

2015 WEST VIRGINIA LEGISLATION UPDATE: PART II

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The West Virginia Legislature passed several laws during the 2015 Regular Legislative Session changes which may impact the legal community. This Article is the second in a two part series that discusses several of those laws and the possible effects. The first part discussed the election of judges, the West Virginia Consumer Credit and Protection Act, premises liability, and the Medical Professional Liability Act. This second part will focus on the limitations on punitive damages, deliberate intent, choice of law in products liability suits, comparative fault, wrongful and retaliatory discharge, and the Wage Payment and Collection Act.

I. LIMITATION ON PUNITIVE DAMAGES GENERALLY

Senate Bill 421 has fundamentally changed the method by which punitive damages are awarded by enacting a new section designed to address this issue.¹

¹ S. 421, 82d Leg., Reg. Sess. (W. Va. 2015).

A. Caps on Punitive Damages

West Virginia Code section 55-7-29 now limits punitive damages to “four times the amount of compensatory damages or \$500,000, whichever is greater.”² Furthermore, punitive damages may only be awarded “if a plaintiff establishes by clear and convincing evidence that the damages suffered were the result of the conduct that was carried out by the defendant with actual malice toward the plaintiff or a conscious, reckless and outrageous indifference to the health, safety and welfare of others.”³

B. Procedures for Trial on Punitive Damages

Finally, the Bill attempts to overhaul the way in which trials on punitive damages are held:

Any civil action tried before a jury involving punitive damages may, upon request of any defendant, be conducted in a bifurcated trial in accordance with the following guidelines:

(1) In the first stage of a bifurcated trial, the jury shall determine liability for compensatory damages and the amount of compensatory damages, if any.

(2) If the jury finds during the first stage of a bifurcated trial that a defendant is liable for compensatory damages, then the court shall determine whether sufficient evidence exists to proceed with a consideration of punitive damages.

(3) If the court finds that sufficient evidence exists to proceed with a consideration of punitive damages, the same jury shall determine if a defendant is liable for punitive damages in the second stage of a bifurcated trial and may award such damages.

(4) If the jury returns an award for punitive damages that exceeds the amounts allowed under subsection (c) of this section, the court shall reduce any such award to comply with the limitations set forth therein.⁴

Given that the statute only states that it “*may* . . . be conducted in a bifurcated trial,”⁵ it is unclear as to whether such a bifurcation will actually occur. But as discussed in Part VI.D, in the first installment of this legislative update, only the West Virginia Supreme Court of Appeals has the right to set

² W. VA. CODE § 55-7-29(c) (2015).

³ *Id.* § 55-7-29(a).

⁴ *Id.* § 55-7-29(b).

⁵ *Id.* (emphasis added).

forth how trials should be conducted;⁶ therefore, this part of the Bill is best viewed as a suggestion by the Legislature to the Judiciary.

C. Effective Date

Senate Bill 421 became effective 90 days from March 10, 2015.⁷

II. DELIBERATE INTENT

By enacting House Bill 2011, the West Virginia Legislature has sought to change the requirements of deliberate intent cases. In order to succeed on a deliberate intent cause of action, the employee is required to prove the following:

- (i) That a specific unsafe working condition existed in the workplace which presented a high degree of risk and a strong probability of serious injury or death;
- (ii) That the employer, prior to the injury, had *actual knowledge* of the existence of the specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by the specific unsafe working condition;

....

- (iii) That the specific unsafe working condition was a *violation of a state or federal safety statute, rule or regulation*, whether cited or not, or of a *commonly accepted and well-known safety standard within the industry or business of the employer*, as demonstrated by competent evidence of written standards or guidelines which reflect a consensus safety standard in the industry or business, which statute, rule, regulation or standard was specifically applicable to the particular work and working condition involved, as contrasted with a statute, rule, regulation or standard generally requiring safe workplaces, equipment or working conditions;

....

- (iv) That notwithstanding the existence of the facts set forth in subparagraphs (i) through (iii), inclusive, of this paragraph, the

⁶ W. VA. CONST. art. VIII, § 3.

⁷ S. 421, 82d Leg., Reg. Sess. (W. Va. 2015). An interesting question that is not discussed herein is whether this statute will apply retroactively. This will certainly be litigated as it relates to all cases currently pending and filed prior to the enactment date of the statute.

employer nevertheless intentionally thereafter exposed an employee to the specific unsafe working condition; and
(v) That the employee exposed suffered serious *compensable injury* or compensable death as defined in section one, article four, chapter twenty-three whether a claim for benefits under this chapter is filed or not as a direct and proximate result of the specific unsafe working condition.⁸

As set forth below, in enacting House Bill 2011,⁹ the West Virginia Legislature has modified how these types of deliberate intent claims are litigated.

A. *Actual Knowledge—Amendments to Former Version § 23-4-2(d)(2)(ii)(B)*

The West Virginia Legislature added new provisions to further define what constitutes actual knowledge:

(I) In every case actual knowledge must specifically be proven by the employee or other person(s) seeking to recover under this section, and shall not be deemed or presumed: *Provided*, That actual knowledge may be shown by evidence of intentional and deliberate failure to conduct an inspection, audit or assessment required by state or federal statute or regulation and such inspection, audit or assessment is specifically intended to identify each alleged specific unsafe working condition.

(II) Actual knowledge is not established by proof of what an employee's immediate supervisor or management personnel should have known had they exercised reasonable care or been more diligent.

(III) Any proof of the immediate supervisor or management personnel's knowledge of prior accidents, near misses, safety complaints or citations from regulatory agencies must be proven by documentary or other credible evidence.¹⁰

B. *Violation of Industry Standard or Safety Statute, Rule, or Regulation—Amendments to Former Version § 23-4-2(d)(2)(ii)(C)*

The West Virginia Legislature further intended to clamp down on what qualifies as a violation of safety statutes by specifically delineating a violation of an industry standard or a violation of a state or federal statute, rule, or

⁸ W. VA. CODE § 23-4-2(d)(2)(B)(i)–(v) (2005) (emphasis added).

⁹ H.D. 2011, 82d Leg., Reg. Sess. (W. Va. 2015).

¹⁰ *Id.*

regulation. In order for a deliberate intent claim to be based upon a violation of an industry standard—said another way, that the unsafe working condition relates to a violation of an industry standard—said industry standard “must be a *consensus written rule or standard promulgated by the industry or business of the employer*, such as an organization comprised of industry members[.]”¹¹

In order for a deliberate intent claim to be based upon a violation of a state or federal statute, rule, or regulation, the law must satisfy the following:

- (a) Must be specifically applicable to the work and working condition involved as contrasted with a statute, rule, regulation or standard generally requiring safe workplaces, equipment or working conditions; [and]
- (b) Must be intended to address the specific hazard(s) presented by the alleged specific unsafe working condition[.]”¹²

Furthermore, this legislation makes “[t]he applicability of any such state or federal safety statute, rule or regulation . . . a matter of law for judicial determination.”¹³

C. Intentional Exposure—Amendments to Former Version § 23-4-2(d)(2)(B)(iv)

House Bill 2011 also amended the definition of intentional exposure to include the requirement that the person with actual knowledge intentionally exposed the employee to an unsafe working condition. The change to this definition is in italics: “(iv) That notwithstanding the existence of the facts set forth in subparagraphs (i) through (iii), inclusive, of this paragraph, *the person or persons alleged to have actual knowledge under subparagraph (ii)* nevertheless intentionally thereafter exposed an employee to the specific unsafe working condition[.]”¹⁴

D. Definition of Compensable Injury—Amendments to Former Version § 23-4-2(d)(2)(B)(v)

The Legislature has further narrowed the scope of what a compensable injury may be for purposes of these types of deliberate intent claims:

[S]erious compensable injury may only be established by one of the following four methods:

¹¹ *Id.* (emphasis added).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* (emphasis added).

(I) It is shown that the injury, independent of any preexisting impairment:

(a) Results in a permanent physical or combination of physical and psychological injury rated at a total whole person impairment level of at least thirteen percent (13%) as a final award in the employees workers' compensation claim; and

(b) Is a personal injury which causes permanent serious disfigurement, causes permanent loss or significant impairment of function of any bodily organ or system, or results in objectively verifiable bilateral or multi-level dermatomal radiculopathy; and is not a physical injury that has no objective medical evidence to support a diagnosis; or

(II) Written certification by a licensed physician that the employee is suffering from an injury or condition that is caused by the alleged unsafe working condition and is likely to result in death within eighteen (18) months or less from the date of the filing of the complaint. The certifying physician must be engaged or qualified in a medical field in which the employee has been treated, or have training and/or experience in diagnosing or treating injuries or conditions similar to those of the employee and must disclose all evidence upon which the written certification is based, including, but not limited to, all radiographic, pathologic or other diagnostic test results that were reviewed.

(III) If the employee suffers from an injury for which no impairment rating may be determined pursuant to the rule or regulation then in effect which governs impairment evaluations pursuant to this chapter, serious compensable injury may be established if the injury meets the definition in subclause (I)(b).

(IV) If the employee suffers from an occupational pneumoconiosis, the employee must submit written certification by a board certified pulmonologist that the employee is suffering from complicated pneumoconiosis or pulmonary massive fibrosis and that the occupational pneumoconiosis has resulted in pulmonary impairment as measured by the standards or methods utilized by the West Virginia Occupational Pneumoconiosis Board of at least fifteen percent (15%) as confirmed by valid and reproducible ventilatory testing. The certifying pulmonologist must disclose all evidence upon which the written certification is based, including, but not limited to, all radiographic, pathologic or other diagnostic test results that were reviewed: *Provided*, That any cause of action based upon this clause must be filed within

one year of the date the employee meets the requirements of the same.¹⁵

E. Pleading Requirements

The West Virginia Legislature has set forth that a deliberate intent cause of action must be accompanied by “a verified statement from a person with knowledge and expertise of the workplace safety statutes, rules, regulations and consensus industry safety standards specifically applicable to the industry and workplace involved in the employee’s injury[.]”¹⁶ This verified statement must set forth the signers “opinions and information” on:

- (I) The person’s knowledge and expertise of the applicable workplace safety statutes, rules, regulations and/or written consensus industry safety standards;
- (II) The specific unsafe working condition(s) that were the cause of the injury that is the basis of the complaint; and
- (III) The specific statutes, rules, regulations or written consensus industry safety standards violated by the employer that are directly related to the specific unsafe working conditions[.]¹⁷

F. Discovery Procedures

The West Virginia Legislature has further sought to shorten the length of discovery in these cases. Specifically, the Legislature has given the employer the opportunity to “request . . . bifurcation of discovery . . . such that the discovery related to liability issues be completed before discovery related to damage issues.”¹⁸ However, the Legislature did not make this a definitive requirement, but instead only required the presiding judge to “give due consideration” to the employer’s request.¹⁹ This will certainly lead to litigation and uncertainty.

G. Venue Provisions

The Legislature also sought to prevent forum shopping by setting forth a venue provision for actions brought for deliberate intent:

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

Any cause of action brought pursuant to this section shall be brought either in the circuit court of the county in which the alleged injury occurred or the circuit court of the county of the employer's principal place of business. With respect to causes of action arising under this chapter, the venue provisions of this section shall be exclusive of and shall supersede the venue provisions of any other West Virginia statute or rule.²⁰

H. *Effective Date*

The amendments to West Virginia Code section 23-4-2 shall only take effect to "all injuries occurring on or after July 1, 2015."²¹

III. CHOICE OF LAW IN PRODUCTS LIABILITY CASES

By enacting House Bill 2726, the West Virginia Legislature has curtailed the use of West Virginia as a hub for mass tort and class action products liability cases. Previously, West Virginia Code section 55-8-16 was only applicable to pharmaceuticals products liability cases:

It is public policy of this state that, in determining the law applicable to a product liability claim brought by a nonresident of this state against the manufacturer or distributor of a prescription drug for failure to warn, the duty to warn shall be governed solely by the product liability law of the place of injury ("lex loci delicti").²²

House Bill 2726 amended that statute to cover products liability cases as well:

It is public policy of this state that, in determining the law applicable to a product liability claim brought by a nonresident of this state against the manufacturer or distributor of a prescription drug *or other product*, all liability claims at issue shall be governed solely by the product liability law of the place of injury ("lex loci delicti").²³

These new amendments "shall be applicable prospectively to all civil actions commenced on or after July 1, 2015."²⁴

²⁰ *Id.*

²¹ *Id.*

²² W. VA. CODE § 55-8-16 (2011), amended by W. VA. CODE § 55-8-16 (2015).

²³ H.D. 2726, 82d Leg., Reg. Sess. (W. Va. 2015) (emphasis added).

²⁴ *Id.*

IV. COMPARATIVE FAULT

Prior to the enactment of House Bill 2002, West Virginia operated under a modified version of joint and several liability.²⁵ By enacting House Bill 2002, West Virginia law has now changed to a modified comparative fault standard.²⁶

A. *Modified Comparative Fault*

As set forth in newly enacted West Virginia Code section 55-7-13a:

In any action based on tort or any other legal theory seeking damages for personal injury, property damage, or wrongful death, recovery shall be predicated upon principles of comparative fault and the liability of each person, including plaintiffs, defendants and nonparties who proximately caused the damages, shall be allocated to each applicable person in direct proportion to that person's percentage of fault.²⁷

As set forth in newly enacted West Virginia Code section 55-7-13c:

In any action for damages, the liability of each defendant for compensatory damages shall be several only and may not be joint. Each defendant shall be liable only for the amount of compensatory damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against each defendant for his or her share of that amount.²⁸

In order to determine the amount of damages each defendant shall be responsible for, the court "shall multiply the total amount of compensatory damages recoverable by the plaintiff by the percentage of each defendant's fault and, subject to [an exception discussed *infra*] that amount shall be the maximum recoverable against that defendant."²⁹

B. *Joint Liability Not Completely Abolished*

While the new standard is modified comparative fault, joint and several liability is still applicable; for joint and several liability to apply, however, a

²⁵ W. VA. CODE § 55-7-24 (2005), amended by W. VA. CODE § 55-7-24 (2015).

²⁶ H.D. 2002, 82d Leg., Reg. Sess. (W. Va. 2015).

²⁷ *Id.*

²⁸ *Id.* Importantly, the new statutory scheme only covers compensatory damages and does not mention how punitive damages will be handled.

²⁹ *Id.*

high burden must be met. “[J]oint liability may be imposed on two or more defendants who *consciously conspire and deliberately pursue a common plan or design to commit a tortious act or omission.*”³⁰ By using the words conscious and deliberate, the West Virginia Legislature clearly wanted to impose a high standard and require the plaintiff to prove that the parties purposefully acted together to commit a tort before joint and several liability would be imposed.³¹

Beyond this, the Legislature has set forth certain acts wherein joint and several liability will be applied:

[A] defendant that commits one or more of the followings acts or omissions shall be jointly and severally liable:

- (1) A defendant whose conduct constitutes driving a vehicle under the influence of alcohol, a controlled substance, or any other drug or any combination thereof, as described in section two, article five, chapter seventeen-c of this code, which is a proximate cause of the damages suffered by the plaintiff;
- (2) A defendant whose acts or omissions constitute criminal conduct which is a proximate cause of the damages suffered by the plaintiff; or
- (3) A defendant whose conduct constitutes an illegal disposal of hazardous waste, as described in section three, article eighteen, chapter twenty-two of this code, which conduct is a proximate cause of the damages suffered by the plaintiff.³²

C. 51% at Fault Bar and Reduction of Damages

House Bill 2002 also precludes a plaintiff from recovery if “plaintiff’s fault is greater than the combined fault of all other persons responsible for the total amount of damages[.]”³³ Consequently, if plaintiff is found to be 51% or more at fault, then he is barred from recovery. Further, “[i]f the plaintiff’s fault is less than the combined fault of all other persons, the plaintiff’s recovery shall be reduced in proportion to the plaintiff’s degree of fault.”³⁴ In other words, a plaintiff cannot recover any losses for his injury that he was directly responsible for, and if he is 51% or more at fault, all recovery is prohibited.

D. Reallocation

Reallocation of an award, however, is still a possibility:

³⁰ *Id.* (emphasis added).

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

[I]f a plaintiff through good faith efforts is unable to collect from a liable defendant, the plaintiff may, not later than one year after judgment becomes final through lapse of time for appeal or through exhaustion of appeal, whichever occurs later, move for reallocation of any uncollectible amount among the other parties found to be liable.³⁵

This uncollectible amount will be split between the remaining defendants in proportion to their percentage of liability.³⁶ So, for instance, assume a jury awards the following:

Total Damages = \$1,000,000.00

Assignment of Liability/Fault:

Plaintiff:	10%	Defendant 1:	30%
Defendant 2:	30%	Defendant 3:	30%

Under the new rules, the Plaintiff's award would be reduced by his percentage of fault—i.e., \$100,000 (or 10% multiplied by \$1,000,000)—and each Defendant would owe Plaintiff \$300,000. If, as an example, within the one year period, Defendant 1 went bankrupt and Plaintiff was unable to collect from Defendant 1, then the amount owed by Defendant 1 could be reassigned to Defendants 2 & 3 in proportion to their amount of fault; i.e., \$90,000 each (or 30% multiplied by \$300,000).

An award may not be reallocated to any defendant if said defendant's "percentage of fault is equal to or less than the plaintiff's percentage of fault."³⁷ Therefore, if the above situation was revised and all parties were found to be 25% at fault, then the plaintiff would not be able to seek a reallocation.

"The fault allocated under this section to an immune defendant or a defendant whose liability is limited by law may not be allocated to any other defendant."³⁸ The parties are allowed to conduct limited discovery on the "issue of collectability prior to a hearing on the motion."³⁹

³⁵ *Id.*

³⁶ *Id.* Further, "[a] party whose liability is reallocated under [this section] is nonetheless subject to contribution and to any continuing liability to the plaintiff on the judgment." *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

1. Reallocation Automatic?

Based upon the way in which section 55-7-13c was drafted, it appears that reallocation will be automatic.⁴⁰ As long as the plaintiff made a good-faith effort, he does not seek reallocation to a defendant whose percentage of fault was equal to or less than the plaintiff's percentage, and he is not seeking to reallocate the percentage of fault to an immune defendant, then the plaintiff can seek a reallocation.⁴¹

2. What Is a "Good Faith Effort?"

The litigation in this area, however, will undoubtedly be centered on whether a plaintiff made a "good faith effort" to collect. What that entails will be a source of great consternation for the Judiciary. For instance, if it is apparent that one defendant is uncollectable at the outset, will a plaintiff be required to make an effort to collect from said defendant? Will this rule require that plaintiffs try to intervene in bankruptcy proceedings in an attempt to obtain some type of recovery from a bankrupt defendant? What is a plaintiff to do if he or she is in the process of trying to collect and the one year statute of limitations is approaching? How should a trial court proceed if a plaintiff files a motion to reallocate shortly before the one year statute of limitations, but said plaintiff is still in the process of trying to collect? Does the court stay the proceedings until it is fully determined that the defendant is not collectable? Ultimately, trial courts will be left to determine what is considered a good-faith effort.

3. Extending Litigation

The process of litigation normally concludes once a judgment is entered. At that point, the parties could appeal the order or simply proceed forward. With the enactment of this Bill, however, a defendant may be pulled back into litigation up to one year after the judgment has been rendered. This will include going through another set of discovery and another hearing.

E. This Section Not Applicable to Certain Actions

Certain types of actions are exempt from section 55-7-13c, including the Uniform Commercial Code as set forth in chapter 46 of the code; the Government Torts Claims Act as set forth in chapter 29, article 12a; and the Medical Professional Liability Act as set forth in chapter 55, article 7b.⁴²

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

F. Empty Chair Defense and Assignment of Liability

In enacting House Bill 2002, the Legislature created a new Code section—West Virginia Code section 55-7-13d—wherein it states the following: “In assessing percentages of fault, the trier of fact shall consider the fault of all persons who contributed to the alleged damages *regardless of whether the person was or could have been named as a party to the suit.*”⁴³ However, there are some requirements for the fault of a nonparty to be contemplated by the jury:

Fault of a nonparty shall be considered if the plaintiff entered into a settlement agreement with the nonparty or if a defending party gives notice no later than one hundred-eight days after service of process upon said defendant that a nonparty was wholly or partially at fault. Notice shall be filed with the court and served upon all parties to the action designating the nonparty and setting forth the nonparty’s name and last-known address, or the best identification of the nonparty which is possible under the circumstances, together with a brief statement of the basis for believing such nonparty to be at fault[.]⁴⁴

As with defending parties, “where a nonparty is assessed a percentage of fault, any recovery by a plaintiff shall be reduced in proportion to the percentage of fault chargeable to such nonparty.”⁴⁵ In regards to a settling party who settles prior to a verdict being rendered—regardless of whether they were a party to the litigation—the “*plaintiff’s recovery* will be reduced in proportion to the percentage of fault assigned to the settling party or nonparty.”⁴⁶ Interestingly, the statute only makes reference to “plaintiff’s recovery” and does not mention what will happen with the other non-settling defendants.⁴⁷

G. Implications of the Empty Chair Defense and Change in Statute

At the outset, it should be noted that new West Virginia Code section 55-7-13d will have some very serious unintended consequences and will lead to further litigation to fully flesh out the full meaning of this statute. Discussed below are some issues that will only be determined as these cases are litigated.

⁴³ *Id.* (emphasis added).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* (emphasis added).

⁴⁷ *Id.*

1. Uncertainty as to Set-Offs

Given the new legislative scheme, it is uncertain whether non-settling defendants will be entitled to set-offs for amounts over and above the settling defendants' assignment of liability. To fully illustrate this point, two scenarios should be considered.

i. Scenario One

A Plaintiff sues three Defendants and prior to trial, one of the Defendants settles for \$200,000. At trial, the jury awards the following:

Total Damages = \$1,000,000.00

Assignment of Liability/Fault:

Plaintiff:	10%	Defendant 1:	30%
Defendant 2:	30% Settling	Defendant 3:	30%

Based upon a plain reading of the statute, the non-settling Defendants are *only* responsible for their assignment of fault—i.e., \$300,000 each—and Plaintiff's recovery would be reduced both by his own assignment of fault—i.e., \$100,000—and the percentage of fault assigned to the settling Defendant—i.e., 30% or \$300,000. Clearly, the settling Defendant settled for less than he would have owed and the Plaintiff, who could have collected \$300,000 against the settling defendant, will only receive \$200,000.

ii. Scenario Two

Assuming the same facts as above, but now the settling Defendant settles for \$400,000. Said another way, the settling Defendant pays an additional \$100,000. Under the current case law, one would assume that the non-settling Defendants would be entitled to a set-off for the additional amount paid by the settling Defendant so that Plaintiff would not receive a windfall. The West Virginia Supreme Court of Appeals has discussed such a situation: "Where a payment is made, and release obtained, by one joint tort-feasor, the other joint tort-feasors shall be given credit for the amount of such payment in the satisfaction of the wrong."⁴⁸

But upon closer examination, the inequities of such a system are self-evident. Plaintiff's counsel will argue that Plaintiff cannot be punished if the settling Defendant over estimated his percentage of fault as in scenario two and

⁴⁸ Syl. pt. 1, *Tennant v. Craig*, 195 S.E.2d 727 (W. Va. 1973) (quoting syl. pt. 2, *Hardin v. N.Y. Central R.R.*, 116 S.E.2d 697 (W. Va. 1960)).

also be punished if the settling Defendant got one over on Plaintiff as in scenario one. Furthermore, it appears as though current West Virginia case law may support such an argument; as stated in a footnote in *Board of Education of McDowell County v. Zando, Martin & Milstead, Inc.*,⁴⁹

[s]ection 2 of the UCFA provides for reduction of the verdict by the percentage of negligence the jury, in allocating fault among all of the responsible parties, attributed to the settlor. Jurisdictions adhering to this model do not require the settlement to be in “good faith.”

The UCFA model has drawbacks, however. If the amount of the settlement is less than the settling party’s pro rata share of the verdict, the plaintiff absorbs the loss. *He cannot collect the difference from the remaining defendants, and they cannot be required to pay more than their individual allocate shares. This procedure essentially destroys the concept of joint and several liability. If, on the other hand, the plaintiff obtains an amount in settlement greater than the percentage of damages attributable to the settling party, he may keep the difference as a “windfall.” The other parties must still pay their allocate shares of the verdict. This permits the plaintiff a recovery in excess of the jury verdict.*

The perceived equities or inequities between these models, as well as other statutory variations, is a subject of ongoing academic debate.⁵⁰

This sentiment from the court is supported by other commentators:

*In a several liability system, the nonsettling tortfeasor is held only for his comparative fault share. In determining the percentage responsibility of the nonsettling tortfeasor, jurors must determine the comparative share of every tortfeasor, including those who have settled. However, a determination that A’s fault was 50% and B’s fault was 50% does not affect A’s settlement or his liability. It merely means that B is liable for 50%, no more, no less. If A paid more than 50% of the damages, that was his decision. If he paid less, the plaintiff made a bad bargain, but none of this matters to B’s liability.*⁵¹

Therefore, it is anticipated that set-offs are no longer applicable; however, it is expected that this issue will still be litigated.

⁴⁹ 390 S.E.2d 796 (W. Va. 1990).

⁵⁰ *Id.* at 805 n.10 (emphasis added) (citations omitted).

⁵¹ DAN B. DOBBS, *THE LAW OF TORTS* §390, at 1088 (2000) (emphasis added) (discussing the effects of abolishing joint and several liability).

2. Discouraging Settlements in Multiple Party Litigation

In cases where there are many defendants, plaintiffs will assuredly be less likely to settle with any one particular defendant, but instead will demand a global settlement. Obviously, once a plaintiff reaches a settlement with one defendant, that defendant will not appear to defend in the case. Consequently, the remaining defendants will point the finger at the settling defendant who is not there in an effort to drive up the percentage of fault assigned to the settling defendant, thereby driving down the assignment of fault to the remaining defendants. This seemingly incentivizes a plaintiff to not settle with one defendant because if he does the remaining non-settling defendants will be able to shift the blame and reduce their exposure. Under this example, unless plaintiff's case is meritless, there is no reason to settle until all parties agree.

3. Defense Tactics in Early Stages of the Case

The new statutory scheme allows a defendant to argue that a nonparty is liable as long as defendant gives notice *no later than 108 days after service of the complaint*.⁵² This timing requirement will undoubtedly have a major impact on litigation tactics as now defendants may have to scramble to determine if someone else may be liable within the first 108 days. Once a complaint is served, defense counsel and their clients will have to have a laser-like focus on determining if another person caused the injury. Otherwise, defense counsel may be stuck. Defense counsel and their clients will want the certainty of being able to point the finger—to put it colloquially—at a non-party tortfeasor rather than take their chances with asking a trial court to allow them to bring in the non-party tortfeasor. In order to have some modicum of certainty, astute defense counsel and their clients will have to take the first 108 days very seriously as the clock begins ticking the minute the complaint is served.

4. Applicability of the Discovery Rule?

The other question that is not definitively answered in this legislation is what happens if a “defending party” realizes that a nonparty is responsible more than 108 days after being served. Assume further that said nonparty is unable to be properly served, cannot be found, or the court does not allow them to be brought in as a party. Assuming that defendants were diligent in working the case and on day 109, they discover a mysterious nonparty who caused the injury, will a court allow the defendant to assert the empty chair defense based upon the discovery rule, or will the defendant be without recourse? These

⁵² H.D. 2002, 82d Leg., Reg. Sess. (W. Va. 2015).

Authors would argue that the discovery rule should be applicable, but there is no basis under this new statute for such a rule.

5. Will This Change How Plaintiffs' Counsel Brings Cases?

The new statute appears to encourage plaintiffs' attorneys to only sue one defendant who has deep pockets. As outlined above, there is no incentive to seek a settlement with individual defendants in multiple defendant cases. With that in mind, why would plaintiffs' counsel bring a case against multiple defendants? Further, given that defendants only have 108 days to assert that a nonparty caused the accident in order to get an empty chair argument, plaintiffs' counsel may take a chance and only sue one defendant who he can get a complete recovery against and hope that said defendant misses the deadline. Only time will tell the true impact of this statutory scheme, but at the outset, it appears that there are some perverse, unintended consequences contained therein.

H. Verdict Against a Nonparty

If a nonparty is asserted to have caused the accident and assuming that the jury assigns a percentage of fault against said nonparty, this assessment is inadmissible in another action:⁵³

Assessments of percentages of fault for nonparties are used only as a vehicle for accurately determining the fault of named parties. Where fault is assessed against nonparties, findings of such fault do not subject any nonparty to liability in that or any other action, or may not be introduced as evidence of liability or for any other purpose in any other action[.]⁵⁴

I. Plaintiff Barred if Injury Resulted out of Commission of a Felony.

If the plaintiff was involved in a felony act, he is barred from seeking recovery:⁵⁵

In any civil action, a defendant is not liable for damages that the plaintiff suffers as a result of the negligence or gross negligence of a defendant if such damages arise out of the plaintiff's commission, attempt to commit or fleeing from the commission of a felony criminal act: *Provided*, That the plaintiff has been convicted of such felony, or if deceased, the

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

jury makes a finding that the decedent committed such felony.⁵⁶

J. *Imputed Fault for Actions of Agents*

The new statute, section 55-7-13d, does not exclude liability of a principle for the actions of its agent:

Nothing in this section may be construed as precluding a person from being held liable for the portion of comparative fault assessed against another person who was acting as an agent or servant of such person, or if the fault of the other person is otherwise imputed or attributed to such person by statute or common law. In any action where any party seeks to impute fault to another, the court shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, on the issue of imputed fault.⁵⁷

K. *Burden of Proof*

“The burden of alleging and proving comparative fault shall be upon the person who seeks to establish such fault.”⁵⁸

L. *Effective Date*

“This section applies to all causes of action arising or accruing on or after the effective date of its enactment,” which is 90 days from February 24, 2015.⁵⁹

V. WRONGFUL AND RETALIATORY DISCHARGE CLAIMS

In Senate Bill 344, the West Virginia Legislature added a new article to the Code, designated sections 55-7E-1, 55-7E-2, and 55-7E-3.⁶⁰ This legislation was intended to address several problems that have arisen for employers in wrongful and retaliatory discharge causes of action.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ S. 344, 82d Leg., Reg. Sess. (W. Va. 2015).

A. *Legislative Findings and Purpose*

This new legislation sets forth some very important legislative findings in regards to wrongful retaliatory discharge claims. While recognizing that employees “are entitled to be free from unlawful discrimination, wrongful discharge and unlawful retaliation,” the Legislators also found that employees and employers are “entitled to a legal system that provides adequate and reasonable compensation to those persons who have been subjected to unlawful employment actions, a legal system that is fair, predictable in its outcomes, and a legal system that functions within the mainstream of American jurisprudence.”⁶¹ The Legislature went on however, to make other findings:

(3) The goal of compensation remedies in employment law cases is to make the victim of unlawful workplace actions whole, including back pay; reinstatement or some amount of front pay in lieu of reinstatement; and under certain statutes, attorney’s fees for the successful plaintiff.

(4) In West Virginia, the amount of damages recently awarded in statutory and common law employment cases have been inconsistent with established federal law and the law of surrounding states. This lack of uniformity in the law puts our state and its businesses at a competitive disadvantage.⁶²

These findings will come as a breath of fresh air to all employers in the State of West Virginia and will certainly be troublesome to wronged employees.

Furthermore, the Legislature stated that the purpose of these legislative changes is to “provide a framework for adequate and reasonable compensation to those persons who have been subjected to an unlawful employment action, but to ensure that compensation does not far exceed the goal of making a wronged employee whole.”⁶³

B. *Duty to Mitigate and Abolishment of the Malice Exception*

By enacting West Virginia Code section 55-7E-3, the Legislature created an affirmative duty for the plaintiff to mitigate his losses, regardless of whether the cause of action arose out of statute or common law:

In any employment law cause of action against a current or former employer . . . the plaintiff has an affirmative duty to

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

mitigate past and future lost wages, regardless of whether the plaintiff can prove the defendant employer acted with malice or malicious intent, or in willful disregard of the plaintiff's rights.⁶⁴

Furthermore, malice is no longer an exception to the duty to mitigate: "The malice exception to the duty to mitigate damages is abolished."⁶⁵

The new Code section also abolished an award of "[u]nmitigated or flat back pay and front pay awards."⁶⁶ "Any award of back pay or front pay by a commission, court or jury shall be reduced by the amount of interim earnings or the amount earnable with reasonable diligence by the plaintiff. It is the defendant's burden to prove the lack of reasonable diligence."⁶⁷

C. Amount of Front Pay Award for the Court

Contained within section 55-7E-3 is a new section stating that "[i]f front pay is determined to be the appropriate remedy, the amount of front pay, if any, to be awarded shall be an issue for the trial judge to decide."⁶⁸

VI. WAGE PAYMENT AND COLLECTION ACT

The West Virginia Legislature also made two changes to the West Virginia Wage Payment and Collection Act as set forth in West Virginia Code sections 21-5-1 *et. seq.* The first change was related to the payment of wages by employers. West Virginia Code section 21-5-3, prior to the amendment, required an employer to "settle with its employees at least once in every two weeks."⁶⁹ By enacting Senate Bill 318, the Legislature changed the time period to "at least twice every month and with no more than nineteen days between settlements."⁷⁰

The other change related to how fringe benefits are to be paid. Prior to enactment of these legislative changes, fringe benefits were to be paid in the same manner as wages. Further, and as set forth in the prior version of West Virginia Code section 21-5-4(b),

[w]henver a person, firm or corporation discharges an employee, the person, firm or corporation shall pay the

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ W. VA. CODE § 21-5-3(a) (2014), *amended by* W. VA. CODE § 21-5-3(a) (2015).

⁷⁰ S. 318, 82d Leg., Reg. Sess. (W. Va. 2015).

employee's wages in full no later than the next regular payday or four business days, whichever comes first. Payment shall be made through the regular pay channels or, if requested by the employee, by mail. For purposes of this section, "business day" means any day other than Saturday, Sunday or any legal holiday as set forth in section one, article two, chapter two of this code.⁷¹

By enacting Senate Bill 12, the West Virginia Legislature changed this statute to separate fringe benefits and provide that payment shall be made on the next regular payday:⁷²

Whenever a person, firm or corporation discharges an employee, or whenever an employee quits or resigns from employment, the person, firm or corporation shall pay the employee's wages due for work that the employee performed prior to the separation of employment on or before the next regular payday on which the wages would otherwise be due and payable: *Provided*, That fringe benefits, as defined in section one of this article, that are provided an employee pursuant to an agreement between the employee and employer and that are due, but pursuant to the terms of the agreement, are to be paid at a future date or upon additional conditions which are ascertainable are not subject to this subsection and are not payable on or before the next regular payday, but shall be paid according to the terms of the agreement. For purposes of this section, "business day" means any day other than Saturday, Sunday or any legal holiday as set forth in section one, article two, chapter two of this code.⁷³

VII. CONCLUSION

As demonstrated above, this new legislation has some very significant changes. By limiting punitive damages, altering deliberate intent causes of action, changing from modified joint and several liability to modified comparative fault, and amending wrongful and retaliatory discharge claims and the Wage Payment Collection Act, the Legislature has significantly altered the legal landscape in West Virginia. With such changes, there will certainly be litigation to test the limits of these new laws; given this, only time will tell their true impact.

⁷¹ W. VA. CODE § 21-5-4(b) (2014), *amended by* W. VA. CODE § 21-5-4(b) (2015).

⁷² S. 12, 82d Leg., Reg. Sess. (W. Va. 2015).

⁷³ *Id.*