COMMERCIAL LAW UPDATE

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Elizabeth A. Amandus
Member
Charleston Office
500 Lee Street East
Suite 1600
Charleston, WV 25301-3202
(O): 304.340.1090
(F): 304.340.1080
(C): 304.550.5731

eamandus@jacksonkelly.com

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Subtopics

I. Statutory Interpretation Cases

II. Contract Interpretation Cases

III. Arbitration Cases

IV. Other Commercial Cases

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I. Statutory Interpretation Cases

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Statutory Interpretation: Review of Legal Principles

- Interpreting a statute presents a purely legal question subject to ***de novo*** review.
- The primary object in construing a statute is to ascertain and give effect to the **intent of the Legislature**.
- Where the statute is **plain and unambiguous**, there is no basis for application of rules of statutory construction; but courts must apply the statute according to the legislative intent plainly expressed therein.
- Courts may not eliminate words or add words through judicial interpretation of statutes.
- Undefined terms are given their common, ordinary, and accepted meaning.
- Remedial statutes should be liberally construed to effect their purpose. (Surface Coal Mining and Reclamation Act)

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Quicken Loans, Inc. v. Walters for Walters, 801 S.E.2d 509, 239 W. Va. 494 (June 15, 2017)

W. Va. Illegal Loan Statute	Issue	Analysis
W. Va. Code 31-7-8(m)(8): In making any primary or secondary subordinate mortgage loan, no licensee may, and no primary or subordinate mortgage lending transaction may, contain terms which: . . . (8) Secure a primary or subordinate mortgage loan in a principal amount that, **when added to the aggregate total of the outstanding principal balances of all other primary or subordinate mortgage loans secured by the same property**, exceeds the fair market value of the property on the date that the latest mortgage loan is made.	Is this statute violated when a **single mortgage** on the property exceeds the fair market value of the property? OR Is this statute violated only when **two or more** mortgages exceed the fair market value of the property? **Holding (Syl. Pt. 5)** **The former.** **"The provisions of West Virginia Code 31-7-8(m)(8) apply to any primary or subordinate mortgage loan that exceeds the fair market value of the property at the time the loan is made, either singly, in the case of a first or consolidation mortgage loan or in combination with any outstanding balances of any existing loan."**	The majority noted that this is a case where both parties contend that the statute is clear and unambiguous and "then reasonably argue, utilizing the same rule of statutory construction, that the statutory provision has two entirely irreconcilable meanings." Instead, the Court looked beyond the parties' "laser focus on a single rule of statutory construction, in order to determine whether our precedents provide a path to a more enlightened analysis." The Court focused on interpreting the statute to **avoid an absurd result**. The Court looked at the purpose of the provision (to protect the public from underwater loans) and concluded that it shows a legislative intent to protect West Virginia homeowners from predatory lending, including predatory primary loans. To interpret the statute apply only to secondary loans when it says "primary or secondary" would be absurd.

Young v. EOSCCA,
800 S.E.2d 224, 239 W. Va. 186 (May 17, 2017)

Statute	Question	Analysis
Consumer Credit Protection Act W. Va. 46A-5-101(1) (2015) "If a creditor or debt collector has violated the provisions of this chapter applying to . . . fraudulent or unconscionable conduct, any prohibited debt collection practice, . . . **the consumer** has a cause of action to recover" damages. Consumer is defined as "any natural person **obligated or allegedly obligated** to pay any debt" W. Va. Code 46A-2-122 (2015).	Does an individual who had received numerous phone calls from debt collectors regarding a debt owed by someone else qualify as a "consumer" with standing to recover under the Consumer Credit Protection Act? **Holding** **No. Syl. Pt. 1 – "By limiting the right to recover for a violation of the W. Va. Consumer Credit and Protection Act to those persons defined as "consumers," the Legislature has expressly prohibited any persons falling outside of the definition of "consumer" from seeking damages and statutory penalties…."**	Ms. Young was not obligated on the debt the collectors were calling about. She was never identified by a caller as a debtor owing money. The one time she answered the phone, she quickly learned she is not the person the caller sought to contact. Nothing in the record suggests that she ever believed she was liable on the debt. Being a consumer in a general sense is not enough to obtain standing.

Blue Ridge Bank, Inc. v. City of Fairmont, 807 S.E.2d 794, 240 W. Va. 123 (November 14, 2017)

Facts	Question	Holding (Syl. Pt. 1)
City of Fairmont entered into a Lease Purchase Agreement for equipment with Comvest, Ltd. whereby Comvest paid for the City's equipment in exchange for monthly lease payments. Comvest assigned its interest to Blue Ridge Bank--Blue Ridge Bank paid Comvest $1,070,600 (the cost of the equipment) in exchange for the right to receive $1,484,071.20 in payments from Fairmont. Comvest converted half of the money, and Fairmont had to pay for it out of pocket. Comvest went bankrupt and was not a party.	Can Fairmont assert claims and defenses against the Bank based on Comvest's conversion of funds designated for the purchase of equipment?	"Under W. Va. Code § 46-9-404(a)(1) (2000), an assignee takes an assignment subject to the account debtor's defenses and claims against the assignor. The rights of the assignee, as well as any defense or claim in recoupment arising from the transaction that gave rise to the contract (unless the account debtor has entered into an enforceable agreement not to assert defenses or claims). It makes no difference whether the defense or claim accrued before or after the account debtor was notified of the assignment."
Statute Under the Uniform Commercial Code, W. Va. Code § 46-9-404(a) (2000), "Unless an account debtor has made an enforceable agreement not to assert defenses or claims. . ., **the rights of an assignee are subject to**: (a) all terms of the agreement between the account debtor and assignor and ***any defense or claim in recoupment*** *arising from the transaction that gave rise to the contract. . . ."*	**Answer** **Yes.** Under the UCC, Fairmont's debt to the bank should be reduced to reflect its recoupment claim against Comvest.	

Alan Enterprizes LLC v. Mac's Convenience Stores LLC, et al., 810 S.E.2d 61, 240 W.Va. 250 (Feb. 7, 2018)

Facts	Question	Analysis
Petitioner and Respondent were direct competitors in the Bridgeport gas station and convenience store market. Alan sued Mac's alleging that Mac's sold gas **below cost** in violation of the West Virginia Unfair Practices Act, W. Va. Code § 47-11A-1, *et seq.*	Does the calculation of a retailer's cost under W. Va. Code § 47-11A-6(a) (1983) include taxes that the retailer pays upon the acquisition of goods it purchase for resale, such as the motor fuel taxes on gasoline, for purposes of determining whether the retailed is selling the item below cost in violation of the Unfair Practices Act?	The definition of "cost" when applicable to retail businesses under W. Va. Code § 47-11A-6(a) (1983) describes a formula for calculation that does not mention or reference "taxes." Recent statutory amendments to this subsection suggest that taxes are not included in the calculation of a retailer's cost. In contrast, the definition of a **wholesaler's** cost under W. Va. Code § 47-11A-6(b) (1983) expressly includes "applicable taxes." The word taxes appears to be purposefully omitted, and such policy decisions are better suited for legislative consideration and decision.
	Holding **No.**	

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Brickstreet Mutual Ins. Co. v. Zurich American Ins. Co., 813 S.E.2d 67, 240 W. Va. 414 (April 5, 2018)

Answers to Certified Questions from the Fourth Circuit (as reformulated)	Analysis
1. The Worker's Compensation Office of Judges ("OOJ") does not have jurisdiction over a declaratory judgment action initiated by an insurance carrier for the purpose of determining whether coverage for a workers' compensation claim exists under a second policy of insurance such that a second carrier is obligated to contribute to the payment of workers' compensation benefits to an injured employee who suffered a single workplace accident.	• The OOJ possesses authority to hear disputed workers' compensation **claims**, not disputes of this nature. • Looking at the legislative intent embodied in the plain language of the statute, the word "shall" requires that a designation of responsible party for obtaining workers compensation insurance must be made in professional employer agreements. • Requiring PEOs and client-employers to share in payment of claims when one has been designated to provide coverage would create an improper conflict in the statutes. • Phrase that "client-employer shall at all times remain **ultimately liable**" means that is liable if special employer defaults.
2. Pursuant to W. Va. Code § 33-46A-(a) (2008), parties to a professional employer agreement **must** designate either the professional employer organization (PEO) or the client-employer as the responsible party for obtaining workers' compensation insurance coverage for covered employees. Moreover, when parties to a professional employer agreement designate the PEO as the responsible party for obtaining workers' compensation insurance coverage for covered employees, the policy obtained by the PEO is primary over a policy obtained by a client-employer. Therefore, coverage under a workers' compensation policy purchased by the client-employer is triggered only if the PEO or its carrier default on their obligation to provide workers' compensation coverage.	

McElroy Coal Co. v. Schoene, 813 S.E.2d 128, 240 S.E.2d 128 (April 12, 2018)

Answers to Certified Questions from 4th Circuit - Loughery, J.	Workman, C. J. & Davis, J.	Ketchum, J.	Walker, J.
A deed expressly transferring the right to mine coal without leaving any right to subadjacent support prohibits the surface owner from a common law claim for subsidence damages caused by mining. **The right to subadjacent support can be waived** by contract.	Concur.	**Dissent** – Parties to Deed could not have contemplate longwall mining method.	Concur
If the surface is damaged by subsidence that is a natural result of mining (and **not a violation of law, rule, permit** etc.), the surface owner is limited to the remedies provided for in W. V. C.S.R. 38-2-16.2.c through 38-2-16.2.c.2 – (1) restoration of subsidence caused to surface lands and (2) either correcting material damage to structures and facilities by repairing the damage OR compensating the owner.	Concur.	Concur.	Concur.
If the surface owner can show damages were caused by a violation of a rule, order or permit under the W. Va. Code 22-3-25(f) (1994), those damages can include compensation for annoyance and inconvenience.	Concur.	Concur.	Concur.
If the surface is damaged without a violation of law and causes damage to structures or facilities under W. Va. C.S.R. 38-2-16.c.2.c, then the landowner should decide which of these remedies applies. The rule is silent and, thus, ambiguous. But landowner choice is consistent with the Legislative goal of protecting surface owners and the public.	Concur.	Concur.	Dissent. It says ”the operator shall. . . either correct. . . or compensate”

II. Contract Interpretation Cases

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Contract Interpretation: Review of Legal Principles

- A circuit court's interpretation of a contract is reviewed ***de novo.***
- ***A meeting of the minds*** and ***consideration*** are required to form a contract.
- ***Clear Meaning*** and ***Intent*** of the parties expressed in the ***Unambiguous Language of the Contract*** will be enforced. The Court cannot make a new contract for them or "alter, pervert or destroy" the contract.
- **Parol Evidence Rule** – prohibits presentation of evidence of the intent and meaning outside of the four corners of the contract unless an ***ambiguity*** is present.
- Mere fact that parties do not agree on the interpretation of a contract dos not render it ambiguous. Whether a contract is ambiguous is a question of law to be determined by the Court. To be ambiguous, the language must be susceptible to two different meanings or of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning.
- Uncertainties should be resolved against the party that prepared the contract.

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Allegheny Country Farms, Inc. v. Huffman, 787 S.E.2d 626, 237 W. Va. 355 (June 6, 2016)

Facts	Question	Analysis
Dispute over a piece of property owned by Ms. Carper that, if owned by Allegheny Country Farms, would permit Allegheny to access a highway. Allegheny sued Ms. Carper, and they entered into a Settlement Agreement in which • Allegheny promised to pay for a survey of the property; • Ms. Carper agreed to enter into a Boundary Line Agreement conveying the property in exchange for $1,000.	Are the Huffmans contractually bound to convey a portion of their property to Allegheny as outlined in the "Acknowledgement of Boundary Line Agreement" they signed at auction?	Specific performance is an equitable remedy available where monetary damages cannot adequately compensate a party's losses. It is "routinely awarded in contract actions involving real property" because no two parcels are alike. Even though the Huffmans weren't parties to the Settlement Agreement, **Allegheny is entitled to the Huffmans' specific performance of the Settlement Agreement's plain and unambiguous terms because the Huffmans expressly agreed in writing to be bound by it.**
Before the survey was completed, Ms. Carper sold the property at auction to the Huffmans. The Huffmans knew about the Settlement Agreement and executed an "Acknowledgment of Boundary Line Agreement" acknowledging that the purchase was subject to the Settlement Agreement. Yet, the Huffmans refused to sign the Boundary Line Agreement after the survey was completed. Allegheny filed a complaint to enforce the Settlement Agreement against the Huffmans.	**Holding** **Yes.** The Circuit Court erred in holding that the Settlement Agreement cannot be enforced against the Huffmans due to a lack of privity.	

CONSOL Energy, Inc. v. Hummel, et al., 792 S.E.2d 613, 238 W. Va. 114 (October 26, 2016)

Facts	Question	Analysis
Ambiguity caused by two conflicting contracts between miner employees of Consolidated Coal Company ("Miners") and parent company, CONSOL Energy, Inc. ("CONSOL"). - Miners terms of Employment included an Equity Incentive Plan ("Plan"), which provided for the award of CONSOL common stock in Restricted Stock Units ("RSUs"). - When RSUs were awarded, Miners were presented with an Award Agreement providing the terms and conditions of the award and the vesting schedule According to the Award Agreements, vesting of RSUs would accelerate upon certain events, including a "change in control." The Plan defines "Change in Control" as a sale of the "Company's" assets, and defines "Company" as "CONSOL." The Award Agreement defines "Company" as "including [CONSOl's] subsidiaries"	Did the sale of Consolidated Coal Company to Murray Energy affect a "change in control" to accelerate the vesting of the Miners RSUs under the CONSOL Plan? **Holding** **Yes. CONSOL's failure to accelerate vesting of the RSUs and declaration that the RSUs were forfeited constituted a breach of contract.**	• There is a patent ambiguity in the Award Agreement, which both indicates that the terms of the Plan shall govern and that the Award Agreement governs if there is a conflict with the Plan. • Ambiguities must be construed most favorably to the Miners since CONSOL prepared the documents. • "Change of control" necessarily includes CONSOL's subsidiaries." Otherwise, this vesting event would never be triggered (sale of CONSOL would effect a termination of employment).

W. Va. CVS Pharmacy, LLC, et al. v. McDowell Pharmacy, Inc., et al., 796 S.E.2d 574, 238 W. Va. 465 (Feb. 9, 2017)

Procedural History	Holding
Circuit Court refused to enforce the Choice of Law provision in contracts between a pharmacy network administrator and various West Virginia pharmacies that are network members. The contracts specified that Arizona law applies, but the Circuit Court applied West Virginia law because Arizona has no substantial relationship to the contract.	The Circuit Court erred. Arizona law should be applied. Caremark provided testimony showing that its network originates from Arizona offices where claims are processed from network pharmacies; AZ addresses are listed throughout the contracts, and all executed contracts are stored in Arizona. This evidence is sufficient to show a substantial relationship to Arizona. The Court knows of no public policy offended by the application of Arizona law. Other courts interpreting these contracts have reached the same conclusion.

Blackrock Capital Investment Corp., et al. v. Fish, et al., 799 S.E.2d 520, 239 W. Va. 89 (April 24, 2017)

Facts	Question	Analysis
The AL Solutions Processing plant processed powdered titanium and zirconium, which are **"liable to ignite upon exposure to air**." MSDS sheets instruct that **water should never be sprayed on such fires** because the chemicals will dissociate water into oxygen and hydrogen gas and the hydrogen will explode. Yet, a **water-deluge fire suppression system** was installed. AL Solutions was managed and controlled by its parent companies (Blackrock and Tremont Associates, LLC) (the "Parent Companies") pursuant to three management agreements providing that the Parent Companies would **never** be liable to AL Solutions and AL Solutions would indemnify the Parent Companies. December 2010 explosion at Plant killed three workers. The workers' families sued AL Solutions, which brought a cross-claim for indemnification and contribution against its parent companies.	Are the no-liability and indemnification clauses in the management agreements unconscionable and unenforceable? **Holding** **Yes. These clauses are both procedurally and substantively unconscionable and, thus, are unenforceable.**	The Clauses are **Procedurally Unconscionable** because AL Solutions had **no meaningful choice** in the contract formation process: • The management agreements were drafted by attorneys for the parent companies. • AL Solutions had no lawyer or independent representative to negotiate or sign the agreements. • AL Solutions' board was comprised solely of principals from the parent companies. The clauses are **Substantively Unconscionable** because they are "outrageous and oppressive," insulating the parent companies from liability under all circumstances, even failure to perform under the contract or an intentional breach. Al Solutions was a pawn.

III. Arbitration Cases

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Arbitration Agreements: Review of Legal Principles

- Because of federal policy favoring arbitration, an arbitration agreement is **presumed to be valid** unless one of the parties to the contract challenges the validity of an arbitration clause.

- Courts cannot consider the validity of an arbitration agreement **unless challenged** by a party.

- Trial Court presented with motion to compel arbitration under the Federal Arbitration Act is limited to the threshold issues of:
  i. Whether a valid arbitration agreement exists; and
  ii. Whether the claims asserted by the plaintiff fall within the substantive scope of the arbitration agreement.

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Arbitration Agreements: Review of Legal Principles

- Whether an arbitration agreement exists is determined based on **contract principles**. Unless there's a legal or equitable principle to revoke the agreement, it is binding and enforceable.
  - DOCTRINE OF SEVERABILITY – Arbitration Agreement is severed from the contract as a whole and analyzed separately from the "container contract."
- Arbitration provisions are not entitled to standards more lax than any other contract provisions.
- Review of order denying motion to compel arbitration is reviewed ***de novo.***

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Arbitration Topics

- The effect of a Delegation Clause within the Arbitration Agreement.
- Is there an Arbitration Agreement?
  - Incorporation by Reference
  - Unilateral Contract Modification
- Is the Arbitration Agreement Valid?
  - Unconscionability
- Is the Arbitration ambiguous?
- Waiver and Estoppel Arguments

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Schumacher Homes of Circleville, Inc. v. Spencer, 787 S.E.2d 650, 237 W. Va. 379 (June 13, 2016)

Facts	Holding
A contract for the construction and purchase of a home included an arbitration clause providing that "the arbitrator(s) shall determine all issues regarding the arbitrability of the dispute."	The Circuit Court erred in ruling upon the validity of the arbitration agreement – it had no power to do so because of the delegation clause. The delegation clause is enforceable. Syl. Pt. 5 – "Under the Federal Arbitration Act, 9 U.S.C. 2, and the doctrine of severability, where [there is] a delegation provision in a written arbitration agreement . . . **a trial court is precluded from deciding** a party's challenge to the arbitration agreement. When an arbitration agreement contains a delegation provision, the trial court must **first** consider a challenge, under general principles of state law applicable to all contracts, that is directed at the **validity revocability or enforceability of the delegation provision itself**." Syl. Pt. 7 – "Under the Federal Arbitration Act, 9 U.S.C. 2, there are two prerequisites for a delegation provision to be effective. First, the language of the delegation provision must reflect a **clear and unmistakable** intent by the parties to delegate state contract law questions about the validity, revocability, or enforceability of the arbitration agreement to an arbitrator. Second, the delegation provision must itself be valid, irrevocable and enforceable under general principles of state contract law."

Schumacher Homes of Circleville, Inc. v. Spencer, 787 S.E.2d 650, 237 W. Va. 379 (June 13, 2016)

- Thorough discussion of the DOCTRINE OF SEVERABILITY beginning on p. 10

The U.S. Supreme Court has interpreted the FAA to require application of the doctrine of "severability" or "separability." **The gist of this doctrine is that an arbitration clause in a larger contract must be carved out, severed from the larger contract, and examined separately for validity and enforceability under state contract law. In doing so, it's ok to consider other parts of the contract that relate to, support, or are otherwise entangled with the operation of the arbitration clause**.

- Doctrine of Severability has been extended to Delegation clauses by the U.S. Supreme Court in *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63. The SCAWV examines and explains this case on p. 15:

Rent-A-Center stands for the proposition that a delegation provision is a mini-arbitration agreement divisible from both the broader arbitration clause and the even broader contract in which the delegation provision and arbitration clause are found.

Therefore, a party must specifically object to the delegation provision in order for a court to consider the challenge.

A party resisting delegation to an arbitrator of any question about the enforceability of an arbitration agreement must successfully challenge the delegation provision first.

The take-away rule from Rent-A-Center is this: under the FAA and the doctrine of severability, where a delegation provision in a written arbitration agreement gives to an arbitrator the authority to determine whether the arbitration agreement is valid, irrevocable or enforceable under state contract law, a trial court is precluded from deciding a party's challenge to the arbitration agreement. When an arbitration agreement contains a delegation provision, the trial court must first consider a challenge. . . that is directed at the validity. . . of the delegation provision itself.

Under this rule, **if the trial court finds the delegation provision to be effective, then the case must be referred to the parties' arbitrator who can then decide if the arbitration agreement is invalid, revocable or unenforceable**.

Conversely, **if the delegation provision is ineffective on a ground that exists at law or in equity for the revocation of any contract, then the trial court may examine a challenge to the arbitration agreement**.

Arbitration Topics

- The effect of a Delegation Clause within the Arbitration Agreement.
- Is there an Arbitration Agreement?
  - Incorporation by Reference
  - Unilateral Contract Modification
- Is the Arbitration Agreement Valid?
  - Unconscionability
- Is the Arbitration ambiguous?
- Waiver and Estoppel Arguments

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G&G Builders, Inc. v. Randie Gail Lawson and Deanna Dawn Lawson, Case No. 15-0920 (November 14, 2016)

Facts	Question	Analysis
The Lawsons signed a Construction Agreement for construction of their home that provided "AIA Document A201-1997, General Conditions of the Contract for Construction, is adopted in this document by reference." Those General Conditions: • Include an Arbitration Clause; • Were not attached to the Agreement; • Were not provided to the Lawsons, at closing or after; and • Were not discussed with the Lawsons. Petitioner sued to enforce its mechanic's lien through a court-ordered sale of Respondent's home. Respondent filed a counterclaim for breach of contract. Petitioner sought to compel arbitration.	Were the arbitration provisions incorporated by reference into the construction agreement? **Holding** **No. We agree with the Circuit Court that there was nothing upon which to conclude that the Lawsons knew the contents of the General Conditions, which were never provided, to establish consent to be bound by the arbitration provision therein. The Contract did not even include the word "arbitration." There was no agreement to arbitrate.**	Parties are only bound to arbitrate where, by clear and unmistakable writing, they have agreed to arbitrate. (Syl. Pt. 2): To incorporate a writing by reference into an agreement requires 1. Clear reference to the writing so the parties' assent is unmistakable; 2. Description of the incorporated document in terms that leave its identity beyond doubt; 3. Evidence that the parties had knowledge of and assented to the incorporated document so that the incorporation will not result in **surprise or hardship.**

Citizens Telecommunications Company of West Virginia d/b/a Frontier Communications of West Virginia, Frontier West Virginia, Inc. v. Michael Sheridan, et al.,
Case No. 16-0005 (April 20, 2017)

Facts	Circuit Court Holding	SCAWV Holding
Respondents had brought a class action in Oct. 2014 against Frontier alleging that internet services provided between 2007-2010 was slower than advertised because Frontier had intentionally reduced the speed. As subscribers, Respondents' relationship with Frontier was governed by Frontier's Residential Internet Service Terms and Conditions available on Frontier's Website. • No Arbitration Clause in 2007-2010 period • Included term giving Frontier the **right to make changes** upon 30 days' notice by bill message, email, or other notice. "You accept the changes if you use the service after notice is provided." • In September 2011, arbitration clause was added that included a waiver of the right to jury trial and a waiver of the right to participate in a class action • Notice of the change was provided in billing statements • Respondents didn't read it • Folded copy of terms and conditions provided Nov. 2012	Motion to Compel Arbitration Denied because: 1. Arbitration agreement was never formed because Respondents never assented; 2. Arbitration provision was illusory and lacked consideration; 3. Arbitration provision did not cover claims that pre-dated its adoption; and 4. Arbitration was unenforceable due to its prohibition of class-wide injunctive relief.	Reviewing *de novo*, REVERSED: 1. This is a **protypical unilateral contract**; offer was accepted by performing the act of continuing to use and pay for service. 2. Subsequent modifications to a unilateral contract are permissible provided **reasonable notice** of the changes are provided. Frontier provided reasonable notice, and was **entitled to rely on customers to read** its notice. Modification of a contract requires **new consideration** (Syl. Pt. 3); but, here, the mutual agreement of the parties to arbitrate is sufficient consideration to support the modification. Retaining the right to modify did not render the contract illusory because the parties cannot be bound to unilateral changes without consent. 3. The parties may agree to arbitrate pre-existing claims. 4. It is permissible for parties to an arbitration provision to agree to waive class-wide injunctive relief.

Arbitration Topics

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Unconscionability

Two Component Parts: Party attacking the contract must prove both

- *Procedural Unconscionability*

Inequities, improprieties, and unfairness in the bargaining process and formation of the contract, such that there was no real and voluntary meeting of the minds.

- *Substantive Unconscionability*

Unfairness in the contract itself such that a contract term is one-sided and has an overly harsh effect on the disadvantaged party.

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Kirby v. Lion Enterprises, Inc.
2017 WL 5513619 (November 17, 2017)

Facts	Unconscionability Holding and Analysis
In a construction contract between the construction company and the Kirbys, • The Kirbys read and initialed each page of the agreement, and signed the signature page, evidencing that they understood the agreement; • The Kirbys were able to read and understand English; • The Kirbys were educated; • The Kirbys had operated a business of their own for close to 40 years; and • One of the Kirbys expressed concern of the inclusion of the arbitration agreement at closing, but signed anyway. Kirbys argued that the arbitration clause was not integrated because a representative of the construction company told them they don't "really have to worry about the arbitration clause."	Affirmed – We agree with the Circuit Court that the evidence presented, including the terms of the agreement, does not raise concerns of unconscionability in either the procedural or substantive aspects of the sliding scale of unconscionability. While both procedural and substantive unconscionability must be proven, "both need not be present to the same degree. **Courts should apply a 'sliding scale'** in making this determination: the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the clause is unenforceable, and vice versa." Parol evidence about what the Kirbys were told at the closing is inadmissible.

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Nationstar Mortgage, LLC v. West, 785 S.E.2d 634, 237 W. Va. 84 (April 7, 2016)

Facts	Unconscionability Holding and Analysis
As part of a mortgage loan transaction, the Wests signed a contractual rider entitled "Arbitration Agreement," providing that either party could choose to have a dispute resolved by binding arbitration. The Wests argued that the arbitration agreement was unconscionable: • They are not sophisticated in financial matters - It didn't include an "opt out" provision whereby they could reject the arbitration clause and still obtain loan funds - The promises exchanged are one-sided because Nationstar could bring a foreclosure action, receivership action, or seek injunctive relieve in court - The costs of arbitration are oppressive	**The Arbitration Agreement is not Unconscionable.** Procedural Unconscionability - "Take-it-or-leave-it" adhesion contracts are routinely signed quickly and without a signatory's full reading. They are typically prepared by the party with more power. Without them, commerce would slow to a crawl. - The bargaining power between the parties may have been unequal, but not grossly unequal. - Inclusion of an arbitration clause is not beyond the reasonable expectations of an ordinary person to render it an oppressive or unconscionable term. - There was no unfair surprise to the Wests – the arbitration language was in all caps immediately above their signatures - **An "opt-out" is not required to avoid procedural unconscionability. It is one of many factors considered, but not determinative**. (Syl. Pt. 2) - The enforceability of an arbitration clause **does not require separate consideration** when the contract as a whole is supported by adequate consideration. - The Wests were not denied of a right to read the agreement and did not lack capacity to understand. **They had a duty to read** the agreement, and failure to read doesn't excuse them from the contract's binding effect. Substantive Unconscionability - Only a "modicum of bilaterality" is required to avoid unconscionability, and **Lenders may carve out unilateral exceptions to arbitration to protect its security interest and avail itself of statutory foreclosure and receivership procedures.** - There is no evidence that the costs of arbitration would be oppressive.

Arbitration Topics

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- Waiver and Estoppel Arguments

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SWN Production Co. v. Long, 807 S.E.2d 249, 240 W. Va. 1 (November 7, 2017)

Facts	Holding and Analysis
The Arbitration Agreement within a mineral lease provides: ARBITATION. In the event of a disagreement between lessor and lessee concerning this Lease, performance thereunder, or damages caused by Lessee's operations, the resolution of all such disputes shall be determined by arbitration in accordance with the rules of the American Arbitration Association. All fees and costs associated with the arbitration shall be borne equally by Lessor and Lessee. Elsewhere in the lease there are references to civil litigation in a severability clause and a forfeiture clause.	The Arbitration Agreement is not ambiguous and must be enforced. **The Circuit Court** erred in denying a motion to compel arbitration because references to civil litigation in other lease provisions **demonstrated an ambiguity**. Under the Doctrine of Severability, "it's ok to consider other parts of the contract that relate to, support or are otherwise entangled with the operation of the arbitration clause." Here, the severability clause and forfeiture clause had nothing to do with the parties' agreement to arbitrate, which was clear. "Given this **clear and unmistakable language** in the arbitration clause, it was unnecessary for the circuit court to consider the context of the clause within the four corners of the contract or consider any extrinsic evidence detailing the formation and use of the contract."

Arbitration: Waiver and Estoppel

- *Estoppel* – Signatory to a valid Arbitration Clause **must** arbitrate claims because they arise out of and relate directly to the contract containing an Arbitration Clause.

- *Waiver* – Party to an Arbitration Agreement has given up his contractual right to arbitrate. There must be evidence demonstrating the party voluntarily and "intentionally relinquished a known right." The waiver may be express or inferred from actions and conduct. There is no requirement of prejudice or detrimental reliance by the party asserting waiver.

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Bluestem Brands, Inc. v. Shade, 805 S.E.2d 805, 239 W. Va. 694 (October 6, 2017)

Facts	Question
Ms. Shade sued Bluestem for violations of the WV Consumer Credit and Protection Act. Bluestem, which operates various catalog and internet retail shops, was successor-in-interest to a Credit Agreement with Ms. Shade that included valid arbitration clause requiring Ms. Shade to arbitrate disputes relating to the Credit Agreement. Ms. Shade's claims are predicated on the existence of the credit she utilized in her relationship with Blue Stem Ms. Shade did not want to arbitrate and argued that Bluestem could not compel her to arbitrate because it is not a signatory to the Credit Agreement.	Can Bluestem, as a non-signatory to the Arbitration Agreement, compel Ms. Shade, a signatory to the Arbitration Agreement, to arbitrate matters arising out of the Arbitration Agreement?
	Holding (Syl. Pt. 4) **"A non-signatory to a written agreement requiring arbitration may utilize the estoppel theory to compel arbitration against an unwilling signatory when the signatory's claims make reference to, presume the existence of, or otherwise rely on the written agreement. Such claims sufficiently arise out of and relate to the written agreement as to require arbitration."**

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Parsons v. Halliburton Energy Services, Inc., 785 S.E.2d 844, 237 W. Va. 138 (April 11, 2016)

Question	Holding
Did Halliburton waive its arbitration rights waiting to file its motion to compel arbitration until **seven months** after the complaint was filed?	Syl. Pt. 2 "The common-law doctrine of waiver focuses on the conduct of the party against whom the waiver is sought and requires that party to have **intentionally relinquished a known right**. A waiver may be **express or be inferred from actions or conduct**. . . ."
Answer **No.** There is nothing in the record to suggest the defendant expressly waived its right to arbitrate. The defendant also did not implicitly waive its contractual right to arbitrate where its first formal filing asserted that right. The delay alone is meaningless.	Syl. Pt. 6 ". . . To establish waiver of a contractual right to arbitrate, the party asserting waiver must show that the waiving party knew of the right to arbitrate and either expressly waived the right, or, **based on the totality of the circumstances, acted inconsistently with the right to arbitrate through acts or language**. There is no requirement that the party asserting waiver show prejudice or detrimental reliance." • Knowledge can be actual or constructive. Constructive knowledge "refers to knowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person."

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Citibank, N.A. v. Robert S. Perry, 797 S.E.2d 803, 238 W. Va. 662 (November 10, 2016)

Facts	Question	Analysis
Five years after initiating a claim in circuit court against Mr. Perry to garner the balance of his account, Citibank moved to compel Mr. Perry to arbitrate. The Arbitration Clause expressly permitted either party to seek arbitration **after** filing a lawsuit in court so long as the trial had not begun and no final judgment had been entered. The Arbitration agreement also provided that "[n]o portion of this arbitration provision may be amended, severed, **or waived** absent a written agreement between you and us."	Did Citibank waive it's arbitration rights? **Holding** **No.** The Circuit Court erred in holding that Citibank implicitly waived its right to arbitration.	The Arbitration Agreement is unambiguous and must be enforced according to its terms according to traditional contract rules. The presence of the "no-waiver clause" is not determinative; the Court instead analyzed whether Citibank intentionally relinquished a known right. "Under these particular circumstances, we do not find evidence that Citibank relinquished a known right." Here, **the delay in the case was due to Mr. Perry, who took more than 4.5 years to file his counterclaim.**

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Williams v. Tucker, 801 S.E.2d 273, 239 W. Va. 395 (June 13, 2017)

Question	Holding
Did the Tuckers waive their right to arbitrate by: • filing an arbitration case with FINRA instead of the AAA, • withdrawing the arbitration and • signing an agreed order to expunge their investor's record with the Central Registration Depository.	Syl. Pt. 6 "A party to a binding, irrevocable arbitration **cannot unilaterally withdraw** from participation in the arbitration after it has begun. If a party to a binding irrevocable arbitration unilaterally withdraws from the arbitration, **the claims or issues raised by the withdrawing party are abandoned, thereby precluding them from being pursued in any subsequent arbitration or civil action**."
Answer **Yes.** These acts – abandoning claims filed before the improper forum – are inconsistent with their right to arbitrate under AAA, which does not have a rule permitting parties to unilaterally withdraw once a case has begun. There is no second chance in arbitration, and permitting one would be contrary to the purpose and policy of arbitration.	

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Arbitration Agreements: Other Issues

- Class Action Waiver in an Arbitration Agreement
- Grounds for Vacatur

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Salem International University, LLC, et al. v. Bates, et al., 793 S.E.2d 879, 238 W. Va. 229 (November 16, 2016)

Question	Question	Analysis
After Salem University's nursing program lost accreditation, students brought a class action asserting breach of contract, negligence, and other claims.	Whether a valid arbitration agreement contains an enforceable class action waiver or is ambiguous.	Federal policy favors arbitration, and arbitration agreements should be read in favor of arbitration
Enrollment Agreement agreement contained language: - Requiring "individual binding arbitration" - Stating that claims "may not be joined or consolidated with claims brought by or against any other person" and, in the same sentence, stating that "the arbitrator shall have no authority to arbitrate claims on a class action basis"	**Holding** **The arbitration agreement contains a valid class action waiver barring this class action.**	The agreement is not ambiguous – the language plainly indicates that respondents are precluded from bringing a class action.

Cunningham v. LeGrand and Mountain Country Partners, LLC, 785 S.E.2d 265, 237 W. Va. 68 (March 15, 2016)

Facts	Question	Holding
After failing to appear or present rebuttal evidence on the third day of arbitration and after the arbitrator entered his award, Cunningham sought to vacate the Arbitration Award because of the arbitrator's "manifest disregard for the law," including considering hearsay evidence and refusing to reopen the proceedings for rebuttal evidence after the award was entered.	Is "Manifest Disregard for the Law" a basis for challenging an arbitration award under the Federal Arbitration Act ("FAA")?	No. "Manifest disregard of the law is not recognized as a valid statutory basis for challenging an arbitration award made pursuant to the provisions of the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2012)."

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IV. Other Commercial Issues

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Other Commercial Issues

- "Gist of the Action" Doctrine / Economic Loss Rule
- Significant decisions in tort cases
- How to prove a lost writing
- Dissolution of partnerships – new syllabus points
- Defenses to statute of limitations on a promissory note
- Bona fide purchaser analysis
- Suggestions in aid of execution
- Overbroad subpoenas to nonparty litigants
- Refusal of leave to amend a pleading for futility
- Property valuation in condemnation

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“Gist of the Action” Doctrine (Economic Loss Rule)

Recovery in Tort will be barred when any of the following factors are demonstrated:

1. Where liability arises solely from the contractual relationship between the parties;

2. When the alleged duties breached were grounded in the contract itself;

3. Where any liability stems from the contract; or

4. When the tort claim essentially duplicates the breach of contract claim or where the success of the tort claim is dependent on the success of the breach of contract claim.

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Dan Ryan Builders, Inc. v. Crystal Ridge Development, Inc., 803 S.E.2d 519, 239 W. Va. 549 (June 8, 2017)

Facts	Question	Analysis
Pursuant to several contracts, the Cystal Ridge Subdivision was: - Graded and contoured by the "Lang Defendants," relying upon Horner Brothers Engineering schematics - Lots were build by Dan Ryan After homes were constructed, major subsidence occurred. The Crystal Ridge homeowners sued Dan Ryan in state court. Instead of joining the Lang Defendants and Horner Brothers in the state action, Dan Ryan sued them in Federal Court, where • Dan Ryan withdrew its claim for indemnification against the Lang Brothers for the state case to maintain federal jurisdiction. • The Federal Court held that: (i) Dan Ryan was limited to damages for **breach (not tort damages**) against the Lang Defendants under the "gist of the action doctrine; (ii) the Lang Defendants had breached only one of its duties under one contract; and (iii) the Lang Defendants third-party complaint against Horner Brothers was dismissed as moot because Dan Ryan failed to prove damages sounding in negligence.	Is Dan Ryan's third party complaint against the Lang Defendants and Horner Bros. for contribution barred by *res judicata* (claim preclusion)? **Holding** **Yes.** Dan Ryan's state court third-party complaint is barred by *res judicata*. Voluntary dismissal of a cause of action does not preserve or withhold it from *res judicata.*	Applying W. Va. Law governing claim preclusion, the Court concluded that the state and federal actions were the same because "**the same evidence would support both actions or issues**." The Court held that "[i]t is clear that the same evidence would support both the state and federal actions" because both rely on the same facts and are "virtually identical in terms of time, space, and origin." **West Virginia's res judicata prohibits not only re-litigation of claims actually asserted, but "every other matter which the parties might have litigated as incident thereto**." This outcome is consistent with the policies against claim splitting and piecemeal litigation – all are designed to encourage having all claims brought in one action.

Tri-State Petroleum Corp., et al. v. Coyne, 814 S.E.2d 205, ___ W.Va. ___ (April 12, 2018)

Facts	Holding	Analysis
The majority shareholders of a close corporation (not publicly traded) allegedly took actions over time to "squeeze out" the minority shareholder (their brother). The minority shareholder sued for both breach of fiduciary duty and breach of a partnership and a shareholder agreement. **Question** Under the "gist of the action" doctrine, is the minority shareholder precluded from suing the majority shareholders for breaches of fiduciary duties in addition to breaches of the agreements?	**No.** Here, the majority shareholders owed duties to the minority shareholder under West Virginia law that **exist independent of the agreements** and would exist in the absence of those agreements. This is not to say that, in every case, a plaintiff may successfully plead both contract and fiduciary duty claims.	• While the officers and directors of a corporation are accorded broad latitude to conduct the affairs of the corporation, they have a fiduciary duty to the corporation and its shareholders. **The same fiduciary relationship exists on the part of the majority shareholders of a business corporation toward its minority shareholders**. • An attempt to freeze or squeeze out a minority shareholder without a legitimate business purpose may constitute oppressive conduct. • "**Whether a tort claim can coexist with a contract claim is determined by examining whether the parties' obligations are defined by the terms of the contract**."

Stevens v. MTR Gaming Group, Inc., et al., 788 S.E.2d 59, 237 W. Va. 531 (June 15, 2016)

Facts

Mr. Stevens developed a gambling disorder in the course of his patronage at a casino.

- He embezzled over $7M from his employer – was fired.
- Lost the family's savings, retirement account, and children's college funds at the casino.
- Walked to a park & fatally shot himself.

Stacy Stevens, as personal representative of her husband, sued the casino that her husband frequented and the manufacturer of the LVL terminals for negligence, products liability, premises liability, intentional infliction of emotional distress and wrongful death.

Question

Certified question from N.D. W. Va. : "What duty of care exists . . . to protect casino patrons from becoming addicted to gambling . . . ?"

Holding (Syl. Pt. 3)

"**No duty of care** under West Virginia law exists on the part of manufacturers of video lottery terminals, or the casinos in which the terminals are located, to protect users from compulsively gambling. Consequently, **an action in negligence** against the manufacturer or the casino may not be maintained for damages sustained by the user of the terminals as a result of his or her gambling,"

Analysis

Imposing such a duty would intrude on the Legislature's deliberate and detailed proclamation of public policy.

The extent of the Legislatures regulation of gambling "manifests clear legislative **intent to foreclose judicial interference** with its essential operation." The Legislature could have, but made a "deliberate decision not to impose such a duty" on casinos.

The Legislature has already established **two statutory remedies** to protect the public from compulsive gambling:

- The establishment of a Compulsive Gambling Treatment Fund, W. Va. Code 29-22A-19, to provide treatment to compulsive gamblers through the WVDHHR, and
- The creation and maintenance of a Exclusion List whereby listed persons are excluded from a casino premises (W. Va. C.S.R. 179-8-128.1.e).

The Legislature intended that these remedies are **exclusive**.

Manufacturers and casinos may not be held **strictly liable** provided they operate lawfully.

McNair v. Johnson & Johnson, Case No. 17-0519 __ S.E.2d ___, 2018 WL 2186550 (May 11, 2018)

Facts	Question (Certified from 4th Cir)	Analysis
Ms. McNair developed a acute respiratory distress (ARD) from taking a prescription drug. ARD was not disclosed as a risk on the drug's warning label . McNair took the **generic** version of the drug, but the label was created by the **brand name manufacturer.** Under **FDA rules**, a generic manufacturer is prohibited from making any unilateral changes to drug labels once they have been approved by the FDA. Generally, plaintiffs may bring failure-to-warn claims against manufacturers of brand-name drugs. But the **U.S. Supreme Court has held that generic manufacturers cannot be sued for state law failure-to-warn claims** because of the FDA labeling rules -- that would put them in an impossible situation of being unable to comply with both state and federal laws.	Can McNair sue the brand name manufacturer under West Virginia law for failure to warn and negligent misrepresentation? **Holding** **No. Syl. Pt. 4 – "There is no cause of action in West Virginia for failure to warn and negligent misrepresentation against a brand-name drug manufacturer when the drug ingested was produced by a generic drug manufacturer."**	"Our products liability law is abundantly clear: liability is premised upon the defendant being the manufacturer or seller of the product in question" That is the majority rule in the country. Where the brand manufacturer neither manufactured nor sold the generic drug, it cannot impliedly represent that the generic drug is free of defects. Nor can it be held strictly liable for failure to warn of another manufacturer's product. "For the duty to warn to exist, the use of the product must be **foreseeable** to the manufacturer of seller." (Syl. Pt. 2) While the use was foreseeable, the brand name company was not a manufacturer or seller of the drug taken by Ms. McNair. Brand manufacturers do not owe a duty to consumers of generic drugs.

Estate of Bossio v. Bossio, 785 S.E.2d 836, 237 W. Va. 130 (April 7, 2016)

Facts	Question	Analysis
Circuit Court found that the parties are bound by the terms of a 1990 Stock Purchase Agreement that required the Estate of Luigi Bossio to sell shares Mr. Bossio owned at the time of his death in Bossio Enterprises back to the company. NO ONE HAD A COPY, or even a draft. The only evidence of the 1990 Stock Purchase Agreement was: - Unsigned draft of a 1982 Stock Purchase Agreement with note- "did new K 1990" - Respondent's testimony that the 1982 Stock Purchase Agreement was executed and was amended in 1990 to remove the requirement that the parties have life insurance policies in place to redeem the shares - Stock Certificates reference a date the agreement was executed - Evidence that the life insurance policies lapsed after 1990 - Exemplar of a similar agreement drafted by the same attorney for another company - Testimony of other parties that can't recall whether these agreements were executed - The empty manilla envelope where the agreements were supposed to be	Did the Respondent prove the existence and terms of the 1990 Stock Purchase Agreement? **Holding** **Yes. Cannot find that the Circuit Court erred in finding that the existence and terms of the 1990 Stock Purchase Agreement were proven.**	• W. Va. Rule of Evidence 1004(a) provides that an original writing is not required to prove its contents where it has been lost or destroyed. • **Secondary evidence** is permitted to prove the existence and content of a writing, but proof must be **conclusive**. • We hold that the proponent of a lost or missing instrument must prove its existence and contents with **clear and conclusive evidence**. (Syl. Pt. 2). • Each type of corroborative evidence presented has been found to be **adequate secondary evidence in other jurisdictions** (circumstantial evidence, production of a comparable agreement done by the same attorney, evidence of an unsigned document, actions in accordance with contract's terms).

Sugar Rock, Inc. v. Washburn, 787 S.E.2d 618, 237 W. Va. 347 (June 3, 2016)

Issue	Order	Analysis
Whether Circuit Court erred by granting summary judgment and ordering dissolution of a partnership before first determining: - the type of partnership - the members of the partnership	Yes – It was error to grant summary judgment while these genuine issues of material fact remain.	Revised Uniform Partnership Act, W. Va. Code 47B-1-1, governs all partnerships, including the termination of partnership affairs. RUPA provides that **a partner** may apply for a judicial determination that a partnership is dissolved. W. Va. Code 47B-8-1(5) (1995). "[I]t is axiomatic that, in order for partners to seek dissolution of a partnership, **they must first be identified** as such. And, before a partnership's partners can be identified, **the existence of a partnership, itself, must be found** in the first instance." Syl. Pt. 2 – "An obvious prerequisite to a dissolution of a partnership is its actual existence at the time dissolution is sought." Syl. Pt. 3 – Before a partnership may be dissolved, it is necessary to first ascertain whether the party seeking dissolution is a partner in such partnership such that he/she may seek its dissolution.

Braxton Lumber Co., Inc. v. Lloyd's Inc., 793 S.E.2d 341, 238 W.Va. 177 (November 9, 2016)

Question	Order	Holdings
Is a lawsuit seeking judgment on a promissory note, which became due in 1999, time-barred by the applicable six-year statute of limitations when the lawsuit was not filed until 2007? **Braxton Lumber Arguments** The 6-year statute of limitations has been tolled by • W. Va. Code § 55-2-21 because Braxton Lumber could have sought judgment on the promissory note in a third-party complaint in a 2004 lawsuit; • W. Va. Code § 55-2-8 tolls the statute of limitations because written statements made by Lloyd's during the 2004 lawsuit constitute new promises to pay the debt.	No. Braxton Lumber's lawsuit is time-barred and must be dismissed.	1. A third-party complaint filed pursuant to Rule 14(a) of the W. Va. R. Civ. Pro. is proper only when the party to be joined **is or may be liable to the third-party plaintiff for all or part of the original plaintiff's claim(s) against the third-party plaintiff**. A third-party complaint is not proper where, as here, it merely arises from the same transaction or occurrence that is the subject matter of the original complaint. 2. The documents referenced in the 2004 lawsuit did not contain a new promise to pay the promissory note or even admit liability to pay it. At the time, no one even knew what the balance of the debt might be due to poor record keeping. To constitute a new promise to pay the debt, "there must be **an express promise to pay** or, if there be a mere acknowledgement, it must be unqualified, without condition, importing liability and willingness to pay without reference to a future settlement, and it must be determinate and unequivocal so as to be tantamount to an express promise to pay." "Mere entries by a party in his own book of accounts" does not qualify as such an acknowledgment.

Kourt Security Partners, LLC v. Judy's Locksmiths,
806 S.E.2d 188, 239 W.Va. 757 (October 13, 2017)

Question	Analysis
Whether the Circuit Court erred in granting summary judgment to conclude that the Petitioner had constructive notice of a lien and was not a bona fide purchaser in good faith?	A party is not a bona fide purchaser if it has **constructive notice (or inquiry notice**) of the lien, and constructive notice turns on factual issues of knowledge and intent that are difficult to resolve at the summary judgment stage.
Holding **The Circuit Court erred because there are genuine issues of material fact which should have precluded summary judgment.**	On page 10, the opinion cites to decisions in other jurisdictions indicating that the question of whether a person is a bona fide purchaser is so fact-dependent that it might not be appropriate for summary judgment.

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IPacesetters, LLC v. Douglas, 806 S.E.2d 476, 239 W. Va. 820 (October 27, 2017)

Facts	IPacesetters Defenses	Court Holding
Garnishee – IPacesetters – brought various defenses to their non-compliance with the Respondents attempt at Suggestions in Aid of Execution IPacesetters was counter-party to a contract with the Judgment Debtor with a fixed obligation to make monthly payments, but didn't know in advance how much the payment would be. IPacesetters answered that it had no invoices owed to the Judgment Debtor. It was sanctioned and ordered to pay the Debtor's debt because payments it made to the Debtor exceeded the judgment amount.	Monthly payments were not subject to garnishment because 1. Debt was contingent because monthly contract payments were unknown 2. Monthly payments were for debts owed to third-party 3. Payments were made to Senior lienholders	Affirmed. 1. The monthly payments were fixed (not contingent) and subject to garnishment because "while the amounts of these invoices changed monthly, the obligation did not." 2. There is no evidence that IPacesetters owed money directly to third-party vendors. These payments are owed to the Judgment Debtor and is subject to garnishment. 3. No evidence has been presented regarding superior liens or attempts to enforce superior liens.

Kahle's Kitchens, Inc. v. Shutler Cabinets, Inc., 809 S.E.2d 520, 240 W.Va. 209 (January 24, 2018)

Facts	Holding/Analysis
Subpoena of a non-party to litigant (Shutler) for all of its business records during a one-year period and its customer list with names and addresses. Kahle Wanted: information about insect-infested wood received from Defendant to its PA lawsuit; Shutler provided an affidavit saying no such issues and moved to quash subpoena because the information sought - Was voluminous and burdensome to provide; - Could have been obtained from the defendant in litigation; - Included confidential customer information; and - Included proprietary information. Circuit Court quashed the Subpoena and awarded fees and costs.	**Affirmed. The information sought was patently unreasonable** . The circuit court has broad discretion in determining whether a subpoena is reasonable, and its decision "will be reversed only if it is clearly unreasonable, arbitrary or fanciful." Rule 45(d) of the W. Va. R. Civ. Pro. Protects subpoenaed persons against unreasonable subpoenas, and it is further **subject to other discovery rules** such as the scope of discovery outlined in Rule 26(b)(1), which permits discovery only on matters that are **relevant** to the subject matter involved in the pending action. (See Syl. Pt. 2) Shutler attempted to comply with this overbroad subpoena by providing an affidavit providing relevant information. Kahle asserted no cogent reason for this information or its relevance to the lawsuit. Special weight is given where nonparties are burdened by subpoenas.

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Motion for Leave to Amend a Complaint

- The Court is vested with sound discretion in granting or refusing leave to amend pleadings in civil actions.
- Leave to amend should be freely given when justice so requires, but the action of a trial court in refusing to grant leave to amend will not be regarded as reversible error in the absence of a showing of abuse of discretion.
- Motions to amend should always be granted under W. Va. R. Civ. P. 15 when:
  a) The amendment permits the presentation of the merits of the action;
  b) The adverse party is not prejudiced by the sudden assertion of the subject of the amendment; and
  c) The adverse party can be given ample opportunity to meet the issue.

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California State Teachers Retirement Sys. v. Blankenship, 814 S.E.2d 549, __ W. Va. __ (May 25, 2018)

Facts	Holding/Analysis
Appellants sought to amend their complaint to assert facts sufficient to bring a shareholder derivative suit against former directors and officers of Massey Energy Company and to bring direct claims against them for breaching fiduciary duties when negotiating to the corporate merger with Alpha.	Affirmed – It would be futile for petitioners to amend their complaint. **The "liberal amendment rules under Rule 15(a) do not require the courts to indulge in futile gestures.** Allowing a futile amendment would not serve the ends of justice. 1. They lack standing to pursue a **derivative shareholder suit** under DE law because of the bright line rule that you must continuously be a shareholder of the company to maintain this cause of action. From the moment of the merger with Alpha, the Appellants have lacked standing because they were no longer Massey stockholders. There is only one applicable exception to this rule – for fraud, where the **merger had been effectuated "solely" to deprive them of derivative standing**. The petitioners cannot prove the fraud exception because a) the purchase price resulted in substantial value to Massey shareholders b) 99% of stockholders approved the merger; and c) the Massey Board was instructed by legal counsel to assume the derivative claims would survive the merger and not take them into account when considering the merger. 2. To bring a **bad faith claim** under DE law, even one plausible and legitimate explanation for the board's decision to proceed with the merger would negate a bad faith claim. It would be futile for the plaintiffs to amend their claim to bring direct bad faith claims against the respondents.

W. Va. Dep't of Trans., Div. of Highways v. CDS Family Trust, LLC,
807 S.E.2d 780, 240 W. Va. 780 (May 25, 2018)

Facts	Holding/Analysis
WVDOH sought to condemn property owned by CDS for purposes of wetland mitigation related to the construction of Corridor H. The seller's experts opined that the highest and best use of the property was as a wetlands mitigation "bank," which effectively would offset wetland losses to future DOJ projects. Considering this use, the just compensation amounted to **$4,775,000** credit the DOH could receive.	While the credits potentially earned from a mitigation bank "may be considered to the extent that such a factor would be weighed in negotiations between private persons participating in a voluntary sale and purchase of the land at the time it was taken," just fair market value of the property **cannot be solely based on the land's value as a mitigation bank**.

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Quick Reference – Standards of Review

Topic on Review	Standard of Review	Recent Cases
Interpretation of a statute, an administrative rule, or regulation	*de novo*	Syl. Pt. 1, *Alan Enterprizes LLC v. Mac's Convenience Stores LLC, et al.*, Case No. 17-0087 (Feb. 7, 2018)
Entry of Summary Judgment	*de novo*	Syl. Pt. 2, *Alan Enterprizes LLC v. Mac's Convenience Stores LLC, et al.*, Case No. 17-0087 (Feb. 7, 2018)
Interpretation of a contract	*de novo*	Syl Pt. 4, *Blackrock Capital Investment Corp, et al. v. Jerry Fish, et al.*, Case No. 15-1122 (April 24, 2017)

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Quick Reference – Standards of Review

Topic on Review	Standard of Review	Recent Cases
Entry of Declaratory Judgment	*de novo*	Syl. Pt. 3, *Blackrock Capital Investment Corp, et al. v. Jerry Fish, et al.*, Case No. 15-1122 (April 24, 2017)
Review of Circuit Court order denying motion to dismiss and to compel arbitration	*de novo*	Syl. Pt. 1, *Bluestem Brands, Inc. d/b/a Fingerhut v. Darlene Shade*, Case No. 16-0793 (October 6, 2017)
Addressing legal issues presented by certified question	*de novo*	Syl. Pt. 1, *Stevens v. MTR Gaming Group, Inc. et al.*, Case No. 15-0832 (June 15, 2016)

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Quick Reference – Standards of Review

Topic on Review	Standard of Review	Recent Cases
Challenge to findings and conclusions of Circuit Court made after a bench trial: - Final order and ultimate disposition - Underlying factual findings - Questions of law	- Abuse of discretion - Clearly erroneous - *de novo*	Syl. Pt. 1, *Estate of Luigi Bossio a/k/a Louis Bossio v. Bernard Bossio, et al.*, Case Nos. 14-1328 and 14-1329 (April 7, 2016) Syl. Pt. 1, *Kahle's Kitchens v. Shutler Cabinets, Inc.,* Case No. 17-0036 (January 24, 2018)
Review of order granting or denying a renewed motion for judgment as a matter of law after trial pursuant to W. Va. R. Civ. Pro. 50(b)	*de novo*; However, it is not the Court's task to review the facts, but to determine whether the evidence, viewed in the light most favorable to the non-moving party, was such that a reasonable trier of fact might have reached the decision below	Syl. Pt. 1-2, *Tri-State Petroleum Corp, et al. v. Kevin Coyne*, Case No. 17-0009 (April 12, 2018)

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Quick Reference – Standards of Review

Topic on Review	Standard of Review	Recent Cases
Action of a trial court in refusing to grant leave to amend a pleading	Reversible error (no reversible error will be found absent an abuse of the trial court's discretion)	Syl. Pt. 1, *California State Teachers Retirement System, et al. v. Blankenship, et al.*, Case No. 14-1339 (May 25, 2018) [applying DE law to affirm the Circuit Court's denial of Plaintiffs' motion to amend complaint where doing so would be futile because it would not cure Plaintiffs' lack of standing to bring shareholder derivative suit under DE law]
Jury's resolution of conflicting evidence	Will not be disturbed unless plainly wrong	Syl. Pt. 16, *Tri-State Petroleum v. Coyne*, 814 SE.2d 205 (W. Va. 2018).
Award of prejudgment interest	Abuse of discretion (unless hinges on legal question, in which case the standard is *de novo*)	Syl. Pt. 14, *Tri-State Petroleum v. Coyne*, 814 SE.2d 205 (W. Va. 2018).

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