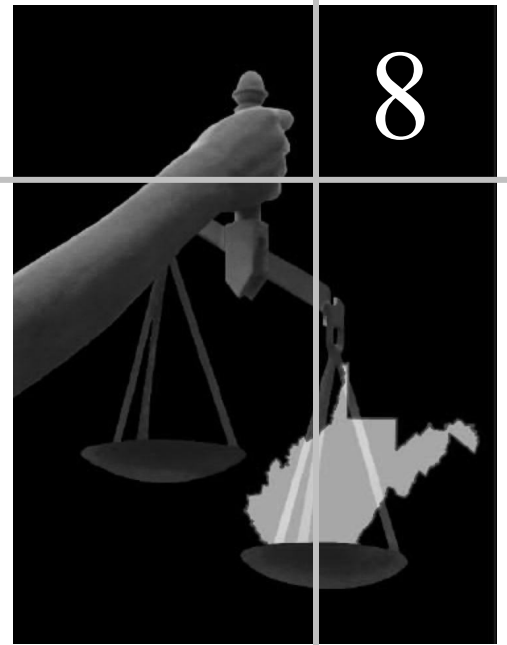


CHAPTER 8



SHOULD WE KEEP THIS COURT?
AN ECONOMIC EXAMINATION OF
RECENT DECISIONS MADE BY THE WEST
VIRGINIA SUPREME COURT OF APPEALS

by Kristen M. Leddy, Russell S. Sobel, and Matthew T. Yann

The Rule of Law

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SHOULD WE KEEP THIS COURT? AN ECONOMIC EXAMINATION OF RECENT DECISIONS MADE BY THE WEST VIRGINIA SUPREME COURT OF APPEALS¹

Kristen M. Leddy, Russell S. Sobel, and Matthew T. Yann

There has been much discussion lately about whether West Virginia's economy could be bolstered by adopting various initiatives aimed at improving its business climate.² While people tend to associate a state's business climate with factors such as corporate taxes and regulations, a state's judicial system is also an important element in determining the relative attractiveness of a state to business development. State court rulings have significant effects not only on the cost of doing business in a state, but also on the predictability and risk associated with operating a business. Entrepreneurs take account of the state's business climate when deciding whether to create new jobs in West Virginia.

At the outset, it is important to discuss the proper role of the court system in a market-based economy, such as we strive for in the United States. The market-based economy relies on the market to provide information, and is the most efficient mechanism to create wealth. A market-based economy allows individuals to be secure in their persons and property, and affords individuals the ability to make decisions over the resources they control. An individual's action is only limited to the extent that individual's action violates or impinges on the rights of others. In cases where one party impinges upon the rights of another, a properly functioning legal system fairly and consistently settles disputes between parties. Court decisions, in effect, set the price (or cost) imposed for impinging on the rights of others. It is critical that courts set these prices fairly and in a predictable manner. Punishments that are too lenient will not provide the correct incentives for parties to avoid impinging upon the rights of others, and punishments that are too severe will result in an abundance of lawsuits and will discourage activities that would have created economic growth. Striking this balance is the key to the court properly arbitrating those cases before it.

¹ This chapter is an updated version of Kristen M. Leddy, Russell S. Sobel, and Matthew T. Yann, *Should We Keep This Court? An Economic Examination of Recent Decisions Made by the West Virginia Supreme Court of Appeals*, FED. SOC., Oct. 2008, available at www.fed-soc.org/westvirginia.

² See, e.g., UNLEASHING CAPITALISM: WHY PROSPERITY STOPS AT THE WEST VIRGINIA BORDER AND HOW TO FIX IT, (Russell S. Sobel, ed., Public Policy Foundation of West Virginia, 2007).

Economists frequently use an analogy to the board game Monopoly™ to explain the important role of the legal system, and the courts, in an economy. While the government's proper role is not to be an active player in the game, it should, and does, have the unique role of setting and enforcing the rules of the game under which the players operate. For the economic game to run smoothly, the rules must be clear, predictable, and enforced fairly. Generally, the state's legislature determines these rules, the state's executive branch enforces them, and the state's judiciary interprets them. Sometimes, however, judges depart from their interpretive function. This departure is sometimes called "judicial activism."

Arthur Schlesinger coined the term judicial activism in the late 1940s, but Schlesinger did not provide a definition of the term that scholars readily accepted.³ While there has been little consensus on the meaning of the term,⁴ a review of the scholarly literature on judicial activism yields the following common explanations of its meaning: 1) judicial conduct that exceeds the power constitutionally granted to the judiciary, 2) judicial decisions that ignore past precedent, 3) judicial decisions which "legislate from the bench," 4) the judicial exercise of broad remedial powers, and 5) judicial decisions according to the judge's personal political preferences.⁵ The scholarly analysis of this term creates a framework to begin this discussion but does little to establish a uniform definition of judicial activism. In an effort to clarify the meaning of judicial activism as it relates to West Virginia, we rely on the definitions provided by West Virginia justices.

The Justices of the Supreme Court of Appeals of West Virginia used the phrase "judicial activism" a total of four times during the period from 2005 through 2008. The term does not appear in any majority opinion; rather, it appears in concurrences and in dissents. According to the various justices, "judicial activism," occurs when a court encroaches upon the authority of the legislature to bar negligent claims by employees against their employers,⁶ or when a court arrogates to itself the task of seeking out and deciding an issue that no one has brought before it or argued,⁷ or when a court exceeds its proper constitutional role by amending a statutory provision to remedy what it believes to be a policy inadequacy in legislative judgment,⁸ or even when a court would improperly emasculate the intent and purpose of a rule of civil procedure.⁹ Importantly, the justices use the term to accuse each other of judicial missteps, and to urge the other justices to refrain from activist decision-making, whatever its meaning.

The court's admonishment against judicial activism seems more than just empty rhetoric. While the court emerged as a significant entity in state policymaking since the 1960s and 1970s, the general choice of the justices is stasis according to Professor Brisbin.¹⁰

³ See Keenan Kmiec, *The Origin and Current Meanings of 'Judicial Activism,'* 92 CAL. L. REV. 1441, 1443 (2004) (referring to Arthur Schlesinger's use of "judicial activism" in a *Fortune* magazine article on the U.S. Supreme Court in January 1947 as the first official usage of the term).

⁴ See Caprice Roberts, *In Search of Judicial Activism: The Dangers of Quantifying the Qualitative,* 74 TENN. L. REV. 567, 570 (2007).

⁵ See Kmiec at 1464-1476; Roberts, 581-600; Vincent Martin Bonventre, *Judicial Activism, Judges' Speech, and Merit Selection: Conventional Wisdom and Nonsense,* 68 ALB. L. REV. 557, 564-575 (2005); and Frank Cross and Stefanie Lindquist, *The Scientific Study of Judicial Activism,* 91 MINN. L. REV. 1752, 1762-1764 (2007).

⁶ *Bias v. Eastern Associated Coal Corporation* (2006) (Davis, C.J., concurring).

⁷ *Fairmont General Hospital, Inc. v. United Hospital Center, Inc.* (2005) (Starcher, J., dissenting).

⁸ *Worley v. Beckley Mechanical, Inc.* (2007) (Benjamin, J., dissenting).

⁹ *Riggs v. West Virginia University Hospitals, Inc.* (2007) (Davis, C.J., concurring).

¹⁰ See RICHARD A. BRISBIN, JR., WEST VIRGINIA STATE GOVERNMENT: THE LEGISLATIVE, EXECUTIVE, AND JUDICIAL BRANCHES, *The West Virginia Judiciary* (Institute for Public Affairs, West Virginia University, 1993);

Brisbin's comprehensive 1993 study of the West Virginia judiciary evaluated the court's activism, finding it most likely to engage in doctrinal changes in the areas of tort law and products liability.¹¹ The court significantly altered the state's policies regarding the workers' compensation system, forced the state to reconstruct its prison system, established alcohol treatment programs, and provided emergency care to the state's homeless population.¹² The court revolutionized the family law system, including child custody law and prenuptial agreements.¹³ Despite the court's willingness to act aggressively at the state level, it does show deference to federal court rulings, to U.S. Supreme Court rulings, and to the U.S. Constitution.¹⁴

In the fifteen years since Professor Brisbin's study, the state legislature made noteworthy changes in the area of tort law, such as lower caps on medical malpractice damages; limits on joint and several liability; venue restrictions; and the elimination of third-party bad-faith claims against insurance companies.¹⁵ In the past three years, the West Virginia Supreme Court invalidated the revised venue statute, discarded a common law modification of a product manufacturer's duty to warn, upheld the imposition of a tax that may prove to violate the Commerce Clause, and refused to grant appellate review to some exorbitant punitive damages awards in commercial cases. However, it has generally upheld workers'-compensation reforms, consumer-protection and family-court-system reforms. In this study, we examine some of the most important cases that have confronted the West Virginia Supreme Court of Appeals in the years 2006 to 2008, and describe how these decisions impact West Virginia's economic climate.

The cases examined here create additional costs on companies doing (or thinking of doing) business in West Virginia. They also create cost uncertainty for businesses, which can lower the attractiveness of investing in the state. To the extent that these cases are won by the lawyers who pursue them, and their clients, this may increase the number of cases filed in the future. This draws resources away from investment and instead involves devoting resources toward litigation costs and potential wealth transfers through settlements or judgments.

THE 2008 CASE: *CAPERTON V. MASSEY*

The glare of a national spotlight shines on West Virginia's highest court, as many observers carefully watch how the U.S. Supreme Court will review the state court's ruling in *Caperton v. A.T. Massey Coal Co., Inc. (Massey)*.¹⁶ In *Massey*, the West Virginia Supreme Court reversed the judgment of the of the Circuit Court of Boone County and dismissed the case awarding Plaintiffs Hugh M. Caperton, Harman Development Corporation, Harman Mining Corporation, and Sovereign Coal Sales, Inc. over \$50 million, including punitive damages, in

see also CHARLES LOPEMAN, *THE ACTIVIST ADVOCATE* (Praeger Publishing, 1999) (discussing the conservative history of the State's Supreme Court of Appeals prior to the 1980s).

¹¹ BRISBIN at 31.

¹² *Id.* at 32.

¹³ *Id.* at 33.

¹⁴ *Id.* at 33-34.

¹⁵ Elizabeth Thornburg, *Judicial Hellholes, Lawsuit Climates and Bad Social Science: Lessons from West Virginia*, 110 W.VA. L. REV. 1097 (2008).

¹⁶ Not reported in S.E.2d, 2008 WL 918444, 2007 W.Va. LEXIS 119 (W.Va., April 3, 2008). On November 14, 2008, the U.S. Supreme Court granted the petition for a writ of *certiorari* in this case, which will be argued on March 3, 2009.

a breach-of-contract dispute. Although the \$44 million dollar punitive damage award makes the case significant in the state's contract law, several high-profile legal groups, including the American Bar Association, submitted amicus briefs,¹⁷ asking the U.S. Supreme Court to review this case for its significance regarding recusal standards.¹⁸

Justice Elliott Maynard recused himself from the case after vacation photographs appeared in the media linking him with Massey CEO Don Blankenship.¹⁹ Justice Larry Starcher similarly recused himself from the case, after comments he made about Blankenship appeared to create an impermissible bias.²⁰ Justice Brent Benjamin, however, did not disqualify himself from the case, even though Blankenship's campaign contributions helped Brent Benjamin defeat former Justice Warren McGraw in 2004.²¹ This is a thorny issue, because Blankenship spent the money himself, in support of Benjamin. Justice Benjamin, that is to say, his campaign committee, did not receive direct campaign contributions from Blankenship, and Blankenship's expenditures were not coordinated with those of Benjamin's committee. Put more accurately, Blankenship's goal was to defeat Warren McGraw, and Benjamin benefited from Blankenship's pursuit of his goal. Does this make it improper for Benjamin to hear cases in which Massey or its CEO is a party? The U.S. Supreme Court will decide this issue.

In sparsely populated states, such as West Virginia, it is especially critical that judges fairly apply the law, given the personal relationships judges often have with case parties. For the system to work fairly, it is important that these personal or financial relationships not interfere with the fair administration of justice. An appearance that these relationships influence court decisions works to undermine the presumption of fairness and predictability in the state's legal system. The controversy associated with this case has led to interest in reforming the method of judicial selection in the state, perhaps by moving to judicial appointment or to public funding of judicial elections.

THE 2007 CASES: *TAWNEY, DU PONT, WHEELING PITTSBURGH STEEL, AND JOHNSON & JOHNSON V. KARL*

West Virginia circuit courts awarded three of the nation's top-ten plaintiffs' verdicts in 2007.²² All three were lawsuits against businesses. The Circuit Court of Roane County awarded the plaintiffs \$404 million in their breach-of-contract claim against Columbia Natural Resources, L.L.C.,²³ the Circuit Court of Harrison County awarded the plaintiffs \$251

¹⁷ The Brief of the American Bar Association as *amicus curiae* in this case, available at http://www.abanet.org/judind/pdf/caperton_brief.pdf.

¹⁸ See Lawrence Messina, *Legal Groups blast W.Va. Justice in Massey Case*, ASSOCIATED PRESS, August 5, 2008.

¹⁹ Ken Ward, *Maynard recuses himself for the third time*, CHARLESTON GAZETTE, February 8, 2008.

²⁰ Paul Nyden, *Starcher recuses himself from the Massey case*, CHARLESTON GAZETTE, February 16, 2008; see also Justice Starcher's recusal statement, available at http://www.state.wv.us/wvsca/press/feb15b_08.htm.

²¹ John O'Brien, *Justice Benjamin draws recusal line in major W.Va. case*, LEGAL NEWS LINE, September 12, 2008.

²² When ranked by the dollar value of the award. See VerdictSearch, *Top 100 Verdicts of 2007*, available at <http://www.verdictsearch.com/index.jsp?do=top100>.

²³ See *Estate of Tawney v. Columbia Natural Resources, L.L.C.* (2007).

million in their toxic-tort claim against E.I. DuPont De Nemours & Co.,²⁴ and the Circuit Court of Brooke County awarded the plaintiff Wheeling Pittsburgh Steel Corp. \$220 million in a breach-of-contract claim against the Central West Virginia Energy Co.²⁵

All but one of the 2007 cases featured here included large punitive damage awards designed to punish the businesses involved. These awards are not related to the amount of damage the defendant party caused, but are instead related to the jury's interpretation of the 'badness' of the defendant party's behavior. It is much easier for jurors to internalize injuries that plaintiffs present in jury trials than it is for jurors to internalize the damage a large punitive damage award may have on the state's business climate, their future employment prospects, and their incomes. Rulings such as these can reduce the willingness of businesses to invest and/or locate in West Virginia.

A business generally faces two distinct types of risk, either of which may subject it to financial ruin. The first is economic risk, characterized by efficiency, management, and market effects. The second is legal risk, characterized by corporate exposure to lawsuits. Inefficiency and poor management risk only the businesses assets invested in the venture. The worst-case scenario is that the firm may lose all of its investment in that particular operation if it were to go out of business. The limit on economic risk for a business is then just the business assets involved or invested in that location. Legal liability, however, can impose verdicts that far exceed the amount of investment in the state, forcing the company to close or dispose of other assets and operations from other states (that had no part in the case in question) to settle the lawsuit. Thus, in cases such as those discussed here, a large national corporation conducting business in West Virginia could face not just the loss of the investment made in the state, but also the risk of a potential lawsuit that results in a verdict that reaches deeply into the total assets of the company. To avoid such exposure, a firm may choose not to have a business presence in West Virginia. We now examine each of these cases in more detail.

ESTATE OF TAWNEY V. COLUMBIA NATURAL RESOURCES

In *Estate of Tawney v. Columbia Natural Resources*, the West Virginia Supreme Court of Appeals determined the appropriate reading of the contract at issue, sent by the Circuit Court of Roane County as a certified question.²⁶ The approximately 8,000 plaintiffs in the case had oil and gas leases of varying forms and types with Columbia Natural Resources ("CRN"), a subsidiary of NiSource, or a predecessor in interest.²⁷ The oil and gas leases provided that the plaintiffs would receive payments of 1/8 of the royalty to be calculated "'at the well,' 'at the wellhead' or similar language, or that the royalty is 'an amount equal to 1/8 of the price, net of all costs beyond the wellhead,' or 'less all taxes, assessments, and adjustments.'"²⁸ "In light of fact that West Virginia recognizes that a lessee to an oil and gas lease must bear all costs incurred in marketing and transporting the product to the point of sale unless the oil and gas lease provides otherwise,"²⁹ the Supreme Court held that:

²⁴ See *Perrine v. E.I. DuPont De Nemours & Co.* (2007).

²⁵ See *Wheeling Pittsburgh Steel Corp. v. Central West Virginia Energy Co.* (2007).

²⁶ 219 W.Va. 266, 633 S.E.2d 22 (2006).

²⁷ *Id.* at 269, 25.

²⁸ *Id.* at 268, 24.

²⁹ *Id.*

language in an oil and gas lease that provides that the lessor's 1/8 royalty (as in this case) is to be calculated “at the well,” “at the wellhead,” or similar language, or that the royalty is “an amount equal to 1/8 of the price, net all costs beyond the wellhead,” or “less all taxes, assessments, and adjustments” is ambiguous and, accordingly, is not effective to permit the lessee to deduct from the lessor's 1/8 royalty any portion of the costs incurred between the wellhead and the point of sale.³⁰

The canon of construction that courts construe ambiguous language against the drafter supports the court's position.³¹

The interesting part of this case was the West Virginia Supreme Court's decision to refuse to hear an appeal of the \$404 million verdict, the third largest verdict in the nation for 2007, of which \$270 million were punitive damages.³² Instead, the West Virginia Supreme Court “granted NiSource's request for a stay of the judgment, pending action by the U.S. Supreme Court on a petition for a writ of certiorari, which NiSource plan[ne]d to file in late August.”³³ Injured plaintiffs generally cannot recover punitive damages in a breach of contract action because a goal of contract law is to compensate the injured party, not to punish the breaching party.³⁴ The punitive damages awarded in this case represent a major departure from the standard principles of contract law.

LENORA PERRINE, ET AL. V. E.I. DUPONT DE NEMOURS & CO., ET AL.

The West Virginia Supreme Court of Appeals has announced that it will hear argument in three cases on September 24, 2008, Numbers 080721, 081461, and 081462, captioned *Lenora Perrine, et al. v. E.I. DuPont de Nemours & Co., et al. (DuPont)*.³⁵ This includes argument in the plaintiff's appeal of partial summary judgment and DuPont's appeal of the approximately \$252 million verdict.³⁶

In *DuPont*, attorneys presented the Harrison County Circuit Court jury with the history of a plant built in 1911 under the ownership of Grasselli Chemical Co., Inc.³⁷ DuPont purchased the plant in 1928, and disposed zinc ore waste into a pile at the facility, which smoldered at high temperatures and released “toxic heavy metals into the surrounding communities.”³⁸ In 1950, DuPont sold the plant to Meadowbrook Corp.³⁹ T.L. Diamond & Co., Inc. “ran the plant from 1984 until approximately 2001, when DuPont regained

³⁰ *Id.* at 274, 30.

³¹ ROBERT A. HILLMAN, PRINCIPLES OF CONTRACT LAW 249 (West 2004).

³² NiSource Reports Second Quarter Earnings, available at <http://www.foxbusiness.com/story.markets/industries/energy/nisource-reports-second-quarter-earnings/>.

³³ *Id.*

³⁴ HILLMAN at 134.

³⁵ See Motion docket for September 24, 2008, available at http://www.state.wv.us/wvsca/calendar/sept24_08.htm.

³⁶ Dan Turner, *DuPont files an appeal with West Virginia Supreme Court on Spelter Lawsuit Decision*, REUTERS PRNEWswire-FIRSTCALL, June 24, 2008.

³⁷ *Lenora Perrine, et al. v. E.I. DuPont de Nemours & Co., et al.*, No. 04-C-296; see VerdictSearch, *Top 100 Verdicts of 2007*.

³⁸ *Id.*

³⁹ *Id.*

operation.”⁴⁰ After repurchasing the plant, DuPont “began smoothing the waste pile and covered it with a synthetic membrane to grow vegetation, which [DuPont] completed in 2004.”⁴¹ Approximately 8,000 residents sued E.I. DuPont De Nemours and Co., Meadowbrook Corp., Matthiessen & Hegeler Zinc Co. Inc., Nuzum Trucking Co., T.L. Diamond & Co. Inc., and Joseph Paushel claiming “wanton, willful, and reckless conduct.”⁴² At trial,

[P]laintiffs' experts testified that the claimants were at a higher risk to cancer (skin, lung, bladder, stomach and kidney cancer) and non-cancer impairments, including decreased renal function, renal failure, plumbism (lead poisoning) and neurocognitive injury. The plaintiffs' experts opined that the class members lived in different identified zones (Zone 1A, Zone 1B, Zone 2 and Zone 3) and that each zone was at a different risk of contracting cancer. Claimants in Zone 1A had a one in 1,000 incremental increased risk of cancer; Zone 1B residents had a 5 in 10,000 increased risk; Zone 2 had a one in 10,000 risk; and Zone 3 had a five in 100,000 risk. . . . [Plaintiffs' expert] Brown testified that it would cost \$56 million to remove and replace the contaminated soils and clean affected zones. In Zone 1A, the top six inches of the soil would be scraped and replaced on 20 properties, while anything that acted as a dust trap in the homes (i.e. insulation, air conditioner, carpet) would be removed and cleansed. In the remaining zones, the cleanup would be less invasive, as homes' ventilation systems would be cleaned⁴³

On the other hand,

Defense counsel contended that the smelter did not present a public health problem, and that any risk to cancer or any other alleged diseases [were] nonexistent. This opinion was reiterated by Peter Valberg, the defense comparative risk expert, who said that it was more dangerous to smoke cigarettes and drive a car while talking on phone than to live in the Spelter area.⁴⁴

In October of 2007, a Harrison County jury awarded the plaintiffs \$196.2 million in punitive damages, \$33.3 million to clean up soil and residences, \$2.8 million to clean up mobile homes, \$1.0 million to clean up commercial structures, and \$18.4 million in lost profits.⁴⁵ On appeal, plaintiffs' argue

that there were material questions of fact as to whether the contamination and injuries/damages due to the operation of a zinc smelter were contemplated by the original landowners and whether certain releases and easements executed in

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

the 1920's provide immunity for those claims. Plaintiffs seek a reversal of the circuit court's order granting partial summary judgment in favor of defendants on the Property Class members' claims and request a remand for reinstatement and adjudication of those claims upon their merits.⁴⁶

This case presents a \$251.7 million dollar award to plaintiffs who have at most “a one in 1,000 incremental increased risk of cancer.”⁴⁷ Whether this value is an appropriate award is subject to debate. In any case, a site owned by multiple companies over a 100-year period has yielded plaintiffs a punitive damage award three times that of the amount needed to compensate the plaintiffs for their increased risk of injury.

PITTSBURGH STEEL CORP. V. CENTRAL WEST VIRGINIA ENERGY CO.

In a breach of contract dispute, the Brooke County Circuit Court awarded the Wheeling-Pittsburgh Steel Corp. (Wheeling-Pitt) \$219.8 million in damages arising out of Central West Virginia Energy Company's “fail[ure] to deliver 104,000 tons of metallurgical grade coal per month as required under a contract that extended to 2010.”⁴⁸ Central West Virginia Energy Co. (Central West Virginia Energy) is a subsidiary of Massey Energy (Massey).⁴⁹ Wheeling-Pitt had a long-term contract with Central West Virginia Energy Co. for the provision of coal, which would allow Wheeling-Pitt to operate its coke ovens nonstop.⁵⁰

The terms of the contract included a “force majeure,” or “greater forces” clause,⁵¹ which allowed a party to breach the contract for limited amounts of time if an event occurred outside the party's control. Problems arose between Wheeling-Pitt and Central West Virginia Energy in late 2003, when “steel-making coal prices skyrocketed.”⁵² “Coal that had been selling for \$40 a ton was going for \$125 a ton or more.”⁵³ Massey asserted that “transportation challenges . . . , a variety of geological problems, poor roof conditions, and flooding at its Southern West Virginia mines” caused the company to fail to deliver the coal to Wheeling-Pitt,⁵⁴ and that Massey and Central West Virginia Energy were protected from a breach of contract action arising under circumstances that were beyond the control of Massey and Central West Virginia Energy. Central West Virginia Energy accused Massey of “selling its steel making coal at prices far greater than its contract with Wheeling-Pitt allowed.”⁵⁵

Wheeling-Pitt sued Central West Virginia Energy and Massey for the damage their coke oven sustained in its intermittent operation, and for replacement coal purchases.⁵⁶ The Brooke County jurors awarded Wheeling-Pitt \$119.8 million in compensatory damages and \$50 million in punitive damages from both Central West Virginia Energy and Massey.⁵⁷

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Associated Press, *Judge Orders Massey to Pay Wheeling-Pitt*, CHARLESTON DAILY MAIL, July 3, 2007, at C2.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Ken Ward, Jr., *Massey Likely to Appeal Wheeling-Pitt Coal Verdict*, CHARLESTON GAZETTE, July 4, 2007, at A2.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

Because the West Supreme Court of Appeals declined to hear an appeal of the verdict, Massey is appealing the case to the U.S. Supreme Court.⁵⁸

This case provides an example of how the West Virginia courts have abandoned the concept of efficient breach of contract. Under an efficient breach, society is made better off by one party breaching an existing contract, reaping the benefits of that breach, and then compensating the injured party. Society is made better off because the breaching party creates wealth, and the innocent, non-breaching party is made whole. If the “force majeure” clause did not apply, as the jury found, then Central West Virginia Energy did owe Wheeling-Pitt an amount equal to the foreseeable damage Wheeling-Pitt sustained as a result of Central West Virginia Energy’s breach. According to the jury, \$119.8 million is a reasonable figure for this breach of contract. The interesting question is whether punitive damages have a place in contract law, and the West Virginia Supreme Court denied an appeal of this case to address that issue. Given the potentially large economic consequences of these large punitive awards, and the lack of legal support for awarding punitive damages in a breach-of-contract case, the Supreme Court’s decision to allow the verdict to stand negatively affects the nation’s view of West Virginia’s business climate.

STATE EX REL. JOHNSON & JOHNSON V. KARL

Under the learned intermediary doctrine, drug manufacturers have no duty to warn consumers about the risks of taking prescription drugs because the manufacturers can rely on prescribing physicians to do so.⁵⁹ In a 3-2 decision in *State ex rel. Johnson & Johnson v. Karl*,⁶⁰ West Virginia became the only jurisdiction in the country to reject the learned intermediary doctrine in prescription medical product cases.⁶¹

In *Karl*, a drug manufacturer asked the Supreme Court of Appeals to issue a writ of prohibition, preventing the trial court, the Circuit Court of Marshall County, from refusing to apply the learned intermediary doctrine, in a case brought by the estate of a woman who died suddenly three days after she began taking a prescription drug made by the drug manufacturer.⁶² The majority opinion cites justifications from a variety of jurisdictions which adhere to the doctrine as “largely outdated and unpersuasive,”⁶³ even though the rule continues to be routinely applied.⁶⁴ The court reasons that the “Norman Rockwell” depiction

⁵⁸ Maria Guzzo, *Massey Vows to Battle W-P to the Last*, AMERICAN METAL MARKET, May 26, 2008.

⁵⁹ See John A. Day, *Learned Intermediary Doctrine*, August 29, 2007, available at <http://www.dayontorts.com/products-liability-learned-intermediary-doctrine.html>.

⁶⁰ 220 W.Va. 463, 647 S.E.2d 899 (2007).

⁶¹ See James M. Beck and Mark Hermann, *Headcount: Who’s adopted the Learned Intermediary Rule*, July 5, 2007, available at <http://druganddevicelaw.blogspot.com/2007/07/headcount-whos-adopted-learned.html>.

⁶² 220 W.Va. 463, 647 S.E.2d 899, 901.

⁶³ *Id.* at 470, 906.

⁶⁴ See Ted Frank and James Beck, *West Virginia Supreme Court Strikes Down the Learned Intermediary Rule*, November 15, 2007, available at http://www.aei.org/publications/filter.all.pubID.27111/pub_detail.asp. (citing the following cases as examples of jurisdictions that recently applied the learned intermediary rule: *E.g.*, *Ethicon Endo-Surgery, Inc. v. Meyer*, ___ S.W.3d ___, 2007 WL 1095552, at *2 (Tex. App. April 12, 2007); *Bodie v. Purdue Pharma LP*, ___ F.3d ___, 2007 WL 1577964, at *5-6, 11 (11th Cir. June 1, 2007) (applying Alabama law); *Stilwell v. Smith & Nephew, Inc.*, 482 F.3d 1187, 1194 (9th Cir. 2007) (applying Arizona law); *In re Zyprexa Prods. Liab. Litig. v. Eli Lilly & Co.*, ___ F. Supp. 2d ___, 2007 WL 1678078, at *28 (E.D.N.Y. June 11, 2007) (applying Pennsylvania, North Carolina and Florida law); *Soufflas v. Zimmer, Inc.*, 474 F. Supp.2d 737, 751 (E.D. Pa. 2007); *Madsen v. American Home Prods. Corp.*, 477 F. Supp.2d 1025, 1033 (E.D. Mo.

of physician-patient relations no longer exists, managed care systems have reduced the amount of time doctors spend with their patients, drug manufacturers have a wealth of advertising money at their disposal to speak directly to patients, and the State's existing law of comparative contribution among joint tortfeasors adequately addresses issues of liability among doctors and drug companies when patients sue for injuries related to prescription drug use.⁶⁵

On the other hand, the dissent argues that the issue of adequate product warnings on prescription drugs largely depends on the unique facts of each case, and the majority opinion downplays the "continuing and vital" role a physician plays in the decision to prescribe particular medications to particular individuals, based on that individual's specific needs.⁶⁶ Further, commentators suggest that the ruling may have potentially damaging effects on other doctrines, such as product identification, remote causation, and burden of proof in pharmaceutical products liability cases.⁶⁷ The results of the case arguably amount to strict liability on pharmaceutical manufacturers.

THE 2006 CASES: *MBNA* AND *RYAN V. CLONCH*

The 2006 cases highlighted here present examples of the West Virginia Supreme Court's willingness to increase tax revenue,⁶⁸ and the court's willingness to leave the bounds of the worker's compensation system to levy additional punishments on employers.⁶⁹ Both decisions decrease the predictability of West Virginia's legal system because they present sudden changes to established rules.

MBNA

In *Tax Commissioner of State v. MBNA America Bank (MBNA)*, dealing with constitutional and tax law, the court reviewed a case in which a Delaware credit card company sought a refund of the West Virginia business franchise tax and corporate net income tax.⁷⁰ MBNA, the credit card company, had no real or tangible personal property or employees in West Virginia during the relevant two-year period, 1998 and 1999.⁷¹ The company's business in the state included issuing and servicing credit cards, extending unsecured credit to card users, and promoting its business through mail and telephone solicitation.⁷² The issue in this case was whether the imposition of West Virginia's business franchise and corporate net income taxes on MBNA violated the Commerce Clause of the U.S. Constitution.⁷³ The court held that the

2007) (applying Iowa law); *Cowley v. Abbott Laboratories*, 476 F. Supp.2d 1053, 1060 (W.D. Wis. 2007) (applying North Carolina law); *Hill v. Wyeth, Inc.*, 2007 WL 674251, at *3-4 (E.D. Mo. Feb. 28, 2007); *Saraney v. Tap Pharm. Prods.*, 2007 WL 148845, at *6 (N.D. Ohio Jan. 16, 2007); *Paparo v. Ortho McNeil Pharm.*, 2007 WL 121149, at *3 (S.D. Fla. Jan. 10, 2007)).

⁶⁵ 220 W.Va. at 477, 647 S.E.2d at 912.

⁶⁶ *Id.* at 481, 917.

⁶⁷ *See* Frank and Beck.

⁶⁸ *See* *Tax Commissioner of State v. MBNA America Bank, N.A.* (2006).

⁶⁹ *See* *Joseph E. Ryan v. Clonch Industries, Inc.* (2006).

⁷⁰ *Tax Commissioner of State v. MBNA America Bank, N.A.* (2006).

⁷¹ *Id.* at 164, 227.

⁷² *Id.*

⁷³ *Id.*

tax scheme did not violate the Commerce Clause, reasoning that the company had a substantial economic presence in the state, sufficiently meeting the substantial nexus required to impose these taxes.⁷⁴

On the other hand, the dissent argues that taxing a business incorporated in a foreign state, when that business has no physical presence in West Virginia, is an impermissible burden on interstate commerce, is lacking in precedential support at both the state and federal levels, and is based upon thinly-veiled-state-tax agendas and inaccurate readings of Supreme Court precedent.⁷⁵ West Virginia's Chief Justice Davis defends the majority opinion in her concurrence. She states that she sees no reason why "mom and pop" businesses in the state with relatively small gross receipts should have to pay the business franchise tax and the corporate net income tax due to their physical presence in the state, when much larger corporations, such as MBNA, that make millions of dollars doing business in the state, should not simply because they lack a physical presence.⁷⁶ As of November 30, 2006, West Virginia became the third state to use the "significant economic presence" doctrine under the Commerce Clause.⁷⁷ In June 2007, the U.S. Supreme Court declined to review the case.⁷⁸ The economic ramifications of this decision are substantial as they relate to the potential costs (in terms of the tax burden) associated with companies doing business in West Virginia. Rightly or wrongly, this decision increases the costs to out-of-state companies thinking of doing business in the state.

JOSEPH E. RYAN V. CLONCH INDUSTRIES

When an individual appeals an administrative decision on a workers' compensation issue, the appeal goes directly to the West Virginia Supreme Court of Appeals for disposition. Only five other states in the United States utilize a similar system of worker's compensation review. According to the court's statistical report for 2007,⁷⁹ seventy-three percent of the new cases filed with the court were workers' compensation cases. The court disposes of most of the compensation cases it decides to review by memorandum order, as opposed to written opinion, its primary means of disposing of non-compensation cases.⁸⁰

Detractors of the court's workers' compensation jurisprudence, including members of the court, criticize some of its decisions as liberalizing benefit distributions beyond the legislature's original intent, driving up the cost of the workers' compensation system.⁸¹ In *Ryan v. Clonch*, the court expanded an exception to a discovery rule, which one attorney

⁷⁴ *Id.* at 173, 236.

⁷⁵ *Id.* at 173-74, 236-37 (Benjamin, J., dissenting).

⁷⁶ *Id.* at 180, 243 (Davis, C.J., concurring).

⁷⁷ See *Ryan, Inc., West Virginia Supreme Court Finds 'Significant Economic Presence' Constitutional Under Commerce Clause in MBNA America Bank*, November 30, 2006, available at http://www.johnbernardllc.com/develop/West_Virginia_Supreme_Court_Finds_Significant_Economic_Presence_Constitutional.aspx. The other two states are South Carolina and New Jersey. *Id.*

⁷⁸ See *TEI urges Supreme Court to clarify nexus standard: argues in MBNA case for clear-cut physical presence standard*, TAX EXECUTIVE, May-June 2007, available at http://findarticles.com/p/articles/mi_m6552/is_3_59/ai_n25378288.

⁷⁹ Available at <http://www.state.wv.us/wvsc/clerk/statistics/2007StatRept.pdf>.

⁸⁰ *Id.*

⁸¹ See *William Wayne Repass v. Workers' Compensation Division and USX Corporation/U.S. Steel Mining Company, Inc.*, unpublished memorandum disposition (2002) (Maynard, J., dissenting), available at <http://www.state.wv.us/wvsc/docs/spring02/29645d.htm>.

referred to as the “narrow exception you could drive a truck through.”⁸² In this case, a lumber worker performing banding duties was injured when a piece of metal banding material struck him in the left eye. The employee, Mr. Ryan, filed a claim under the deliberate intent statute, which provides immunity from suit to employers unless the employee can sufficiently prove five statutory requirements, including whether the unsafe working condition violated an industry standard applicable to the process, and whether the employer had a subjective realization and appreciation of the hazardous working condition and the high degree of risk associated with it.⁸³ The court reasoned that even though the employer’s actual subjective knowledge of the unsafe working condition was lacking, it held that the employer unconscionably violated a mandatory duty to perform a hazard evaluation pursuant to an OSHA regulation.⁸⁴ The dissent argued that the majority contravened legislative intent by using a general safety regulation to “satisfy the statutory specificity requirement of a deliberate intent cause of action.”⁸⁵

CONCLUSION

A fair and balanced legal system that enforces contracts and property rights is an essential foundation for a healthy and prosperous market-based economy. In this study, we have examined some of the cases with the largest potential ramifications for West Virginia’s business climate that have faced West Virginia’s Supreme Court of Appeals from 2006 to 2008. The decisions made (or refused to be made) on these cases have the potential to affect economic growth and job creation. In the end, West Virginia is in competition with the other 49 states to attract entities that will create jobs and income. Thus, it is critical to examine how West Virginia judges treat individuals and businesses relative to the treatment businesses and individuals receive in other states. If the West Virginia court system imposes more costs and uncertainty than would be present in other states, it will detract from West Virginia’s ability to sustain economic growth and prosperity. To grow, West Virginia’s legal system must be competitive with other states.

⁸²Brian Peterson, *Deliberate Intent: the narrow exception you could drive a truck through* December 27, 2005, available at <http://legalweblog.blogspot.com/2006/12/deliberate-intent-narrow-exception-you.html>; see *Ryan v. Clonch Industries, Inc.* (2006).

⁸³*Ryan v. Clonch Industries, Inc.*, 219 W.Va. 664, 669-673, 639 S.E.2d 756, 761-765 (2006).

⁸⁴*Id.* at 673, 765.

⁸⁵*Id.* at 675, 767.

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