly notify terminated producers.

In a prepared statement, Cline stated: “Each of these companies entered into agreements to take corrective action on deficiencies identified by the examiners. In some cases, this included making additional payments to claimants or offering to restore policies which were previously cancelled.”

Punative Damages Decreasing

For the second consecutive year, punitive damages awards have declined nationally. Per a January report published by *Bloomberg News*, punitive damages in the country’s 50 largest verdicts fell to \$1.6 billion in 2007. This represented a decrease from \$5 billion in 2005.

Lawyers for national corporations who are often the subject of punitive damages awards credit recent U.S. Supreme Court decisions limiting the scope and amount of acceptable punitive damages awards.

“This may well bring sanity to the world of punitive damages,” said Ted Boutrous, a Los Angeles attorney who represents Ford Motor Company.

While punitive damages decreased, the total damages increased in those same cases from \$6.3 billion in 2006 to \$6.9 billion in 2007, *Bloomberg* reported.

Children May Recover Medical Expenses - Court Overturns Common Law

In a case which may affect civil litigation statewide, the West Virginia Supreme Court has abrogated common law and now holds that a child may recover for his own medical expenses incurred during his infancy. In *State ex rel. Packard v Perry*, (No. 33214, W.Va., filed November 21, 2007), the Court overruled in part, rulings of the Circuit Court of Logan County in a medical malpractice action holding that a child could independently recover his medical expenses as damages and that such recovery was no longer solely vested with his parents so long as a double recovery was avoided.

Writing for the majority, Justice Brent Benjamin found that West Virginia has historically adhered to the common law rule that a parent, not a minor child, may recover a child's pre-majority medical expenses incurred as a result of personal injury to the child. "The parental right to recover expenses when a child is injured stems from the parents' legal obligation to support a child," he found. "Thus, at common law, an injury to a child gave rise to two independent causes of action: one on behalf of the child for such damages as pain and suffering, permanent injury, post-majority impairment of earning capacity, and post-majority medical expenses; the other on behalf of the parents for such damages as loss of services during minority and pre-majority medical expenses."

A line of cases upholding this principle, however, was overruled when the *Packard* Court held:

The right to maintain an action to recover pre-majority medical expenses incurred as a result of a minor's personal injuries belongs to both the minor and the minor's parents, but under no circumstances will double recovery be allowed. Thus, a procedural bar that prevents the parents from maintaining an action will not affect their minor child's right to recover.

The decision also seems to invalidate W. Va. Code § 48-29-303(a) which states:

A husband and wife are both liable for the reasonable and necessary services of a physician rendered to the husband or wife while residing together as husband and wife, or for reasonable and necessary services of a physician rendered to their minor child while residing in the family of its parents, and for the rental of any tenement or premises actually occupied by the husband and wife as a residence and reasonably necessary to them for such purpose.

The Court found this statute is limited only to services of a physician.

Benjamin wrote it was "absurd" to require two separate actions for a child's medical expenses arising from the same tortious conduct. He also wrote the potential of two separate trials for pre and post-majority expenses would be "ridiculous from the standpoint of judicial resources." Under this logic, he

wrote, "a child is no longer dependent on his or her parent to timely seek expenses for needed medical treatment by separate suit."

Benjamin concluded stating: "Whether we are the first state – or the fiftieth state – to adopt a specific legal proposition, our decision inevitably will be based upon what we deem to be in the best interests of justice and of the citizens of this State at the time the question is presented to us."

The opinion seems result-oriented in that it stems from a medical malpractice action the petitioner filed on behalf of her son. The mother, however, was not a named plaintiff seeking recovery of her son's medical expenses and missed the statute of limitations to file such suit. Therefore, the only claim that was timely filed was the child's malpractice claim. The result of this opinion is to permit additional damages to the child that were otherwise time barred.

However, the decision will have ramifications far beyond the facts of the *Packard* case. It is not limited to a child's medical malpractice claim and now permits a child, rather than his or her parent or guardian, to recover medical expenses in other tort claims. This decision will obviously impact the defense of any claim involving a minor plaintiff including infant settlement summary proceedings. This again underscores the necessity that such infant claims be court-approved.

No Limits on Private Intoxication in West Virginia - Intoxication Exclusion Inapplicable

The U.S. District Court for the Southern District of West Virginia has concluded there is no legal intoxication limit for an individual on private property and thus an exclusion in a health insurance policy was ruled inapplicable.

The issue arose in *MacDonald v Unicare Life & Health Ins. Co.*, Civil Action No. 3:07cv345 (decided January 17, 2008), when Judge Robert Chambers granted summary judgment to the insured. The case stems from a fall sustained by the insured from his apartment balcony while he was drunk. The insured had a blood alcohol content of .26 His health insurance policy contained an exclusion for “injury resulting from the Covered Person’s being legally intoxicated or under the influence of alcohol as defined in the jurisdiction in which the Accident occurs.”

While the insurer pointed to several West Virginia statutes such as the legal limit for driving under the influence, public intoxication, receiving a tattoo, skiing and operating watercraft, none applied to an insured standing on his balcony since there is no statute governing conduct on a private property.

Judge Chambers concluded “there are no limits on private intoxication under West Virginia law.”

Claimants’ Medical Expenses Rise Faster than Inflation

A new study by the Insurance Research Council indicates that medical expenses reported by auto injury claimants continue to rise faster than the inflation rate. Average claimed economic expenses grew 9 percent from \$5,520.00 in 2002 to \$8,522.00 in 2007. Economic expenses considered in the study were medical expenses, lost wages and out-of-pocket expenditures. The annualized rate of inflation as measured by the Consumer Price Index was 3 percent over the same period.

The study considered data on more than 42,000 closed claims. Twenty-two insurers participated in the study. The study determined the largest gains were from medical care. This is despite the fact that injuries from auto accidents are reported to be less severe. Per the IRC, the two likely factors for the increase in medical care expenses are: more frequent use of more expensive treatments and increased unit cost per treatment.

“Medical costs for auto injury claimants have clearly grown faster than medical care in general, suggesting that medical providers may be reacting to cost pressures in other areas by increasing their charges to auto injury insurers,” said Elizabeth Sprinkel, senior vice president of IRC. “This type of cost-shifting has important implications for the auto injury industry and for overall healthcare policy.”

Sprinkel concluded: “The trends shown in this report should be a wake-up call to the auto injury insurance industry, which has benefited in recent years from declines in the frequency of auto injury claims. The continued climb of medical expenses could threaten the recent benign rate environment.”

Third Party Bad Faith Claim Dismissed

In a case successfully litigated by this firm, the Circuit Court of Ohio County has dismissed a claim entitled a fraud and “tort of outrage” claim because it in fact stated a third party “bad faith” claim which was abolished in 2005.

In *Gump v Davis, et al.*, Civil Action No. 07-C-351, (entered January 30, 2008), the Plaintiff settled her personal injury claim against an Allstate insured. Months later, she attempted to reopen her claim alleging additional damages which Allstate denied because of the prior settlement. Thereafter, the Plaintiff sued the insured, Allstate and a claim representative. Allstate and the claim representative moved to dismiss the direct action as void due to the abolition of third party bad faith.

The Circuit Court agreed finding that despite the title of the cause of action, the Plaintiff was challenging the claim settlement practices of Allstate and such was no longer a viable cause of action.

The Plaintiff has filed a motion for reconsideration.

CSX Sued Over a Goose

CSX Transportation has been sued by one of its employees in the U.S. District Court for the Southern District of West Virginia for damages caused in a rail yard by a goose.

In *Richards v CSX Transp.*, Civil Action No. 3:08cv0079, the Plaintiff alleges he was injured when a goose, which was previously known by CSX to nest in its yard, “suddenly jumped out from under one of the railcars, striking the Plaintiff, and causing him to fall.” The Plaintiff alleges CSX is liable under the Federal Employers’ Liability Act.



The Plaintiff alleges damages in excess of \$75,000.00 and has demanded a jury trial. The case has been assigned to U.S. District Judge Robert C. Chambers.

Circuit Court Grants Summary Judgment to Nationwide

In a coverage case successfully litigated by Martin & Seibert, L.C., the Circuit Court of Raleigh County has granted summary judgment to Nationwide upholding its “owned but not insured exclusion.”

In *Biggs v Nationwide*, Civil Action No. 00-C-1022H, (entered January 11, 2008), the Court found the Plaintiff was injured while operating a motorcycle. After collecting proceeds from various tortfeasors and his underinsured motorist policy on the motorcycle, the Plaintiff sought underinsured motorist coverage from his father’s commercial auto policy issued by Nationwide. The Plaintiff’s motorcycle was not listed on the commercial auto policy.

The Circuit Court rejected arguments of the Plaintiff that Nationwide was required to show line-item reductions in premium for the exclusion. The Court also rejected the Plaintiff’s reasonable expectations argument finding that the “knowing conduct” of the Plaintiff of purchasing a separate policy for the motorcycle from a different insurance company indicates he “did not in fact expect the Nationwide policy to provide coverage for the motorcycle.”