



## LITIGATION CLIMATE CHANGE IN WEST VIRGINIA

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West Virginia was ranked squarely at the bottom of the U.S. Chamber of Commerce's 2015 Lawsuit Climate Survey: Ranking the States published by the Institute for Legal Reform. Not only was West Virginia ranked No. 50 overall, it was in the bottom five of all ten elements evaluated in the survey. Moreover, the state was ranked No. 50 in the U.S. Chamber of Commerce's 2012 and 2010 surveys. However, a climate change may be underway in West Virginia as a result of a number of significant tort reform measures passed by the West Virginia State Legislature in 2015.

As a direct result of these legislative initiatives, West Virginia was removed from the American Tort Reform Foundation's list of "Judicial Hellholes" for 2015-2016. However, the state remains on that organization's "Watch List." While it is too early to fully assess the impact of the tort reform measures, overall, the attitude of business commentators toward West Virginia's litigation climate appears to be improving.

### Comparative Fault

West Virginia is a "modified comparative negligence" jurisdiction. A plaintiff can recover as long as the plaintiff's own negligence does not equal or exceed the combined negligence of the other parties. Conversely, a plaintiff cannot recover if his or her negligence exceeds or equals the combined negligence of the other parties. *See Bradley v. Appalachian Power Co.*, 256 S.E.2d 879 (W.Va. 1979).

One of the most important pieces of tort reform legislation to emerge from the 2015 West Virginia legislative session was House Bill 2002, which became effective on May 25, 2015. HB 2002 substantially changed West Virginia's comparative fault regimen and abolished joint and several liability.

The newly codified doctrine of modified comparative fault appears at W.Va. Code § 55-7-13a. Liability is allocated to each applicable person (including plaintiffs, defendants and nonparties who proximately caused the damages) in proportion with the percentage of fault assessed against them by the jury. **(continued)**

Carr Maloney Member Kenneth Stallard has over 25 years of experience in civil litigation proceedings, including products liability construction defects, professional malpractice, fire loss, medical devices, products liability, lead paint exposure, radon gas exposure, insurance coverage, contract disputes, and trust and estates matters. Ken maintains constant contact with his clients, and believes that only well informed clients can make well informed decisions. Ken has an extensive history with the D.C. Defense Lawyers' Association after serving as President from 2007-2008 and as a Member of the Board of Directors from 2008-2012. A 2012 Fellow of the American Bar, Ken is also a former Board Member at the Council for Court Excellence and Affiliate Member of the Potomac Valley Chapter of the American Institute of Architects. Ken is also a member of the West Virginia State Bar, the Bar Association of the District of Columbia, District of Columbia Bar, Virginia State Bar, the Defense Research Institute and the Virginia Association of Defense Attorneys.



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New W.Va. Code §55-7-13c abolishes joint and several liability and provides that a defendant is only liable for the amount of compensatory damages allocated to him in proportion to his percentage of fault. There are several exceptions to the new rule of several liability (i.e. a defendant may be held jointly and severally liable where the conduct that is the proximate cause of damages constitutes criminal conduct; driving under the influence of drugs and/or alcohol; and illegal disposal of hazardous waste, or where it is determined that two or more defendants consciously conspired and deliberately pursued a common plan or design to commit a tortious act or omission).

If a plaintiff cannot recover from a liable defendant, there is a procedure for reallocation of uncollectible amounts, which is set forth in W.Va. Code §55-7-13c(d).

### West Virginia Consumer Credit and Protection Act

The 2015 tort reform measures include an amendment to West Virginia's Consumer Credit and Protection Act to require a plaintiff to show that a violation caused an actual out-of-pocket loss. The law also avoids inconsistency and over-regulation by excluding from coverage any act or practice permitted or regulated by a federal or state agency, and provides any party with the right to a jury trial.

### Punitive Damages

The 2015 tort reform measures also addressed punitive damages. *See* W.Va. Code § 55-7-29. This provision became effective June 8, 2015. Historically, West Virginia had no statutory cap on punitive damages, and so the amount of a punitive award was limited only by constitutional restraints. The new code provision establishes a statutory cap on punitive damages. The amount of punitive damages that may be awarded in a civil action may not exceed the greater of four times the amount

of compensatory damages or \$500,000. If the jury returns a verdict in excess of the cap, the judge is required to reduce the award to comply with these limits. The new code section also requires that a plaintiff establish by clear and convincing evidence that the damages suffered were the result of a defendant's conduct with actual malice toward the plaintiff or a conscious, reckless, and outrageous indifference to the health, safety and welfare of others. The issue of punitive damages may be bifurcated upon request of a defendant. The public policy of West Virginia does not preclude insurance coverage for punitive damages arising from gross, reckless or wanton conduct. *See Hensley v. Erie Ins. Co.*, 283 S.E.2d 227 (1981).

### Election of Judges

Electoral reform also passed the West Virginia Legislature during the 2015 session. As a result, West Virginia now has nonpartisan election of judges. The new statute applies to justices of the Supreme Court, circuit court judges, family court judges and magistrates. Elections will also be on a division basis when more than one judge is to be elected. Such elections will occur during the primary election with nonpartisan ballots. The change became effective with the 2016 primary election.

### Conclusion

While West Virginia remains a potentially high risk jurisdiction for insurance carriers and their insureds, the recent tort reform measures taken by the West Virginia legislature hopefully signal an intent to bring the state more in line with other jurisdictions with regard to litigation practices and perceptions, particular as related to the conduct of business within the state.