Practical Implications: House Bill 2002 (Comparative Fault) – A Front-Line Litigator's Homework Senate Bill 421 (Punitive Damage Cap) – Short of the Mark

By Jacob R. Shaffer, *Dinsmore & Shohl, LLP,* Charleston, WV

The practical impact of any piece of legislation is often times difficult to predict. No matter how many studies are conducted, how much research is performed, or how the language of each bill is carefully scrutinized and crafted, once that legislation is effective, all bets are off. The legislature, perhaps not admittedly, must then rely on judges, lawyers, businesses, and your next-door-neighbor to work together—and opposite each other—to apply the laws that it enacts. Although the 2015 West Virginia legislative session saw the enactment of several necessary and key pieces of legislation related to business development and tort reform, how many of these laws will have the practical impact desired by their authors and proponents and, more importantly, which will have the greatest impact on the everyday practice of law in West Virginia?

Truly, only time will tell. But, that will not make for a very interesting article, so we've decided to take a crack at this imperfect science with the assistance of fellow Defense Trial Counsel of West Virginia member, Thomas Kleeh. Tom is a member of Steptoe & Johnson, PLLC, in the Charleston, West Virginia office, where he focuses his practice in the areas of employment and labor law and has been advising and defending employers on a daily basis since he began with the firm in 1999. Tom also served as Per Diem Staff Counsel to the Senate Judiciary Committee during the 2015 West Virginia legislative session and was intimately involved in the discussion, debate, and drafting of many of these pieces of legislation. Based on his experience both as a front-line litigator and counsel to the Senate Judiciary Committee, Tom offers a unique perspective, and opinions, on which piece of legislation will likely have the greatest impact on everyday litigators as well as the legislation that may not have gone far enough to achieve its intended purpose.

When we spoke, it was not long into our conversation when Tom, unequivocally, stated his pick for the bill with the most practical impact, "House Bill 2002 is a must-read for any attorney that litigates." In describing the bill, he explained that "it represents a dramatic overhaul of how we have handled negligence claims in West Virginia for years." Generally, House Bill 2002 relates to comparative fault and the establishment of "several liability" as the default rule for most negligence causes of action. House Bill 2002 marks a significant departure from the prior "joint and several liability" rules that previously governed how fault was apportioned among an injured party and others that may have caused the injury, whether a defendant or a non-party.

Although it does certainly warrants a read, House Bill 2002, which will be enacted at W. Va. Code §§ 55-7-13a through 55-7-13d, establishes a situation where everybody to a civil action: plaintiffs, defendants, non-parties, third-parties, and settling parties will all be listed on a verdict form for the trier of fact to apportion fault in a negligence claim. The bill specifically requires that "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." *Id.* § 55-7-13d(a)(1). Indeed, the 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 180 days after service of process that a nonparty was wholly or partially at fault. *Id.* § 55-7-13d(a)(2).

An additional change is the percentage of fault attributable to a plaintiff that is necessary to bar recovery, which now must be "greater than the combined fault of all other persons responsible for the total amount of damages[.]" *Id.* § 55-7-13c(c). Further, in "all instances 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" and "where a plaintiff has settled with a party or nonparty before verdict, that plaintiff's recovery will be reduced in proportion to the percentage of fault assigned to the settling party or nonparty." *Id.* § 55-7-13d(a)(3). Notably, however, assessments of percentages of fault for nonparties are used only to determine the fault of named parties and do not subject a nonparty to liability in that or any other action and may not be introduced as evidence of liability in any other action. *Id.* § 55-7-13d(a)(5).

Nonetheless, each defendant will only be liable for the amount of damages allocated to that defendant in direct proportion to that defendant's percentage of fault. *Id.* § 55-7-13c(a). There is not joint liability unless two or more defendants "consciously conspire and deliberately pursue a common plan or design to commit a tortious act or omission." *Id.* Interestingly, though, there is a provision that permits a plaintiff to seek leave of the court for reallocation of any uncollectable amount from a liable defendant if good faith efforts to collect have failed. *Id.* § 55-7-13c(d).

House Bill 2002 does create certain blanket exceptions to the default rule of "several liability," which includes, lawsuits under the Government Tort Claims and Insurance Reform Act, W. Va. Code §§ 29-12a-1, *et seq.*, Uniform Commercial Code, W. Va. Code §§ 46-1-1, *et seq.*, and medical negligence and malpractice claims under W. Va. Code §§ 55-7b-1, *et seq.* It also provides for "joint

and several liability" amongst defendants under certain additional limited circumstances related to, among other things, driving under the influence of alcohol or controlled substances, committing criminal acts that cause harm to the injured party, or illegally disposing of hazardous waste. *Id.* §§ 55-7-13c(h)(1)-(3).

Tom predicts that enactment of House Bill 2002 will increase the significance of third-party practice because if a plaintiff fails to name a potentially liable party, the defendant must promptly investigate and file the appropriate notice within 180 days in order to preserve the ability for that party to be on the verdict form, which could be critical for the apportionment of fault, particularly if the unnamed party was strategically not added because it lacks assets or service of process would be difficult. He also believes that the change from the amount of fault attributable to a plaintiff that is necessary to bar a plaintiff's negligence claim—from 50% to 51%—will be significant. Stated again, House Bill 2002 deserves a read—maybe more than once.

On the other side of the coin, and with some hesitation, Tom indicated the piece of legislation that will not likely have as great of the practical impact that was desired is Senate Bill 421. As it was introduced, Senate Bill 421 proposed a limitation on punitive damages of a ratio of 2:1 to the actual compensatory damages awarded. However, after debate and compromise, the bill was amended to provide for a punitive damage limitation of a ratio of 4:1 or $500,000.00, whichever is greater. Senate Bill 421, as amended, passed the legislature and will be enacted at W. Va. Code § 55-7-27.

Although Tom believes that Senate Bill 421 will provide comfort to businesses and other entities that there is a cap on punitive damages that may be levied, a historical analysis of past decisions regarding punitive damage awards by the Supreme Court of Appeals of West Virginia demonstrates that few punitive damages awards have ever implicated a ratio of 4:1 or higher. Thus, although the cap is in place, it may rarely, if ever, be used. Moreover, the 4:1 ratio puts West Virginia near the high-end of those states that have limitations on punitive damage awards. The punitive damages cap is surely a step in the right direction and represents a bipartisan accomplishment, but it may not be as effective as originally introduced. To be clear, however, while the punitive damages cap may not often impact the everyday litigator, it will certainly become a critical consideration for companies looking to provides jobs and do business within our great state.

As the economist Irving Fisher remarked three days before the Wall Street Crash of 1929, "stock prices have reached what looks like a permanently high plateau." Let's see if we predict better than he did.

Loss Prevention Tips for DTC Firms

TAKING THE PAIN UPFRONT – THE CONFLICTS CHECK

By Stephen Crislip, *Jackson Kelly PLLC,* Charleston, WV

Every firm has some system, but their effectiveness varies greatly. Small firms check manual lists and even ask everyone about new files. Bigger firms have to use expensive software to run for multiple offices and numerous files. The flaw in both is the human factor. You have to do the conflict check properly at the beginning, and correctly later when the parties change.

A conflict, in an otherwise winnable claim against you, will change the result against you. Juries punish those with perceived divided loyalty. I have watched mock juries go 180° when the facts were changed to show that the lawyers were in a conflict, even if *de minimus*. Their reaction is immediate and sharp in dollars awarded compared with the no conflicts fact pattern.

Everyone loves the new business of a good paying client. The risk of losing a long-term good client and having a claim against you must make the "no" process a fundamental firm act when a conflict presents itself. Some compensation systems make it worse by rewarding any origination, causing cuts on conflict corners.

You must make the conflict check absolute on every case before <u>any</u> work is done. Otherwise, you may lose more than one file. Management must back up such intake decisions which are best usually done by someone with experience in the area and no stake in the file. A simple way to enforce such checks is to prohibit a file from being opened until done and absolutely regulate on any who work a matter — then open it. Facts change or new parties enter: insist upon another conflict check in the normal course of the file.

The pain upfront is ultimately worth it. Sure you lose a piece of business occasionally which a competitor would take. However, it only takes one bad conflict claim to convince you the front loaded pain is the way to go.

At a recent carrier symposium in Chicago, General Counsel on the panel made it clear they were looking for loyalty in their outside counsel, despite what any technical conflict rules might provide. They stressed that counsel better recognize conflicts early and then immediately communicate with General Counsel about them. The panel stressed good communication, not an e-mail, so that these issues can be addressed. Usually good and prompt discussions help resolve such issues. You never want General Counsel to feel betrayed by their outside firms. You will lose the trusted advisor status pretty quickly that way, so conflicts matter.