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MORE INFORMATION

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WV No. 1 Judicial Hellhole Again

"It seems as if the West Virginia Supreme Court of Appeals, the state's highest court, is hell-bent on repeatedly reminding the public that the state is known as 'wild and wonderful' not simply for its natural beauty, but also for its lawsuits," stated the American Tort Reform Association in again naming West Virginia as the number one judicial hellhole in America.

In its annual "Judicial Hellholes" report released in mid-december, ATRA found West Virginia to be the only statewide judicial hellhole for its "near perfect storm of anti-business rulings, massive lawsuits and cozy relationships between the personal injury bar, the state attorney general and some in the judiciary."

ATRA is a non-profit corporation whose mission is to 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." Judicial Hellholes are defined as places where judges systematically apply laws and court procedures in an unfair and unbalanced manner, generally against defendants in civil lawsuits.

The reasons given for West Virginia's ranking were many, including:

- medical monitoring lawsuits;
- mass trials;
- venue laws;
- deliberate intent actions eroding workers' compensation immunity;
- the learned intermediary doctrine;
- "backwardly" allowing damages before liability;
- no right of appeal in civil cases;
- the Attorney General's "alliance" with the plaintiff's bar; and
- frivolous lawsuits.

The report cited the Supreme Court's "history of plaintiff-biased decisions, paying damages to those who are not injured, allowing mass trials, permitting lawsuits outside the workers' compensation system, rejecting long-established legal princi-

ples, and welcoming plaintiffs' lawyers from other states to take advantage of its generous rulings."

"To make matters worse," the report stated, "West Virginia is one of only two states that do not guarantee a right to appeal a civil verdict, even if a multimillion-dollar award is clearly excessive under the law or the trial court violated procedural fairness by allowing a jury to decide punitive damages before it found a defendant legally responsible for a claim. There also may be no state with a closer alliance between the state attorney general and politically-connected personal injury lawyers. This alliance has wreaked havoc at the expense of civil justice."

As an example, the report cited Cabell County Circuit Court Judge Hobby Spaulding stating: "There's one thing I have learned in the State of West Virginia the hard way, this ain't Texas, this ain't Kansas, this is West Virginia, and we don't give summary judgment. Every time I do, I get reversed…. And I'm going to allow all of these [cases] to go to a jury." This statement emanated from a $14.9 million verdict involving a claim for breach of a confidentiality agreement. It is alleged plaintiff presented no evidence of actual financial loss.

Other judicial hellholes in order of their ranking are:

2. South Florida
3. Cook County, Illinois
4. Atlantic County, New Jersey
5. Montgomery and Macon Counties, Alabama
6. Los Angeles County, California
7. Clark County, Nevada

ATRA also identified jurisdictions which are on its "watch list." Those in order identified are:

1. Rio Grande Valley and Gulf Coast, Texas
2. Madison County, Illinois
3. Baltimore, Maryland
4. The City of St. Louis, St. Louis and Jackson Counties, Missouri

Additionally, ATRA identified "points of light" where tort reform may be happening. Those include:

1. Maryland Court of Appeals
2. Rhode Island Supreme Court
3. Pennsylvania
4. Texas
5. New Jersey Supreme Court
6. Oregon Supreme Court

The report also found that West Virginia's reputation as an anti-business jurisdiction is well known characterizing the litigation climate as "economy-sapping." West Virginia ranked 50th in the U.S. Chamber of Commerce Institute for Legal Reform's "Legal Climate" study. Forbes ranked the state last for the second year in a row in its annual rankings of "The Best States for Business."

The plaintiff's bar dismissed the report as "scare tactics." "West Virginians resent ATRA's disingenuous attack on the integrity of our hardworking judges and citizen jurors. ATRA has been getting away with this non-

Insurance Commission Files Deemed Discoverable

West Virginia Insurance Commissioner Jane Cline has lost her attempt to maintain the confidentiality of the Commission's investigatory files. In *State ex rel. Cline v Frye* (No. 33875, W.Va., filed November 6, 2008), the Commission resisted two Orders of the Circuit Court of Grant County to produce files concerning the Commission's investigation of a former insurance agent. The Commissioner alleged the documents were confidential and statutorily privileged. The Supreme Court disagreed and ordered the documents produced, finding that W.Va. Code § 33-2-19 does not expressly prohibit disclosure of the Commission's investigatory materials when a court of competent jurisdiction orders that such materials be produced for use in a private civil action.

The issue arose from three consolidated civil actions in which plaintiffs sued former agent William Blankenbeckler and his former employer, Monumental Life Insurance Company, alleging fraud, misrepresentation, churning, and embezzlement of insurance premiums. In addition to the civil action, the Commission had previously investigated the claims which resulted in an Agreed Order whereby the agent agreed to cease transacting insurance business in West Virginia. In discovery, the plaintiffs and Monumental Life both sought production of the Commission's investigative file. The Commissioner eventually intervened in the Grant County action to argue against production of the file. In addition to the statutory argument, the Commissioner argued that disclosure of the documents could harm the insurance industry as a whole. The Circuit Court overruled all arguments of the Commissioner. Both the Circuit Court and the Supreme Court placed great weight on the fact that no party other than the Commissioner objected to producing the documents

On appeal, the Supreme Court held that in considering whether the Insurance Commissioner's investigatory file should be subject to disclosure in a private civil action, a trial court should examine whether the materials can be obtained from another entity; whether there is a specific need for the materials; whether the individuals named in the materials or affected by the potential disclosure have waived any privilege they may have to such materials; and any other indicia relevant to the issue of privilege or confidentiality.

The statute which the Commissioner relied upon deems the Commission's investigative file confidential and privileged and not subject to the State's FOI Act, but contains a provision that a court of competent jurisdiction may nonetheless deem the materials discoverable in a civil action in exercising its discretion. The Commissioner argued the carve-out applied only to criminal proceedings or governmental actions.

Writing for the unanimous majority, Senior Justice Thomas McHugh found this argument to be "untenable." The *Cline* Court held that the privilege is not "absolute in nature," but rather is a conditional privilege. The Court distinguished these materials from those obtained by the Commissioner in a fraud investigation under the Insurance Fraud Act, W.Va. Code §33-41-7, because it specifically exempts all material from production in any private civil action. There is no such statutory prohibition in W.Va. Code §3-2-19.

However, the Supreme Court did not permit an absolute disclosure of the documents either. Rather, the Court imposed upon trial courts the necessity to conduct a balancing test. The Court specifically noted in a footnote: "There is nothing in the ruling of this opinion that suggests that the confidentiality protections established by the statute have been vitiated. Where valid reasons exist for nondisclosure, a circuit court is clearly charged with authority to prohibit the production of materials in the investigatory file of the Insurance Commissioner. In this case, there simply was no legitimate basis for withholding the production of the requested documents."

This case arguably lends precedent to attempts to obtain investigatory files of the Commissioner relative to administrative complaints filed under W.Va. Code §33-11-4a. The Commission likewise takes the position those files, including claim file materials and responses to administrative complaints to the Commission, are statutorily privileged and confidential.

Court Adopts Continuous Medical Treatment Doctrine

The West Virginia Supreme Court has adopted a new theory in medical malpractice cases that will extend the applicable statute of limitations. In *Forshey v. Jackson* (No. 33834, W.Va., filed November 19, 2008), the Court adopted the continuous medical treatment doctrine.

The doctrine tolls the statute of limitations and the statute of repose in medical malpractice actions "when a course of treatment that includes wrongful acts or omissions has run continuously and is related to the original condition or complaint. Stated another way, the statute does not commence running until treatment by the physician or surgeon has terminated, where the treatment is continuing and of such nature as to charge the physician or surgeon with the duty of continuing care and treatment which is essential to recovery until the relationship ceases." The doctrine is limited to situations of continuous care and will not apply where the medical services rendered are intermittent.

The case arose when a patient had carpal tunnel surgery in 1995 and continued treating with the surgeon until 1997. He sustained a separate injury in 2005 at which time he learned of a foreign body in his wrist which was allegedly causing the ongoing pain since the 1995 surgery. Upon learning this, he filed suit in 2006. The surgeon moved to dismiss the claim as untimely which the Circuit Court of Kanawha County granted. Although the Court utilized this case to adopt the continuous medical treatment doctrine, it nonetheless affirmed the dismissal of the suit as untimely finding the doctrine inapplicable in this specific case because plaintiff's injury did not result from a continuing course of treatment that rendered him unable to pinpoint the precise date of his injury.

Judge Awards $3.9 Million in Attorney Fees to Private Attorneys General

Judge Ronald Wilson, sitting in the Circuit Court of Hancock County, WV has awarded $3.9 million in attorneys fees to private attorneys general appointed by Attorney General Darrell McGraw who obtained a $12.2 million settlement against Visa and Mastercard.

In awarding the fees, Judge Wilson issued a written opinion harshly critical of the Citizens Against Lawsuit Abuse organization which opposed the fee award and sought an accounting of work performed.

"In truth, and probably because he is employed by an organization that seems entirely too partisan when addressing any issue involving plaintiffs' lawyers, his bias towards the Attorney General is so visible that it clouds his effort to deploy persuasive reasoning," Wilson wrote. "It's too bad that Mr. Cohen's organization is so mean spirited in its criticism about our legal system and its lawyers and judges, because it renders the nature of those claims more like an antagonistic ideology rather than a rational and substantive critique."

In awarding the fees, Judge Wilson wrote: "The attorneys appointed by the Attorney General in this case were not being paid by the hour and have employees needing to be paid every two weeks." He also wrote: "large fees are a necessary and effective tool to deter wrongdoers."

"West Virginians need to understand that we need to provide lawyers with a sufficient incentive to take cases like this to advocate zealously for our interests," Wilson wrote. "When they obtain benefits for us, they need to be adequately compensated.

The case arose when the AG appointed several private West Virginia attorneys to pursue MasterCard and Visa for unfair and deceptive trade practices for tying acceptance of credit cards to acceptance of debit cards as well from various West Virginia merchants. Those splitting the fee include Barry Hill and Teresa Toriseva, immediate past president of the West Virginia trial laywers' organization.

Federal Court Refuses to Bifurcate First Party Bad Faith Claim

The U.S. District Court for the Northern District of West Virginia has held that discovery may proceed simultaneously on tort and "bad faith" discovery in first party bad faith claim in which the plaintiff is also pursuing an underinsured motorist claim.

In *Tustin v. Motorists Mut. Ins. Co.* (Civil Action No. 5:08cv111, N.D.W.Va., decided December 22, 2008), Judge Frederick P. Stamp, Jr. found that unitary discovery should proceed because only the insured and the insurer were involved in the claim and because the issues "do not appear to be complex." The Court further found the plaintiff would be "unduly prejudiced" by delay and costs involved if discovery was bifurcated. The Court also commented that bifurcation of discovery could impose an additional burden on the Court. While permitting unitary discovery, the Court left open the question of whether it would bifurcate the two claims for trial.

The Court also held that as a direct action against the insurer, because the plaintiff had previously settled with the tortfeasor, that Motorists Mutual could not defend in the name of the tortfeasor, but could only defend in its own name.

Seat Belt Evidence Excluded in Crashworthiness Case

The West Virginia Supreme Court is permitting a $993,000.00 verdict in a crashworthiness case against Ford Motor Company to stand, finding no error in the McDowell County trial proceedings. In *Estep v. Mike Ferrell Ford-Lincoln-Mercury, Inc. and Ford Motor Co.* (No. 33810, W.Va., filed December 10, 2008), the Court precluded any evidence that plaintiff was not wearing a seat belt.

The case centered on interpretation of West Virginia's seat belt statute, W.Va. Code §17C-15-49(d) which states: "A violation of this section is not admissible as evidence of negligence or contributory negligence or comparative negligence in any civil action or proceeding for damages, and shall not be admissible in mitigation of damages."

Ford argued on appeal that precluding such evidence in a crashworthiness case that challenged the effectiveness of a vehicle's restraint system deprived it of presenting a defense and was a due process violation. Ford argued it was not offering

the lack of seat belt use as evidence of negligence, but to refute the allegation Ford did not use reasonable care in designing the restraint system of a 1999 Ford Ranger. The Supreme Court disagreed, finding that Ford's intended use of the evidence "relates" to negligence and mitigation of damages. The Court therefore applied a literal interpretation to the statute. Finding no exception in the statute for crashworthiness cases, the Court held that the preclusion of the evidence was proper.

The Court thereafter rejected all other errors raised by Ford including the trial court's refusal to instruct the jury that compliance with federal motor vehicle safety standards raises a rebuttable presumption that the vehicle was reasonably safe and not defective. In rejecting this portion of the appeal, the Court held that compliance with those standards is not conclusive proof that the design of the product was reasonable.

The opinion was written by Senior Status Justice Thomas McHugh.

Study Finds Buildup Claims On the Rise

Fraudulent claims and claim buildups cost the insurance industry between $4 and $6 billion last year per a recent study of the Insurance Research Council (IRC). The excess payments amount to 13 to 18% of total payments, an increase from the year before.

The IRC study found that the most common type of claim abuse was buildup, defined as the inflation of an otherwise legitimate claim such as through unnecessary medical treatments or diagnostic procedures. The study found that 20% of bodily injury claims appeared to involve buildup in 2007.

"Claim abuse continues to be a significant problem. The excess payments attributable to fraud and buildup help drive up the costs of insurance for everyone," said Elizabeth Sprinkel, Senior Vice President of IRC.

Whitewater Rafting Not Governed by Federal Maritime Law

Whitewater rafting does not constitute traditional maritime activity and is therefore not governed by federal admiralty law, the West Virginia Supreme Court has held in *River Riders Inc. v. Steptoe, et al.* (No. 34206, W.Va., filed December 10, 2008).

The case arose following a fatal whitewater rafting incident on the Shenandoah River in Jefferson County in which 13 others were injured. Each passenger signed a "Release, Assumption of the Risk and Indemnity Agreement" before the trip. Prior to trial, the decedent's estate filed a Motion in *Limine* to exclude the Release which the trial court granted. The trial court also granted a Motion in *Limine* prohibiting the defendants from arguing assumption of the risk finding it was not an available defense in a maritime action. The Court specifically held that because the incident occurred on a navigable body of water, it is governed by "general maritime law." Assumption of the risk is not a defense in admiralty or maritime law.

Federal admiralty law governs a tort action if the wrong occurred on navigable waters, and if the incident involved had the potential to disrupt maritime activity and the general character of the activity giving rise to the incident had a substantial relationship to traditional maritime activity. Finding that the Shenandoah River maintains average depths of two feet, the Court held it was "hard to envision how the act of whitewater rafting could have a potentially disruptive impact on maritime commerce, to the extent that this area was unlikely a highly traveled thoroughfare over which trade and travel is conducted. However, even assuming, for the sake of argument, that the incident that occurred during this whitewater rafting trip had a potentially disruptive impact on maritime commerce, it still did not bear a substantial relationship to traditional maritime activity.

In his majority opinion, Justice Brent Benjamin find it particularly relevant that there is no existing federal or state precedent applying admiralty jurisdiction to the activity of whitewater rafting. "Perhaps this is because the very nature of the activity of whitewater rafting is not the customary mode of travel or transportation with which maritime law has ever been concerned. Whitewater rafting is a recreational activity where participants seek the adventure of paddling a rubber raft in rapidly moving whitewater streams and rivers. Such use of streams and rivers carrying people, not as traveling passengers, but rather as participants seeking adventure, makes it difficult to conceive that whitewater rafting bears a substantial relationship to traditional maritime activity," he wrote. For these reasons, the Court reversed the Circuit Court of Jefferson County.

Insurance Commissioner's Exclusive Jurisdiction Over Rate Making Affirmed

The West Virginia Supreme Court has overturned the Circuit Court of Marshall County in a class action finding that the Insurance Commissioner, not the trial court, has exclusive jurisdiction over matters involving insurance rates.

In *State ex rel. Citifinancial, Inc. v. Madden* (No. 34216, W.Va., filed December 10, 2008), the Court granted Citifinancial's petition for writ of prohibition after its Motion for Summary Judgment was denied by the trial court. The issue stems from class action allegations that Citifinancial imposed excessive credit insurance rates. Citifinancial argued it was merely a "middleman" collecting payment for credit insurance pursuant to the rates approved by the West Virginia Insurance Commissioner. Thus, it could not be held liable under the Consumer Credit Protection Act for allegedly unreasonable and excessive charges.

The Supreme Court analyzed the relation of rate statutes to the Consumer Credit Protection Act and concluded the Legislature gave the Commissioner express and exclusive rule-making authority for the setting of rates for credit insurance. Furthermore, the Court concluded that rate-making statutes also set forth the Legislature's intent to remove "judicial intrusion" from insurance rate issues.

As a result, the Court held that plaintiff could only challenge Citifinancial's rates by way of administrative hearing before the Insurance Commissioner. Plaintiff argued the administrative forum would not "make him whole" because the administrative process did not contain a damages provision. This, the Court held, was irrelevant. The opinion was authored by Senior Justice Thomas McHugh.

Writ of Prohibition Denied

The West Virginia Supreme Court of Appeals has refused to issue a writ of prohibition on a jurisdictional question raised by West Virginia National Auto Insurance Co., Inc. finding that writs of prohibition are to be tightly controlled and issued only in extraordinary circumstances.

In *WV National Auto Ins. Co. v. Bedell* (No 34337, W.Va., filed December 10, 2008), the Court upheld a Circuit Court's dismissal of a Florida attorney from a breach of contract action for lack of in *personam* jurisdiction. The issue arose when WV National forwarded several subrogation accounts to a Florida attorney for the filing of suits in West Virginia. The attorney lacked a West Virginia law license and never filed any suits thus permitting the statutes of limitations run. WV National then sued the attorney and his collection agency for *inter alia,* breach of contract, fraud, breach of fiduciary duty, and legal malpractice. The attorney moved to dismiss the suit against him for lack of personal jurisdiction which the Circuit Court of Harrison County granted.

Nine months later, WV National filed a petition for writ of prohibition in the Supreme Court seeking to overturn the Circuit Court's ruling and seeking in the alternative reinstatement of the action for the purpose of jurisdictional discovery which the insurer had not sought previously.

Both requests were denied by the Supreme Court which held that the case was not appropriate for a writ of prohibition seeking the Supreme Court to exercise original jurisdiction. Such cases are reserved for "extraordinary situations," the Court held in its *per curiam* opinion.

U.S. Supreme Court to Hear Case Involving WV Supreme Court Justice

The U.S. Supreme Court has accepted an appeal of whether West Virginia Supreme Court Justice Brent Benjamin should have recused himself in a case involving Massey Coal, whose CEO spent millions of dollars to unseat Benjamin's opponent in the 2004 Supreme Court election.

Benjamin twice voted in the majority in 3-2 decisions to overturn a $50 million verdict originally awarded to Harman Mining Corp. in 2002 against Massey Energy Co. With interest, that verdict is now estimated at $77 million. Massey CEO Don Blankenship spent more than $3 million in the 2004 election running ads against Warren Mcgraw and supporting Benjamin.

After Massey appealed the original verdict in 2006, Harman and its owner Hugh Caperton repeatedly asked Benjamin to step aside from the case. In every instance, Benjamin refused to recuse himself. Harman then appealed to the U.S. Supreme Court to rule on whether Benjamin should have recused himself and the ABA filed an amicus brief advocating Harman's position. This case has come under press scrutiny recently because the Court has repeatedly refused to decide whether to accept the case. On November 14, 2008, the day after a second editorial in the New York Times encouraged the high court to hear the case, the justices accepted the case to the court's docket.

"In this country, money has begun to pervade and permeate every election that's held. And I agree that it's the right of each citizen to support their candidate. But you can't have Supreme Court seats being propped up by millions of dollars from one individual or group," Harman said. "It makes the appearance of impropriety so great that normal citizens like myself lose faith in the judicial system."

Commissioner Reports on Insurance Market in WV

In her annual report to the Governor, West Virginia Insurance Commissioner Jane Cline outlined the status of the insurance market in West Virginia. The 2007 Annual Report, submitted November 1, 2008, analyzed 2007 financial statements and data of the Insurance Commissioner's office.

The Commissioner reported she issued 17,458 new licenses to insurance agents in 2007, while also handling over 100,000 company appointments and cancellations The Commissioner also granted licenses to 16 insurance entities to do business in West Virginia, due to the privatization of Workers' Compensation insurance. The Office of Consumer Advocacy assisted in 29 consumer complaints while the Consumer Services Division received 2,467 written complaints in 2007. The Commissioner estimated the Division responded to an average of 114 calls per day. The Legal Division was involved in 66 administrative or circuit court hearings while the Fraud Unit handled 885 referrals in 2007 which lead to 39 arrests and 28 convictions.

The Commissioner also examined market share of insurers per line of business. The top 10 property and casualty carriers overall are: Brickstreet Mut. Ins. Co., State Farm Mut. Auto. Ins. Co., Nationwide Mut. Ins. Co., Erie Ins. Prop. & Cas. Co., State Farm Fire and Cas. Co., Westfield Ins. Co., Nationwide Mut. Fire Ins. Co., Allstate Ins. Co., West Virginia Mut. Ins. and Nationwide Prop. & Cas. Ins. Co.

In the first year of private workers' compensation insurance, the 5 largest insurers are: Brickstreet Mut. Ins. Co., American Home Assur. Co., National Union Fire Ins. Co. of Pittsburgh, Liberty Ins. Corp. and Westfield Ins. Co.

Washington Supreme Court Permits Bad Faith In Absence Of Coverage Or Duty To Defend

The Washington Supreme Court has held that an insured may pursue a "procedural" bad faith claim against its liability insurer even when there is no contractual duty to defend, settle or indemnify the insured in any underlying claim.

The Court reached its decision in *St. Paul Fire and Marine Ins. Co. v Onvia,* (No. 80359-5, decided November 26, 2008), in answering certified questions from the U.S. District Court for the Western District of Washington.

The case arose when Onvia was sued in a class action for "fax blasting." Onvia settled the class action after St. Paul denied coverage and defense. The insured entered into a consent judgment of $17.5 million and an assignment of its first party rights against St. Paul which the trial court approved. St. Paul then instituted a declaratory judgment action asserting it had no duty to defend, settle or indemnify Onvia in the underlying claim and the assignee counterclaimed for *inter alia*, "procedural bad faith" relating to the manner in which St. Paul denied Onvia's tender for coverage and defense. The assignee alleged St. Paul failed to timely acknowledge and act upon notice of the claim and tender of defense and failed to promptly or reasonably investigate the claim.

Upon certified questions, the Washington Supreme Court held that such a cause of action could proceed despite the fact St. Paul had no contractual duty to defend or indemnify its insured finding the duty of good faith is not specific to either the duty to defend or indemnify but "permeates the insurance arrangement." Damages, the Court held, must be actual and proven, not presumed.

The Court further found the duty of good faith is akin to a fiduciary duty applicable to first and third party coverage.

Unlicensed Contractor May Sue in West Virginia

An unlicensed contractor may utilize the Courts of West Virginia to sue for payment of contracts. The West Virginia Supreme Court, in issuing this ruling in *Timber Ridge, Inc. v. Hunt Country Asphalt & Paving, LLC* (No. 33877, W.Va., filed December 10, 2008), held that the Legislature had the opportunity but did not choose to preclude unlicensed contractors access to West Virginia courts in enacting the Contractor Licensing Act, W.Va. Code §21-11-1, *et seq*.

Timber Ridge operates a youth camp in Hampshire County and contracted with Hunt Country for construction work. Timber Ridge sued Hunt Country for breach of contract, fraud, breach of warranty, and negligence. Hunt Country then counterclaimed for unpaid fees. Timber Ridge asserted the counterclaim could not be maintained in West Virginia due to the lack of a West Virginia contractor's license. The U.S. District Court for the Northern District of West Virginia certified the question to the West Virginia Supreme Court which held the lack of a license would not bar access to the courts, thus reversing the federal court's answer.

The Legislature has barred access to West Virginia courts in two other instances that involved unlicensed professionals, - under the Real Estate Appraiser Licensing and Certification Act and the Real Estate Licensing Act governing real estate agents.

Court Considers Propriety of Jury Selection

In two cases decided the same day, the West Virginia Supreme Court of Appeals has set forth guidelines of when prospective jurors should be stricken for cause.

In *Macek v Jones* (No. 33525, W.Va., filed November 6, 2008), the Court affirmed a defense verdict in a medical malpractice case where plaintiffs could not demonstrate undue bias. However, in *Murphy v. Miller, et al.* (No. 33904, W.Va., filed November 6, 2008), the Court reversed a defense verdict because of clear bias demonstrated by a prospective juror. In both instances, plaintiffs utilized peremptory challenges to strike the challenged jurors and then moved for new trials alleging error in the jury selection process.

In *Macek*, a prospective juror advised the Circuit Court of Brooke County he knew a physician who was the subject of a million dollar malpractice verdict and stated he had "sympathy for him." He further stated: "I sometimes can't help but think that some lawyers take advantage of what become frivolous cases and the premiums doctors have to pay skyrocket and it drives some of them out of the state. On the other hand, I try to be objective about them as well." The Court did not strike the juror.

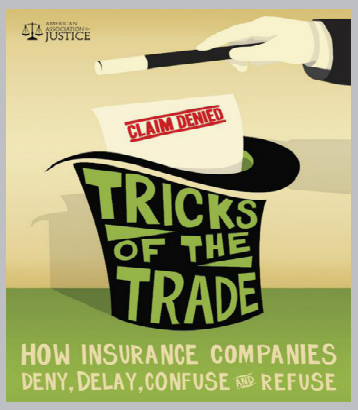
The Court also did not strike a prospective juror employed by Ogden Publishing. Ogden publishes the Wheeling Intelligencer newspaper. Plaintiffs alleged Ogden's coverage of medical malpractice litigation rendered the prospective juror biased and alleged the prospective juror was untruthful when he answered a juror questionnaire as to whether he had read, heard or discussed anything about medical malpractice litigation because he answered "no." He later admitted he was aware of some media coverage.

In *Murphy*, the Circuit Court of Ohio County refused to strike a dentist from the panel. In a juror questionnaire, the dentist answered he had been a defendant in a "frivolous" lawsuit and commented that West Virginia has the highest health insurance rates due to malpractice claims and verdicts

Trial courts in West Virginia are required to consider the totality of the circumstances and grounds relating to a potential request to excuse a prospective juror, to make a full inquiry to examine those circumstances, and to resolve any doubts in favor of excusing the juror. *O'Dell v. Miller,* 211 W.Va. 285, 565 S.E.2d 407 (2002). Both opinions were *per curiam.*

AAJ Accuses Insurers of Harming Consumers in Tough Economic Times

The trial lawyers organization, American Association for Justice, has released a report indicating that insurers are taking advantage of current economic troubles to "put the squeeze' on consumers in an effort to increase profits.



In a report entitled "Tricks of the Trade, How Insurance Companies Deny, Delay, Confuse and Refuse," the organization alleges that insurers are denying more claims, using confusing policy language, discriminating based on credit score and retroactively canceling health care policies. The report further alleges that the largest insurers, specifically Allstate, AIG and State Farm have "systems" of rewarding employees who "successfully" deny claims and replace those who don't. "Insurance companies are preying on cash-strapped consumers with tough tactics to increase profits," AAJ CEO Jon Haber said of the study. "The current challenges facing American families are only compounded when their insurance company plays hardball in their greatest time of need.

Federal Jurisdiction Over ERISA Plans Affirmed

The West Virginia Supreme Court has held that state trial courts do not have jurisdiction to enforce subrogation rights of an ERISA governed plan.

In *Turner v. Turner and City Hospital, Inc.* (No. 33892, W.Va., filed December 15, 2008), the Court refused to hear a claim by City Hospital on behalf of its Group Benefit Plan. The issue arose when the children of a hospital employee were injured in a motor vehicle accident with medical payments made under the Group Benefit Plan. The children, through their mother, the hospital employee, then settled the bodily injury claims of her children with two insurers and sought court approval of the settlements. City Hospital intervened to assert subrogation liens.

The Circuit Court of Berkeley County held it did not have jurisdiction to hear City Hospital's assertion of liens under an ERISA governed benefit plan which the Supreme Court affirmed. Those claims, the Court held, must be filed in federal court. In affirming the lack of jurisdiction of the trial court, the Supreme Court held that the Circuit Court could nonetheless proceed with approving or rejecting the proposed infant settlements.

Court Denies Jurisdiction in Internet Sex Tape Case

A motion for default judgment filed by a former Miss West Virginia who claims she was defamed by a series of Internet sex tapes has been denied because the Plaintiff could not obtain jurisdiction over the Internet site operators.

In *Williams v Advertising Sex, LLC,* (Civil Action No. 1:05cv51), decided October 3, 2008, U.S. District Judge Irene Keeley found that the Internet site operators - many of whom resided in other countries - did not purposely avail themselves of contacts in West Virginia.

Allison Williams, Miss West Virginia 2003, alleged that her photograph was transposed over photos of other women in a series of sex tapes that were available for download on several Internet sites. Ms. Williams sued the owners of various companies operating the sites alleging various common law tort claims. The defendants did not respond to the Complaint or to various attempts at service and the plaintiff thereafter moved for default judgment. Plaintiff alleged the Court had jurisdiction based upon Internet activity alone.

In denying default judgment, the District Court held that to determine if personal jurisdiction existed, Courts must consider: 1) (1) the extent to which the defendant "purposefully avail[ed]" itself of the privilege of conducting activities in the State; (2) whether the plaintiffs' claims arise out of those activities directed at the State; and (3) whether the exercise of personal jurisdiction would be constitutionally "reasonable".

When a defendant's contact with the forum state is limited to the Internet, however, the appropriate inquiry is to determine how much virtual contact is enough to satisfy due process requirements. The Court specifically held that: "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity an entity conducts over the Internet," a standard adopted by the *Fourth Circuit in ALS Scan, Inc. v. Digital Service Consultants, Inc.,* 293 F.3d 707,712 (4th Cir. 2002).

An individual will only be subject to personal jurisdiction pursuant to the ALS Scan test if there is manifest evidence that he both intended to enter the state and also actually did so. Judge Keeley found that the defendants did not purposefully avail themselves of contacts in West Virginia and thus the Court lacked personal jurisdiction over the defendants.

Court Examines Expert Testimony

The West Virginia Supreme Court of Appeals has again considered who may testify as an expert witness in civil cases. In *West Virginia Dept. of Transportation v. Parkersburg Inn, Inc.* (No. 33882, W.Va., filed November 5, 2008), a condemnation proceeding, the Circuit Court of Wood County permitted a real estate appraiser to testify on behalf of the State. The appraiser offered opinions about the effect of a road-widening project on a hotel's business.

The witness had conducted a study and generated a report that involved collecting data on hotels in Wood County, state-wide, and in surrounding states. The hotel took the position the appraiser was not qualified to testify because he was not a hotel manager. This argument was rejected and a verdict in favor of the State affirmed.

In determining who is an expert, a circuit court should conduct a two-step inquiry. First, a circuit court must determine whether the proposed expert (a) meets the minimal educational or experiential qualifications (b) in a field that is relevant to the subject under investigation (c) which will assist the trier of fact. Second, a circuit court must determine that the expert's area of expertise covers the particular opinion as to which the expert seeks to testify. One knowledgeable about a particular subject need not be precisely informed about all the details of the issues raised in order to offer an opinion but merely possess enough information to assist the jury. Whether the witness is the best expert witness on the specific subject is a matter that goes to weight of testimony and not to qualifications, the Court held.

The Court also affirmed the exclusion of one of the hotel's expert witnesses because he was not disclosed as an expert prior to trial.

Trespass Defense Denied to Utilities in Guy Wire Accident

Even though a child is a trespasser on another's property, he is not considered a trespasser as to companies who maintain electric or guy wires either on or near the property, ruled the West Virginia Supreme Court in *Smoot v. American Electric Power, et al.* (No. 33806, W.Va., filed November 12, 2008).

American Electric Power and Charter Communications maintained guy wires on the property of Anna Farley in Kanawha County. Plaintiff, who was 13, was riding his bicycle when he lost control of the bicycle and went over an embankment thus striking the guy wires. The Defendants were granted summary judgment by the trial court which found the defendants had no duty to the plaintiff, a trespasser, and that, nonetheless, they were not required to place markers on the wires because the wires were not "exposed" to pedestrian traffic as per industry standards.

The Supreme Court reversed finding that the wires, located 19 feet off the road, were exposed to pedestrian traffic. "This is evident by the fact that a mail box, newspaper box, gas meter, and flower garden are near the guy wires. Further, insofar as no evidence to the contrary has been presented, the lawn immediately around the guy wires is mowed and maintained. We are not concerned with the defendants' emphasis on the fact that the guy wires are approximately nineteen feet from the roadway. … the guy wires are merely 'a few horse strides off' the road," the Court held in its *per curiam* opinion.

The Court further rejected the trial court's finding the plaintiff was a trespasser, finding that utility companies cannot rely upon the defense of trespass on real property in which they only hold a right-of-way.

Martin & Seibert, L.C. represents Charter Communications in this matter.

Maryland Court of Appeals Denies *Certiorari* on Debtor's Claim

On December 30, 2008, the Court of Appeals of Maryland denied a Petition for *Certiorari* in a collection matter successfully prosecuted by Martin & Seibert, L.C.

In Moonblatt v CACH, LLC, the debtor argued that granting a judgment against him based upon an affidavit was improper because it was not accompanied by supporting documentation detailing his liability and damages to the creditor.

CACH argued that pursuant to subsection (1) of Md. Rule 3-306(a), the affidavit is required to be accompanied by supporting documents that contain sufficient detail as to liability and damages, including the precise amount of the claim and interest. The Complaint was filed with an Interest Worksheet which stated the principal amount owed and the accrued interest on the debt; an Application and Affidavit of Judgment that states that the amounts listed on the Complaint are justly due and owing by the debtor, the creditor's Affidavit of Debt which affirmed the principal owed; a Certificate of Assignment, a statement from CACH confirming the principal owed; and an Affidavit of Sale evidence that the debt was sold. These documents were therefore deemed sufficient.

CAT Losses Approach $25 Billion in 2008

Property/casualty insurers paid $24.9 billion to policyholders for insured losses incurred through the first nine months of 2008, per a report from ISO's Property Claims Service. This was due in large part to an active hurricane season.

Hurricanes Dolly, Gustav and Ike produced a combined total of more than $11 billion of these losses. There were 16 named storms this Atlantic hurricane season, making 2008 the fourth most active year since record-keeping began in 1994.

Hurricane Ike was the year's most costly natural disaster, with an estimated $10.6 billion in insured losses, making it the fifth-most expensive (in 2008 dollars) hurricane and the seventh costliest insurance event in U.S. history, per a statement released by the Insurance Information Institute.

Tornado activity also saw an increase in insured losses. "Strong winds can adversely impact those who live far from the coastline so there is always a need for homeowners to reassess their insurance coverage and strengthen their properties," said Michael Barry, vice president, Media Relations for III.

Significant wildfires and extensive flooding also occurred in 2008. Nationwide, the wildfire problem is a growing one for homeowners and property insurers because residential populations have increased dramatically in wildfire prone areas in western states.

Despite increased occurrence of flooding, less than 20 percent of all Americans have a flood insurance policy even though 73 percent of those surveyed said they are aware that a standard homeowners insurance policy will not cover flood-related losses.

"Insured catastrophe losses in 2008 exceeded all cat losses incurred in 2006 and 2007 combined," said Barry. "Large-scale weather events have widespread repercussions that last long after the media attention fades. When disaster strikes, however, insurers fulfill their role as the nation's economic first-responders, and this year was no exception."

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