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DEMYSTIFYING THE H-1B PROCESS: LITIGATION AS LAST RESORT TO ACHIEVE GOVERNMENT TRANSPARENCY

Although U.S. employers and immigration attorneys understand that maneuvering the H-1B petition process is a challenge and sometimes sheer luck, USCIS' internal practices and basic operational procedures for the lottery process have remained a mystery to the public. Unanswered questions include: How does the lottery system work? Does USCIS allocate all of the available visa numbers? How fair is the selection process, and how is the process monitored? [CLICK HERE TO READ MORE]

RECENT DEPARTMENT OF EDUCATION REGULATIONS MAY RESULT IN INCREASED LITIGATION AGAINST FOR-PROFIT HIGHER EDUCATION INSTITUTIONS

The Department of Education published new regulations in October 2016 that adversely affects for-profit higher education institutions across the nation, including one rule that undoubtedly will lead to significant and increased litigation. [CLICK HERE TO READ MORE]

CLICK HERE TO READ MORE ABOUT NEWS, ANNOUNCEMENTS AND DEVELOPMENTS

LITIGATION CLIMATE CHANGE IN WEST VIRGINIA

By Kenneth G. Stallard, Esq.

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)**

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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.

LITIGATION CLIMATE CHANGE IN WEST VIRGINIA

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.

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Demystifying the H-1B Process: Litigation as Last Resort to Achieve Governmental Transparency

By Samir A. Aguirre, Esq.

On the first business day of April, U.S. employers submit hundreds of thousands of H-1B petitions to U.S. Citizenship and Immigration Services (USCIS) every year to obtain an H-1B visa for a beneficiary, which allows a highly skilled foreign professional worker to temporarily work in the United States. Currently, H-1B nonimmigrant visas are capped at 65,000 for new hires, and 20,000 for those who graduate with a master's or doctoral degree. For the past ten years, employer demand for H-1B workers has exceeded the number of H-1Bs available. Once the numerical limits are met, USCIS uses a computer-generated random selection process (or "lottery system") to select a sufficient number of H-1B petitions to satisfy the limits.

Although U.S. employers and immigration attorneys understand that maneuvering the H-1B petition process is a challenge and sometimes sheer luck, USCIS' internal practices and basic operational procedures for the lottery process have remained a mystery to the public. Unanswered questions include: How does the lottery system work? Does USCIS allocate all of the available visa numbers? How fair is the selection process, and how is the process monitored?

On May 20, 2016, the American Immigration Council and the American Immigration Lawyers Association (AILA) filed a lawsuit against the U.S. Department of Homeland Security and USCIS, seeking answers to these questions, and more importantly to shine light on the government's administration of the H-1B petition process. The lawsuit brings allegations against USCIS under the Freedom of Information Act (FOIA); and USCIS' failure to respond to AILA's FOIA request, dated November 30, 2014.

In the Complaint, AILA requests that USCIS produce all responsive documentation explaining (1) the intake procedure for cap-subject cases; (2) the reasons why a cap-subject petition might be rejected upon receipt, and not included in the lottery pool; (3) how USCIS determines that it has reached the statutory cap; (4) how the random selection process is conducted for the master's cap lottery; (5) how the random selection process is conducted for the regular cap lottery; and (6) how USCIS tracks and counts unused H-1Bs for each fiscal year.

In response to the FOIA request, USCIS produced numerous documents in part or in redacted format, and completely withheld other documents under a FOIA exemption. AILA asks that USCIS conduct an adequate search for records responsive to the AILA's FOIA request, and that USCIS disclose all wrongfully withheld records in their entirety.

The case continues in litigation. The public and immigration attorneys have an interest, and stake in the outcome of this litigation. At a minimum, U.S. employers and foreign beneficiaries could potentially gain piece of mind knowing that the immigration system that they trust and rely on is transparent, and fairly selects and adjudicates H-1B petitions when unfortunately, no other guarantees in the process exist.

SAMIR A. AGUIRRE is a litigator focusing his practice on immigration, general, professional and product liability. With a solid background in civil and criminal litigation, Samir brings superior communication, analytical and problem-solving skills to the table and gives clients the efficient representation they deserve.

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Recent Department of Education Regulations May Result in Increased Litigation Against For-Profit Higher Education Institutions

By Matthew D. Berkowitz, Esq. and Ashley A. Norton, Esq.

The Department of Education ("DOE") released new regulations, published on November 1, 2016, which may adversely affect for-profit higher education institutions across the nation. One of the new rules undoubtedly will lead to significant and increased litigation. This new rule prohibits institutions participating in the government's Direct Loan Program from enforcing arbitration provisions. Participants will be prohibited from enforcing provisions that prevent class actions by students. Moreover, the institutions will be prohibited from requiring its students to submit to internal institution grievance procedures before bringing "borrower defense" claims, such as deceptive practices, misrepresentation, and fraud claims.

Historically, institutions included mandatory arbitration provisions in their student enrollment contracts. Such provisions not only precluded full-blown litigation, but also barred class actions suits by students. This new regulation will give students – either individually or as a class – greater access to the court system to pursue misrepresentation and fraud claims against their schools.

The new rules also have an impact on the causes of action that qualify as "borrower defenses." Whereas formerly these defenses included only those causes of actions which could be brought under applicable state law, the DOE's new regulations create a federal standard which encompasses all of the following: an educational institution's breach of the contract with the student, a contested judgment entered against the school for an act or omission relating to the borrower's loan, and a substantial misrepresentation made by the institution.

These new regulations, which go into effect in July of 2017, represent the latest blow to for-profit higher education institutions delivered by the DOE. In 2015, the DOE levied a $30 million fine against Corinthian College and a California Court concluded that the now-defunct school misrepresented job placement statistics. Just a few months ago, ITT Tech, a for-profit school with nearly 40,000 students and more than 120 campuses, closed its doors after the DOE pulled federal funding following repeated allegations of deceptive practices. Additionally, the DOE recently stripped the Accrediting Council for Independent Colleges and Schools ("ACICS") – the largest accrediting agency of for-profit colleges and universities – of its authority after a federal panel concluded that it failed in its oversight of its educational institutions.

Indeed, these rules will likely open the flood-gates of lawsuits by students to recover monetary damages from schools accused of misrepresentation and deceptive practices. With the prohibition of the arbitration provisions, class claims against such institutions will likely soar in 2017.

Despite the anticipated increase in class action lawsuits, institutions may guard against potential exposure by relying on common class action defenses. For example, institutions may be able to successfully argue that the students cannot satisfy the "commonality" and "predominance" requirements under Federal Rule 23. Many students in a putative class may not have relied on the same alleged representations to their detriment and students who can show reliance may have varying damages that require numerous mini-trials.

In sum, institutions should evaluate their risks in light of the new regulations and take necessary steps to guard against a potential class action suit in 2017.

MATTHEW BERKOWITZ is a is an experienced civil litigator with significant class action experience who represents businesses and professionals in complex disputes.
ASHLEY NORTON concentrates her practice on employment law, professional liability and construction defect cases.

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NEWS AND ANNOUNCEMENTS

JIM STEELE AND MATTHEW BERKOWITZ PROFILED ON LEGAL TALK NETWORK'S *THE INSURANCE LAW PODACST*

Carr Maloney Members Jim Steele and Matthew Berkowitz were Featured Guests on the October edition of Legal Talk Network's ***The Insurance Law Podcast***. Mr. Steele and Mr. Berkowitz had an in-depth discussion on how Offers of Judgement work, their use in class actions and the potential to moot a putative class with an unaccepted offer. The podcast can be found at: http://legaltalknetwork.com/podcasts/insurance-law-podcast-am-best/2016/10/attorneys-discuss-define-offers-judgement/

KEN STALLARD JOINS CARR MALONEY AS FIRM EXPANDS INTO WEST VIRGINIA

Kenneth Stallard joined Carr Maloney as its newest Member as the Firm expanded into West Virginia. Mr. Stallard has over 25 years of experience in civil litigation, including professional malpractice, construction defects, fire loss, medical devices, products liability, lead paint exposure, radon gas exposure, insurance coverage, contract disputes, and trust and estates matters. Mr. Stallard is barred in the District of Columbia, Virginia, and West Virginia. Ken received national attention for a 2015 lawsuit that was featured on ABC's *Good Morning America*, NBC's *Today Show*, CBS *This Morning*, and Fox News' *Fox & Friends*.

MARIANA BRAVO RE-ELECTED AS HISPANIC NATIONAL BAR ASSOCIATION'S VICE PRESIDENT OF PROGRAMS

Carr Maloney Member Mariana Bravo was re-elected to a second term as Vice President of Programs for the Hispanic National Bar Association. As a member of the HNBA National Executive Committee, Ms. Bravo is instrumental in the implementation and expansion of the "Su Negocio" Program, a collaborative effort that empowers the emerging Latino small business community through access to commercial enterprise resources. The program has already launched in Miami, Houston, Chicago and San Jose, and is expected to open in six other cities in the coming year. Ms. Bravo served as HNBA Regional President for the District of Columbia, Maryland, Virginia and West Virginia from 2012 to 2015.

JAN SIMONSEN FEATURED AT PERRIN CONFERENCE EVENTS

On October 18, 2016, Carr Maloney Member Jan Simonsen was Co-chair at Perrin Conferences' **Food & Beverage Litigation Conference: A Look at Hospitality, Liquor and Food Liability.** This prestigious annual conference assembled leaders in U.S. food, beverage and hospitality liability litigation. On November 3, 2016, she was featured on a panel discussion entitled *Developing Diverse and Inclusive Leadership* at Perrin Conferences' **Diversity and Inclusion Conference**. This one day conference featured speakers and panel discussions covering topics such as *Insights on Diversity in the Legal Community*, *Understanding the Value of Emotional Intelligence* and *The Powerful Legacy of Female Leadership*.