MARTIN & SEIBERT, L.C.

UPDATE ON THE LAW

April 22, 2005 Vol. 12 No. 1

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MORE INFORMATION

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WV LEGISLATURE ABOLISHES THIRD PARTY BAD FAITH CAUSE OF ACTION

Effective July 11, 2005, the private cause of action for third party "bad faith" will be eliminated in West Virginia. The West Virginia Legislature abolished the private cause of action in the closing hours of the 2005 legislative session on April 9, 2005 by the passage of Senate Bill 418, a key component of newly elected Governor Joe Manchin's tort reform package. The sole remedy now available to third party claimants is an administrative complaint before the Insurance Commissioner.

The new statute creates a Consumer Advocate who may investigate administrative claims filed with the Insurance Commissioner and provides a penalty process funded by a trust fund, based in part upon assessments of insurance companies doing business in West Virginia.

Third parties will now be required to file a complaint on a form to be created by the Insurance Commissioner no later than one year from the actual or implied discovery of an alleged unfair claim settlement practice. Thereafter, the Commissioner, through the Consumer Advocate, may advocate on the part of a third party claimant in any proceeding.

Once such an administrative complaint is filed, an insurance company, its agents or employees will be given 60 days to cure the situation. If correction is not made or is not made to the satisfaction of the Commissioner, the statute permits a subsequent investigation. The statute is silent as to the scope and manner of such investigation and merely states that the Commissioner shall "conduct any investigation her or she considers necessary to determine whether the allegations contained in the administrative complaint are meritorious."

If after such initial investigation the Commissioner finds the complaint has merit, she may order further investigation and hearing by the Consumer Advocate to determine if an unfair claim settlement practice has occurred with such frequency as to constitute a general business practice. A finding of a general business practice may only be based on the existence of "substantially similar violations in a number of separate claims or causes of action." The statute, however, specifically states that a "good faith disagreement" over the value of a claim or liability of any party is not an unfair claim settlement practice.

The new statute permits the Commissioner to fine companies up to $5,000 for each violation not to exceed $100,000 in any six-month period. If, however, the Commissioner finds an intentional violation of the Unfair Claims Settlement Practices Act, fines may increase to $250,000. Such fines are payable to the State. In addition, the Commissioner is granted the right to award restitution to claimants up to $10,000 from the trust fund. Restitution is not permitted for attorney fees or punitive damages.

CEM Martin of this firm was a lead lobbyist on behalf of the insurance industry in obtaining this critical tort reform.

LEGISLATURE PERMITS NON-RENEWALS UP TO 1%

Effective July 1, 2005, property insurance carriers in West Virginia may non-renew policies in West Virginia not to exceed 1% per year of the total number of policies in the state. Carriers are permitted to non-renew up to 1% per county, so long as the total number of policies non-renewed does not exceed 1% for the entire state. Before a carrier, which writes property insurance policies in West Virginia, may non-renew. it must file with the Commissioner a copy of its underwriting standards which shall be considered confidential and privileged. The West Virginia Legislature last year permitted a similar non-renewal program with respect to auto policies and this year expanded it to include property insurance when it passed Senate Bill 30 which amends West Virginia Code §33-17A-4a.

Senate Bill 30 also created the file and use method for commercial lines insurance policies in an amendment to West Virginia Code §33-6-8.

DEFAULT JUDGMENT SET ASIDE FOR IMPROPER SERVICE

The West Virginia Supreme Court-in reviewing statutory provisions concerning service of process-has held that service on a corporation under W.Va. § 31-1-15 and 31-D-15-1510 is insufficient when notice mailed by the Secretary of Secretary of State is neither accepted nor refused by the agent and the mail is returned because the notice is undeliverable. In so doing the Court reversed a default judgment against a division of Sherwin-Williams Company in *Crowley v. Krylon Diversified Brands,* (No. 31723, W.Va., filed December 3, 2004). In *Crowley,* the plaintiff attempted to serve a Complaint on Sherwin-Williams, a foreign corporation authorized to transact business in West Virginia. The Complaint was served on the Secretary of State who then sent a Summons and Complaint via certified mail to an individual identified as the agent for service of process. The certified mail, however, was returned to the Secretary of State with a notice indicating it was undeliverable because a forwarding Order with the U.S. Postal Service had expired. Sherwin-Williams, therefore, did not receive notice of the suit, of default judgment nor a subsequent writ of inquiry which rendered damages until plaintiff's counsel attempted to collect on the judgment.

Thereafter, Sherwin-Williams moved to set aside the default arguing that it was not properly obtained because of insufficient service of process. The Supreme Court agreed finding that pertinent Code provisions hold service of process is achieved only when the Secretary of State provides registered or certified mailing to an authorized corporation's listed agent and the process is either accepted or "refused" by the agent. However, when the Secretary of State's mailing is returned due to the postal service's inability to locate the agent, good service has not occurred.

MEDICAL MALPRACTICE BAD FAITH CLAIM DISMISSED

The West Virginia Supreme Court has upheld the dismissal of a "bad faith" claim against Medical Assurance finding that the Amended Complaint which asserted "bad faith" did not arise from the same conduct, transaction or occurrence as asserted in the original Complaint; thus any pleading filed after the medical malpractice statute was amended to prohibit third party bad faith claims would be dismissed.

The issue arose in *Elam v. Medical Assurance of West Virginia, Inc.*, (No. 31656, W.Va., filed December 2, 2004).

The case began following a June 14, 2001 surgery in which the plaintiff was rendered permanently disabled. The plaintiff filed suit in February, 2002 against various health care providers alleging medical malpractice, the day before the statute was amended to prohibit "bad faith" claims. The plaintiff then filed an Amended Complaint alleging "bad faith." The Amended Complaint, however, was filed after the statute was amended. Medical Assurance filed a motion to dismiss which was granted by the Circuit Court of Raleigh County. On appeal, the plaintiff argued that the Amended Complaint should relate back to the filing of the original Complaint.

The Supreme Court, however, refused to accept this argument finding that an Amended Complaint relates back to the date of the original filing under Rule 15(c)(3) of the West Virginia Rules of Civil Procedure if:

1) the claim asserted in the amended Complaint arose out of the same conduct, transaction or occurrence as that asserted in the original Complaint;

2) the defendant named in the amended Complaint received notice of the filing of the original Complaint and is not prejudiced in maintaining a defense by the delay in being named;

3) the defendant either knew or should have known that he or she would have been named in the original Complaint had it not been for a mistake, and;

4) notice of the action and knowledge or potential knowledge of the mistake was received by the defendant within the period prescribed for commencing an action and service of process of the original Complaint.

The Supreme Court found that the amended Complaint alleging "bad faith" did not arise out of the same conduct, transaction or occurrence as the medical malpractice claim and thus would not relate back.

STANDARD FOR FUTURE EARNING CAPACITY CLAIMS ALTERED

The West Virginia Supreme Court has held that a plaintiff may recover damages for future lost or impaired earning capacity without demonstrating a permanent injury. The issue arose by certified question in *Cooke v. Cooke*, (No. 31703, W.Va., filed November 15, 2004). Writing for the majority, now Chief Justice Albright interpreted *Jordan v. Bero*, 158, W.Va. 28, 210 S.E 2d 618, (1974), and held that the test for future damages as set forth in *Jordan* requires that the "consequences" of the negligent infliction of a personal injury" as opposed to the nature of an injury determines whether future damages for lost or impaired earning capacity can be recovered. Syllabus Point 7 of *Jordan* sets forth the landmark test governing future damages claims. Syllabus Point 7 states:

> To form a legal basis for recovery of future permanent consequences of the negligent infliction of a personal injury, it must appear with reasonable certainty that such consequences will result from the injury; contingent or merely possible future injurious effect are too remote and speculative to support a lawful recovery.

Id., 210 S.E.2d, at 622-23.

The *Cooke* Court held that the test never required that the injury be permanent in nature or result in permanent impairment in order to recover future damages. Rather, the *Cooke* Court found that so long as a plaintiff can establish by a reasonable degree of certainty that the negligently inflicted injury or its direct consequences will have a lasting, permanent future effect, then recovery is possible.

In further explaining its rationale, the *Cooke* Court held that *Jordan* does not prescribe the specific type of evidence needed to support a claim for future damages. Where an injury is obvious, the effects of which are reasonably common knowledge, a plaintiff may prove future damages either by lay testimony from the injured party or others who have viewed his injuries; by expert testimony; or from both lay and expert witnesses so long as the proof is demonstrated to a reasonable degree of certainty. Where, however, the injury is obscure, subjective testimony is insufficient and medical or expert opinion testimony is required. The *Cooke* Court cautioned that "prudent plaintiff's counsel would seek to introduce vocational evidence in addition to medical evidence... to assist the jury in ascertaining the extent and permanency of the plaintiff's alleged inability to engage in gainful employment. Similarly, prudent defense counsel would also present such evidence in order to assist the jury in determining whether the plaintiff would be capable of some other future employment which might mitigate the damages for loss of future earning capacity."

COURTS, NOT JURIES, TO ASSESS FEES IN SUBSTANTIALLY PREVAILED CLAIMS

The West Virginia Supreme Court has ruled that when a policyholder substantially prevails on a first party insurance claim and becomes entitled to attorney fees under the *Hayseeds* doctrine the amount of attorney fees is to be determined by the Court, not a jury. In an issue of first impression the Court so ruled in *Richardson v. Kentucy National Ins. Co.*, (No. 31658, W.Va., filed December 3, 2004). The *Richardson* Court held that a policyholder becomes entitled to recover a reasonable attorney fee from an insurance carrier when there is proof that the attorney's services were necessary to obtain payment of insurance proceeds. The means by which a Circuit Judge calculates the attorney's fee is a matter left to the Judge's discretion. The *Richardson* Court, however, held that there is still a presumption that a reasonable attorney fee is one-third of the face amount of the policy unless the amount disputed under the policy is "either extremely small or enormously large." Justice Starcher, writing for the majority, acknowledged that these terms are "inherently vague and subject to debate" and held that if a policyholder must expend significant attorney fees to recover a "small" amount of coverage, the policyholder may be able to shift the entire fee to the insurance carrier if the fee is found reasonable by the trial court. Conversely, if the policyholder recovers an "enormously large" amount of coverage, the fee will be limited to that which is "conscionable and in accord with the risk and effort undertaken by the attorney."

In addition, the *Richardson* Court resolved a dichotomy in West Virginia jurisprudence concerning the substantially prevailed doctrine and held that in calculating the fee under *Hayseeds* the trial court should consider the totality of the negotiations between the policyholder and the insurance carrier.

CLASS ACTION FAIRNESS ACT, ENACTED

On February 18, 2005, President Bush signed the Class Action Fairness Act, S.5. The Act now permits defendants to remove formerly non-diverse state law class actions if the class involves more than 100 people and the aggregate amount in controversy exceeds $5 million.

The bill also forecloses a common tactic of plaintiffs' counsel of pleading damages less than $75,000.00 per class member in order to defeat removal based upon the amount in controversy threshold.

COVERAGE ACTION PERMITTED TO PROCEED

The West Virginia Supreme Court of Appeals has reversed a summary judgment Order in favor of an insurance carrier permitting a declaratory judgment action and an Amended Complaint for "bad faith" to proceed. The action was taken in *Wehner, et al. v. Wienstein, et al. v. American International Companies, et al.*, (Nos. 31736, 31737 and 31738, W.Va., filed December 1, 2004). The consolidated appeals arose from summary judgment granted in favor of New Hampshire Insurance Company which issued a general liability and an excess policy to the national fraternity of Sigma Phi Epsilon. The action is based upon the 1989 death of a student at West Virginia University when two fraternity members released the parking brake on a pizza delivery vehicle which subsequently rolled down a hill below the fraternity house killing one student and injuring two others. A jury assessed the majority of liability against the fraternity member who released the brake with additional liability against a pledge of the fraternity, the national fraternity and the Sigma Phi Epsilon Building Association.

In a subsequent declaratory judgment action instituted by the fraternity building association and the Estates of the victims it was discovered that New Hampshire failed to disclose its two policies potentially affording $3 million in coverage to the national fraternity and that the fraternity member and the pledge may have been identified either as named insureds or additional insureds under the policy.

The Circuit Court of Monongalia County construed the "additional insureds - club member" endorsement of the primary general liability policy and held that it did not provide coverage because neither student was engaged in a fraternity activity at the time of the incident. The trial court found that the excess policy also did not provide coverage restricting its interpretation to the same language of the primary policy despite the absence of a similar endorsement in the excess policy. The trial court also prohibited the underlying plaintiff from pursuing a "bad faith" claim against New Hampshire.

The Supreme Court reversed finding an ambiguity between the policy and the endorsement concluding that any such ambiguity must be resolved in favor of an insured.

The Supreme Court also permitted an amendment to the underlying complaint to assert a "bad faith" claim against New Hampshire premised on the fact that New Hampshire designated fraternity members and pledges as named insureds but later asserted the members were not entitled to coverage and that such information was withheld from the insureds and those seeking insurance benefits.

NO NEED FOR SOLE PROXIMATE CAUSE

The West Virginia Supreme Court has reversed summary judgment in favor of a defendant in a medical malpractice action finding that questions of proximate cause are fact-based issues reserved for jury resolution. The issue arose after the Circuit Court of Cabell County granted summary judgment to St. Mary's Hospital and a physician based upon an allegation of failure to diagnosis and treat low blood sugar which then led to a post-operative infection requiring additional medical treatment. The parties agreed that the initial bypass operation which the plaintiff underwent at St. Mary's was performed appropriately and without negligence. Finding that any failure to properly treat or diagnose the plaintiff's hyperglycemia condition did not actually cause the infection, the Circuit Court granted the defendants' summary judgment. The Supreme Court overturned summary judgment in *Stewart v. George, et al.*, (No. 31667, W.Va., filed November 15, 2004).

The Supreme Court found that although the plaintiff's expert could not identify the precise cause of the infection, summary judgment was nonetheless inappropriate. "This Court has consistently observed that a plaintiff is not required to prove that the negligence in question was the *sole* proximate cause of an injury," the Court wrote in its *per curiam* opinion. Finding that the question of proximate cause was fact-based, thus best reserved for a jury, the Supreme Court reversed finding that "uncertainties implicit in this medical record are prime territories for jury determination."

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COVERAGE PROVIDED FOR WIRE TAPPING

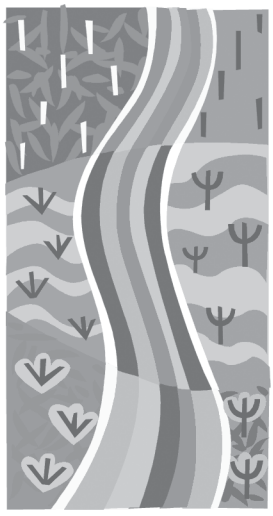
The West Virginia Supreme Court has upheld a $500,000 verdict against a hotel chain for improperly recording conversations of its employees and the public by secret means in violation of the West Virginia Wire Tapping and Electronic Surveillance Act. The court affirmed a $100,000 emotional distress and $400,000 punitive damages verdict in *Bowyer v. Hi-Lad, Inc. and Westfield Ins. Co.*, (No. 31697, W.Va., filed December 3, 2004). The case arose when the owner of the Comfort Inn hotel franchise in Cross Lanes installed an electronic surveillance system which included hidden microphones at the hotel front desk, lobby and bar whereby the owner conducted audio and video surveillance of employees and the public. A former desk clerk sued the hotel for violations of the statute alleging invasion of privacy. During the course of the underlying claim *Westfield*-which had issued a commercial general liability policy to the hotel-was granted leave to intervene and ultimately obtained summary judgment with a finding there was no duty to defend or indemnify the hotel. On appeal, the Supreme Court overturned, finding that insurance coverage was available under personal and advertising injury coverage.

The policy provided that *Westfield* would "pay those sums that the insured becomes legal obligated to pay as damages because of 'personal and advertising injury' to which this insurance applies..." Personal and advertising injury was defined in the policy as "injury, including consequential 'bodily injury' arising out of... oral or written publication of material that violates a person's right to privacy."

The Circuit Court concluded that because there was no oral or written publication of any material relating to the plaintiff/employee that no personal or advertising injury had occurred. The Supreme Court reversed finding that the term "publication" was not defined in the Westfield policy and was thus ambiguous.

Justice Davis and then Chief Justice Maynard dissented arguing that the verdict was only supported by circumstantial evidence and that the plaintiff lacked standing to assert a violation of the Wire Tapping and Electronic Surveillance Act because he did not suffer an injury in fact.

COURT PERMITS FLOOD CLAIMS BY LANDOWNERS FOR UNREASONABLE USE OF LAND



The West Virginia Supreme Court has answered a series of certified questions from the flood litigation panel outlining plaintiffs' rights to bring certain causes of action against various companies alleging that business activity such as mining coal, oil and timber contributed to property damage as a result of floods from heavy rain storms in southern West Virginia in July, 2001. In answering certified questions from a three judge panel the Supreme Court *In re: Flood Litigation, (No. 31688, W.Va., filed December 9, 2004)*, held that adjacent and non-adjacent landowners have a cause of action based on allegations of unreasonable use of land by the diversion of surface water. The case law previously recognized such a cause of action only for adjacent landowners.

The Court also permitted plaintiffs to sue based on allegations that the defendants' use of the land was a private nuisance which is defined as a substantial and unreasonable interference with the private use and enjoyment of another's land such that the gravity of the harm outweighs the social value of the activity. The Court, however, refused to recognize a cause of action that extracting natural resources is an abnormally dangerous activity which would render the defendants strictly liable. The Court held that day-to-day activities involved with mining and extracting natural resources does not necessarily create a high risk of flash flooding, but that the increased risk of flooding could be greatly reduced by the exercise of due care. Furthermore, the Court found that "extractive activities" such as mining and timbering are common in southern West Virginia and refused to conclude that the great economic value of these activities outweighs their dangerous attributes. Finally, the Court accepted the "act of God defense" and held that where a rainfall of an unusual and unforeseeable nature combined with a defendant's actionable conduct causes flood damage, the defendant is liable only for the damages that are fairly attributable to the defendant's conduct. The defendant, however, must demonstrate such by clear and convincing evidence. Failure to do so would render the defendant responsible for the entire liability.

The flood litigation panel was created after 489 plaintiffs who are private residential property owners and occupiers filed suit in seven southern West Virginia counties against 78 defendants including coal companies, railroads and gas companies.

LEGISLATI

The West Virginia Legislature in its 2005 legislative sessio
specifically and the civil justice system generally. Pertinent legis

-Notice of No Flood Coverage

The Legislature passed Senate Bill 256 which adds a new section to the West Virginia Code §33-17-6a, which requires fire insurance companies to provide a Notice of Non-Coverage of Flood Damage on such policies. The Notice must state:

THIS POLICY DOES NOT COVER DAMAGE FROM FLOOD. FOR INFORMATION ABOUT FLOOD INSURANCE, CONTACT THE NATIONAL FLOOD INSURANCE PROGRAM OR YOUR INSURANCE AGENT.

Senate Bill 56 was passed April 7, 2005 and becomes effective 90 days from passage.

-Child Safety Seats

In passing Senate Bill 414, the West Virginia Legislature now requires every driver who transports a child under the age of eight to secure the child in a child safety seat or booster seat. A seatbelt will suffice for any child under the age of eight who is at least 4'9". Violation of the West Virginia Code §17C-15-46 is deemed a misdemeanor.

-Joint and Several Liability

After several proposed changes, the Legislature passed, in the closing hours of its session, Senate Bill 421 concerning joint and several liability, another key component of the Governor's tort reform package. West Virginia Code §55-7-23 was added to allow for the apportionment of damages between joint tortfeasors. If a defendant is found 30% at fault or less, that defendant's liability shall be limited to the percentage of fault assessed by the jury. There are additional provisions included in the new statute which would void the limitation on liability under certain circumstances including, but not limited to, if damages based on fault of a remaining defendant is uncollectible.

The statute applies only to causes of action that accrue on or after July 1, 2005.

-Consumer Protection

The Legislature also passed Senate Bill 456 concerning consumer protections that permit cure offers by merchants or sellers to consumers. A "cure offer" is defined as a written offer of one or more things of value, including but not limited to, the payment of money that is made by a merchant or a seller and that is delivered by certified mail to a consumer claiming to have suffered a loss as a result of a consumer transaction or to the attorney for such person. The bill modified West Virginia Code §46A-6-102 and §46A-6-106. In addition to creating the right to cure, the amended statute also requires notice of a violation prior to the initiation of a lawsuit. This bill was also requested by Governor Manchin as part of his tort reform package.

-Cyber-Shoplifting

On the last night of the session, the Legislature also passed Senate Bill 473 which amends West Virginia Code §61-3A-1 which defines shoplifting. The Legislature added additional definitions which makes it a crime to repudiate a credit or debit sale by telephone, mail order, internet or other means that does not require the cardholder's signature or physical presentation of the card to the merchant. Therefore, anyone who repudiates such a transaction after receiving merchandise and who then does not return the merchandise, is guilty of the offense of Cyber-Shoplifting.

-Electronic Postmark

The Legislature also amended Chapter 39A of the Code concerning digital signatures to provide for the use of an "electronic postmark". An electronic postmark is defined as an electronic service provided by the United States Postal Service that provides evidentiary proof that an electronic document existed in a certain format at a certain time and that an electronic document was opened where the contents of the electronic document were displayed with a time and date documented by the United States Post Office. Such electronic postmark, however, is not authorize to affect service of a Summons or Complaint.

VE ACTION

on passed several bills which affect the insurance industry
slation which passed the regular session are summarized below.

-Medical Professional Liability

The Legislature also amended West Virginia Code §55-7B-12, which now insulates a health care provider from liability for injury a third-party sustains from a prescribed drug or medical device so long as the health care provider observed all FDA protocols regarding dosage and administration of the drug.

-Service of Process Fees

In adopting House Bill 2296 the Legislature amended West Virginia Code §59-1-14, now raising service of process fees to $25.00 for service through the Sheriff's Department. In addition, the amendment now requires that $2.00 of each fee collected shall be deposited into the "West Virginia Deputy Sheriff Retirement Fund."

-West Virginia Healthy Act of 2005

The Legislature also enacted the "Healthy West Virginia Program" finding that the rise in obesity and related weight problems has created a health care crisis that "burdens the health care infrastructure of the State." The Legislature made specific findings that the State must take action to assist West Virginians in healthful eating and regular physical activity and that the State must invest in research to improve understanding of inappropriate weight gain and obesity. The Legislature charged the Department of Health and Human Resources to coordinate efforts of agencies to prevent and remedy obesity and related weight problems and created the Office of Healthy Lifestyle within the DHHR. The Office is to establish a coalition to assure consistency of public and private sectors with respect to programs addressing obesity and to establish a recognition program for employers, merchants and restaurants from other private sector businesses to encourage the development of healthy lifestyles and to solicit grants, gifts, bequests, donations and other funds to enable the State to accomplish the goals of the program.

-Apology to be Inadmissible

Effective July 11, 2005, if a health care provider makes any apology or statement concerning sympathy, condolence or compassion to a patient, relative or representative of a patient, such statements shall not be deemed an admission of liability in a civil suit, arbitration, mediation or other related civil action. The West Virginia Legislature added this subsection to W.Va. Code §55-7-11a when it passed House Bill 3174 on April 9, 2005.

COURT NARROWLY INTERPRETS *CAMPBELL*

The West Virginia Supreme Court, in considering a punitive damages claim arising from a fraudulent licensing scheme, has limited the effect of *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 US 408 (2003), in West Virginia. In *Boyd v. Goffoli*, (No. 31671, W.Va., filed November 29, 2004), the Court reviewed a nearly $1 million verdict returned against Falcon Transport Company from the Circuit Court of Brooke County.

Falcon Transport Company, an Ohio corporation with a trucking terminal in Weirton, apparently engaged in a scheme whereby West Virginia residents were enrolled in truck driver training programs in Pennsylvania and were requested to obtain commercial drivers licenses using a false address in Pennsylvania. Four West Virginia residents applied with a Falcon Transport recruiter in Weirton and subsequently had their West Virginia drivers licenses revoked when they applied for the Pennsylvania license using a false address. At trial, the jury awarded $75,000 to each plaintiff for lost wages, aggravation and inconvenience and $250,000 to each for punitive damages. On appeal the defendant argued the punitive damages award violated *Campbell* because it involved a scheme to violate Pennsylvania law and thus concerned out-of-state conduct. Chief Justice Maynard, writing for the majority, disagreed, finding that the punitive damages award did not violate *Campbell* because unlawful out-of-state conduct injured West Virginians. *Campbell* prohibits evidence of out-of-state conduct because a state has no legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside a state's jurisdiction.

The *Boyd* Court found that *Campbell* was distinguishable because it was based upon dissimilar, lawful, out-of-state conduct. The *Boyd* Court found that the present case involved evidence of unlawful, out-of-state conduct that actually injured West Virginians. The *Boyd* Court wrote: "[T]his Court does not believe that the *Campbell* Court's broadly worded *dictum* that a State does not have a legitimate concern imposing punitive damages to punish a defendant for lawful out-of-state conduct applies to the instant case... This Court now holds that a State has a legitimate interest in imposing damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction where the State has a significant contact or significant aggregation of contacts to the plaintiff's claims which arise from the unlawful out-of-state conduct."

The *Boyd* Court further held that "fairness" to the plaintiff supported the award because the defendant knew that the plaintiffs were West Virginia residents and that as a result may be held accountable in West Virginia for wrongful conduct which injured its citizens. Therefore, the *Boyd* Court concluded that introduction of the defendant's illegal conduct in Pennsylvania was not sufficiently arbitrary or unfair as to exceed constitutional limits and permitted the evidence and upheld the punitive damages verdict.

The Court also upheld the ratio of punitive damages which was 3.3 to 1. The defendant argued that the ratio was actually higher based upon the non-economic component of the compensatory award, thus raising the ratio to 8.4 to 1. Under either calculation, the Court found the ratio to be appropriate.

In a concurring opinion Justice Davis reiterated her prior statements in *Jackson v. State Farm Mut. Auto. Ins. Co.*, W.Va., 600 S.E.2d, 346 (2004), that *Campbell* involved only lawful, out-of-state conduct and therefore the question of whether or to what extent unlawful, out-of-state conduct may be used remains unanswered.

In a separate concurring opinion Justice Starcher wrote: "*Campbell* was not a significant decision by the U.S. Supreme Court. It did not dramatically alter the punitive damage landscape, and actually did little more than reiterate the standards of review established in prior cases." He concluded that because the defendant's agent made statements to West Virginia plaintiffs about the out-of-state licensing scheme and that the unlawful actions were pervasive, these acts demonstrated deliberateness and reprehensibility sufficient to sustain a punitive damages award. "There is simply no procedural or constitutional prohibition that would prevent this evidence from being used to support a punitive damage award," Justice Starcher wrote.

He also concluded that *Campbell* did not limit punitive damages to a single digit ratio holding: "The Constitution identifies no particular multiple of compensatory damages as an acceptable limit for punitive awards; it does not concern itself with dollar amounts, ratios, or the quirks of juries in specific jurisdictions."

DISCIPLINARY BOARD FINDS INSURER BILLING GUIDELINES MAY VIOLATE RULES OF PROFESSIONAL CONDUCT

The West Virginia Lawyer Disciplinary Board has issued a legal ethics opinion, LEI 2005-01, which states that when retained by an insurance company to defend an insured, a lawyer can not ethically agree to adhere to insurance company billing guidelines that:

1) dictate how work is to be allocated;

2) restrict or require approval before conducting discovery, engaging in motion practice, trial preparation or otherwise performing substantive work; or

3) otherwise impose a financial penalty or create an economic disincentive with respect to the lawyer's exercise of independent professional judgment.

The Board considered several billing guidelines of insurance companies and found that certain restrictions and necessity of obtaining prior approval may violate Rules 1.7, 1.8 and 5.4 of the Rules of Professional Conduct.

The Board found Rule 5.4(c) particularly pertinent. This Rule prohibits one who pays for the legal services of another from directing or regulating the lawyer's exercise of professional judgment in rendering legal services.

The Board cautioned, however, that the Opinion was not to be interpreted as an "open checkbook or unlimited carte blanche discretion" reiterating that a lawyer's fee must be reasonable. Several insurance companies have recently issued statements that to the extent their billing guidelines are in conflict with this Opinion, they are so modified or will be either withdrawn or re-written.

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