



VANTAGE POINTS

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Vantage Points - Summer Edition

Dear Friends

Can it be that our summer vacation season is winding down and its time to buy school shoes already? The looks in the faces of my family were a real mix when we realized the holidays were now just a few months away. The kids were delighted; mom and dad are bracing themselves.

Our newsletter this season has some good ideas to ponder as we move into the fall. The hot buzz words right now for politicians, economic developers and business visionaries are “consolidation” and “metro government.” In this issue, we offer folks a brief introduction regarding this important statutory change for 2006. Also, Tom Krieger, one of our senior members and the leading employment lawyer in our region, discusses arbitration of employment related claims in West Virginia. Brian Lindsay, who has developed an expertise in asbestos defense, has contributed a must read on asbestos – both the 2003 case-handling rules in West Virginia and the proposed bill now being debated in the United States Senate.

We trust that you continue to find our articles helpful to your business planning. Please contact us with your comments and ideas for future articles.



Warmly,

Barry Taylor
Chief Executive Officer



Risky Business: The Arbitration of Employment-Related Claims in West Virginia

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In 2002, the United States Supreme Court ended the argument that the arbitration of employment disputes was illegal, holding that the Federal Arbitration Act of 1925 (“FAA”) only exempts from its coverage those employees involved in the interstate transportation of goods. By holding that the FAA applies to all employment agreements involving other workers, the Supreme Court opened the door to mandated arbitration of employment-related claims. The attraction of these arbitration agreements to employers is the reduced cost to resolve the matter, primarily by reducing attorneys fees and discovery costs associated with the litigation of employment-related disputes. This was a big win for employers.

However, these mandatory arbitration agreements have not been utilized by employers in West Virginia to the extent first thought. While still an option for West Virginia employers, our courts have not favored these arbitration agreements and many legal obstacles to their effective use have discouraged employers from implementing these programs.

The law now generally provides that these arbitration agreements, to be enforceable, must allow the employee the same relief he/she could obtain in court. Thus, an employer cannot avoid exposure to punitive or other damages by creating an arbitration program that negates or caps damages that are otherwise permitted by law. The arbitration program cannot unduly pass on the costs of arbitration to the employee to a greater extent than the litigation process. Moreover, the employer cannot control the selection process by pre-screening a panel for the employee’s selection or even selecting the arbitrator unilaterally. Other provisions, such as a limited right to discovery and a right to counsel for the employee ensure the fundamental fairness of the process and should not present a problem for most employers.

What is a problem is the restrictive and paternalistic approach our courts have taken with these arbitration programs. The West Virginia Supreme Court has held that an employee cannot contract away his/her right to litigate claims under the West Virginia Human Rights Act; any attempt by an employer to force arbitration of claims under this Act, which generally deal with illegal employment-related discrimination, is unenforceable. Additionally, the United States Supreme Court has held that the EEOC (Equal Employment Opportunity Commission) can seek relief in court for an employee in its own capacity, including back pay, reinstatement, attorneys fees and other forms of damages, even though the employee signed an arbitration provision that prevented him from personally going to court to litigate claims based upon employment discrimination of some sort. Thus, courts have carved out a major exception to any agreement to arbitrate employment-related disputes.

Applying a mandatory arbitration program across-the-board to all employees in an organization is also problematic in West Virginia. Our courts will look at each individual employee seeking to overturn his/her prior consent to an arbitration agreement and compare the relative bargaining power of the employer and employee as well as the education and experience of the employee in deciding whether to enforce an arbitration agreement against the employee. For the well educated and higher ranking members of the establishment, the same clause might be enforceable that is not enforceable against a poorly educated or lower paid employee.

As a practical matter, these arbitration agreements currently seem to be creating as much litigation as they were designed to prevent. Plaintiffs litigate any provision of the arbitration agreement they can prior to a hearing in order to defeat enforcement of the agreement; arguments abound over the fairness of the provisions, whether it was forced upon the employee, whether there is adequate consideration given by the employer to support the employee’s consent to the arbitration agreement, etc. Only later are the merits of the dispute considered. The net result of all this seems to be a move toward insurance for employment-related claims to offset, in some form or fashion, the cost of litigating these claims. Arbitration agreements for employment-related claims are still permissible in West Virginia, but employers creating such a program should know their limitations up front.





An Update On West Virginia Asbestos Litigation

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West Virginia has been at the forefront of asbestos litigation since its inception in the 1970s. Several “mass trials” were conducted in Monongalia and Kanawha counties, with the last being in September 2002. The 2002 trial, dubbed by some as the “West Virginia Mass Trial” included thousands of claims asserted by plaintiffs prior to September 6, 2001. A limited number of defendants proceeded to trial on the bifurcated issue of liability alone and no damage trials were completed afterwards. Thus, aside from some remaining contested claims against a limited number of defendants, West Virginia theoretically “wiped the slate clean” and instituted the current trial system to resolve claims filed after the September 2001 deadline.

The current Master Case Management Order (“CMO”), entered by Judge Arthur Recht on March 25, 2003, presently governs all asbestos cases in which plaintiffs assert claims for personal injury or death as a result of exposure to asbestos or asbestos-containing products. The CMO presently mandates that three groups of twenty cases be tried every year and that the trial groups consist of cases involving the diagnosis of malignant mesothelioma and/or lung cancer. Pursuant to a supplement to the original CMO entered by Judge Ronald Wilson of the First Circuit, the trial judge assigned to handle the current trial group schedule, cases are designated for trial 240 days prior to the established trial date. Currently, trials are scheduled for the second or third week of January, May and September and are conducted in either Charleston or Wheeling. Pre-trial issues and deadlines, including discovery, lay and expert witness identification, deposition schedules, exhibit production and the production of pathology materials and medical records are set forth in the CMO and supplements. FELA (Federal Employer Liability Act) claims asserted against railroad entities or unfair trade practice claims against insurance companies are expressly excluded from the current trial scheme established under the CMO.

The CMO is designed to provide some form of certainty for the parties; however, several factors exist that serve to do exactly the opposite for both small businesses in West Virginia and defendants currently involved in the litigation. First and foremost, with corporate bankruptcies hastened by both potential asbestos liabilities as well as other factors, plaintiffs’ attorneys are “casting a much wider net” in an attempt to identify companies to include in their Complaints. More and more, claims are asserted against small West Virginia companies, including sellers and distributors of asbestos-containing products, including electrical components, automotive parts and household items. Small contracting companies, including those providing construction, electrical, insulating and other services to industrial worksites have also been brought into the litigation, with plaintiffs asserting negligence claims for the installation, removal or merely the “disturbing” of asbestos-containing materials and deliberate intent claims for failing to provide a safe workplace for the plaintiff employee. Any smaller entity that had any connection to the sale and/or use of an asbestos-containing product, or with work at an industrial facility, must be aware of the potential for a claim and be prepared in the event such a claim is asserted.

Another factor which may change the landscape of West Virginia asbestos litigation is the recent opinion of the West Virginia Supreme Court of Appeals in *Morris v. Crown Equipment Corp., et al.* issued on June 29, 2006. The West Virginia legislature, in an attempt to limit “forum shopping” by plaintiffs’ attorneys, enacted W.Va. Code § 56-1-1 (c) [2003] which provides:

Effective for actions filed after the effective date of this section, a non-resident of the state may not bring an action in a court of this state unless all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state...

Plaintiff’s product liability claims were dismissed by the Circuit Court of Kanawha County on the basis that plaintiff failed to satisfy the venue requirements as the injury occurred in Virginia and plaintiff was a Virginia resident. While the Supreme Court did not find the statute per se unconstitutional, they did hold that this statute could not apply to any plaintiff that sued a West Virginia entity under the Privileges and Immunities Clause of the United States Constitution. The Court reasoned that, with all facts being the same, a West Virginia resident could pursue a claim in the West Virginia court system, but a non-resident is categorically barred from doing so. Thus, because one defendant in the case was a West Virginia corporation, venue was appropriate

in the Circuit Court of Kanawha County. The Court did not address the instance wherein an out-of-state plaintiff asserts claims against only out-of-state defendant(s) in a West Virginia court.

One of the defendants in the Morris case also argued that plaintiff must establish proper venue for each defendant in the case pursuant to the language of the aforementioned statute. However, the Supreme Court disagreed, noting that “[t]his court follows the venue-giving defendant principle, whereby, once venue is proper for one defendant, it is proper for all other defendants subject to process.” Thus, the Court’s opinion effectively means that if a plaintiff can pursue a colorable claim against any West Virginia company, claims against all other defendants can proceed in the West Virginia court system. While the effects of this ruling remain to be seen, traditional defendants wait to see if additional out of state claims may once again be filed in West Virginia. Further, the venue-giving provisions identified in the opinion will certainly provide plaintiffs’ counsel with the motivation to investigate, identify and pursue claims against West Virginia entities to ensure that their cases remain in the West Virginia system.

Yet another factor that may provide local, national and international businesses with some form of certainty regarding potential asbestos liabilities is the Fairness in Asbestos Injury Resolution Act of 2006, S. 3274, currently on the Senate Calendar. The fund, as proposed, would create a \$140 billion trust fund providing an alternative to the current tort system. The fund, administered through the Department of Labor, would be fully funded by companies that manufactured asbestos-containing products, other entities subject to asbestos liabilities and their insurers. The fund, as proposed, would theoretically work similarly to no-fault workers’ compensation systems where victims qualifying through strict medical criteria would submit their claims through an administrative process designed to compensate quickly. Several entities on both sides of the issue are opposed to this fund, as designed, and it is unclear if this matter will even reach the Senate floor for vote.

West Virginia companies that have had any involvement with selling or supplying asbestos-containing products as well as those entities that have used, installed or removed such products must be prepared to be named as a defendant in a West Virginia asbestos suit. The same applies for entities involved in the installation, removal of such products as well as those that provided contract work to industrial sites, whether to provide materials or labor. All of these companies must be prepared for the ever-evolving threat of potential litigation and the concomitant asbestos liability. For newly identified and sued entities, insurance coverage issues typically will arise based on the exposure periods alleged and all companies should gather and store policies that may provide an avenue for coverage for these claims.

If named as a defendant in an asbestos suit for the first time, the company should immediately put its insurer(s) on notice and advise that they would like experienced West Virginia asbestos counsel to represent their interests. If at any time, your company is sued or any form of demand is made, the products liability litigation professionals at Jenkins Fenstermaker, PLLC would be more than willing to meet with you to review the case and potential defenses to the claims asserted.



The Municipalities Platform For Change

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The West Virginia Legislature enacted revolutionary Workers Compensation reform in 2005, and we have seen the radical changes with BrickStreet Mutual now up and running. This same body now has established a platform for local government consolidation. Its driving purpose, at least in the short term, is to allow local government to combine and create larger population entities more attractive to national businesses. Many of these businesses are expanding and want to locate or relocate offices, but only in those areas with a threshold population. West Virginia’s current population spread and fragmented local governments keep us from even being considered for such offices according to economic development experts.

The new law, codified in the West Virginia statutes at Chapter 7A-1-2, et seq., did not mandate consolidation, but has provided a step-by-step process to do so and has required the people involved to support such change. Counties can combine, cities can combine and so can cities and counties. We see such combinations throughout our region, such as in Louisville and Charlotte, and the legislature believed significant economic benefits would result here also. We understand that the Bridgeport, West Virginia, area is studying the idea closely.

The process begins through the formation of a Charter Review Committee with members from each entity (county and/or city) involved. This committee can be formed by voters signing a petition, or by resolution of the governing bodies of the county or city entities. As a practical matter, county and city leaders must be in favor of the consolidation idea for it to succeed. Their leadership and political bases are critical for success. The committee is established for one year and its first job is to organize itself. A charter then is drafted setting the form and powers of the new entity, public hearings are held and it is put to a popular vote. A 55 percent supermajority vote within the affected cities/counties is required for passage. Rejection results in re-drafting or abandonment of the effort.

Our area delegates and senators supported the bill allowing these combinations and we now have much to discuss as to consolidation. Would a Cabell-Putnam-Kanawha County consolidation benefit your business? What are your current markets? How does local government affect you? Does Huntington have a consolidation partner? Or does Charleston? What problems have to be addressed to make a suitable partner? Who can let go of old alliances, and who can build new successful ones? The 2010 census, which will set metropolitan areas and population statistics for 10 years, nearly is upon us. Stay tuned for more information on this, and keep thinking. Do our local governments need to change to get better? Is this the change that is needed?

