Commercial Law

Mark B. D'Antoni

West Virginia University College of Law

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Available at: https://researchrepository.wvu.edu/wvlr/vol88/iss2/11

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COMMERCIAL LAW

I. STATUTE OF LIMITATIONS: ACCOUNTS


The West Virginia Supreme Court of Appeals recently decided two cases concerning the running of the statute of limitations with regard to accounts. The general rule is that, absent an agreement of the parties, the statute of limitations begins to run on the date that each credit charge is made. Notations on a check evidencing a debt and the partial payment of a debt were both held to toll the running of the statute of limitations with regard to the debt. The notations represent a new acknowledgment under West Virginia Code section 55-2-8, and the partial payment must be taken as an implied acknowledgment under the doctrine of partial payment.

In Weirton Ice & Coal Co. v. Weirton Shopping Plaza, Inc.1 the West Virginia Supreme Court of Appeals was presented with the question of whether checks issued by a debtor, in partial payment of his debt, and bearing notations to the effect, constituted written acknowledgments of indebtedness sufficient to revive a time barred cause of action under West Virginia Code section 55-2-81.2

An open account was established between Weirton Shopping Plaza, Inc. (the Shopping Plaza) and Weirton Ice & Coal Co. (the Supply Company). Payments on the debt owed by the Shopping Plaza began in 1963. Principal and interest payments were made by check as agreed upon up until 1971 when no principal payment was made toward the debt. In 1972 the Supply Company filed suit. The Shopping Plaza moved to dismiss the action claiming that there was no note or writing evidencing indebtedness, and any claims that the Supply Company had were on an open account subject to a five-year statute of limitations. However, the checks drawn by the Shopping Plaza as payments on the debt carried notations on them which showed the amount of the debt outstanding. The trial court held that the

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2 W.VA. CODE § 55-2-8 (1981), provides that:

If any person against whom the right shall have so accrued on an award, or on any such contract, shall by writing signed by him or his agent promise payment of money on such award or contract, the person to whom the right shall have so accrued may maintain an action or suit for the monies so promised within such number of years after such promise as it might originally have been maintained within upon the award or contract, and the plaintiff may either sue on such a promise, or on the original cause of action, and in the latter case, in answer to a plea under the sixth section [§ 55-2-6], may, by way of replication, state such promise, and that such action was brought within such number of years thereafter; but no promise, except by writing as aforesaid, shall take any case out of the operation of the said sixth section, or deprive any part of the benefit thereof. An acknowledgment in writing as aforesaid, from which a promise of payment may be implied, shall be deemed to be such promise within the meaning of this section.
notations\textsuperscript{3} were new acknowledgments under West Virginia Code section 55-2-8 which revived the time-barred claim.\textsuperscript{4} The supreme court affirmed the lower court’s decision.

The West Virginia Supreme Court of Appeals, in an opinion written by Justice Miller, drew on established principles in affirming the lower court’s decision. It was noted that section 55-2-8 essentially provides that, when a debtor acknowledges his debt in a writing signed by him or his agent, the acknowledgment extends the statute of limitations on the claim by a like period (five years) from the date of the acknowledgment.\textsuperscript{5} The court then cited language from Preston County Coke Co. v. Preston County L & P Co.\textsuperscript{6} which stated that the acknowledgments of a valid and existing debt must be unqualified and without condition.\textsuperscript{7}

Although the language must be unconditional and unqualified in order to constitute an acknowledgment for the purposes of section 55-2-8, the court stressed that the statute does not require any special language. The language does not need to contain an express promise to pay or even a statement of willingness to pay because the willingness to pay can be inferred from an unqualified admission of indebtedness. Also, the amount of the debt still outstanding or its date does not have to be specified on the writing as long as the debt can be readily ascertained. Extrinsic evidence, written or parol, can be used to make certain the amount of the debt. Finally, the written promise or acknowledgment should be made to the creditor or someone that is acting for the creditor.\textsuperscript{8}

Applying these principles to the case, the supreme court held that the notations on the checks constituted a sufficient writing to extend the statute of limitations under section 55-2-8.\textsuperscript{9} The supreme court reasoned that the notations on the checks, which indicated that they were payments of principal or interest on the account and stated the balance due, were clear and unequivocal acknowledgments without reservation, qualifications, or condition of an existing and valid debt. The checks on which the notations appeared were writings which had been signed by the party to be bound and delivered to his creditor. Furthermore, the debt referenced by the checks was readily ascertainable.\textsuperscript{10} The final holding in Weirton Ice & Coal

\begin{footnotesize}
\begin{enumerate}
\item The following notations were typical:
  \begin{itemize}
  \item February 21, 1966—“Interest on 170,000 $ 5% for Feb.”
  \item September 5, 1967—“On acc—Bal. now 150,000.00”
  \item August 17, 1970—“Payment on loan—Balance due $130,000.00”
  \item September 1, 1970—“Sept int on $30,000”
  \item February 1, 1971—“Feb. int on loan”
  \item June 1, 1971—“June interest on $130,000”
  \end{itemize}
  \textit{Weirton Shopping Plaza}, 334 S.E.2d at 615 n.2.
\item Id. at 612.
\item Id. at 614.
\item Id. at 421.
\item \textit{Weirton Shopping Plaza}, 334 S.E.2d at 614-15.
\item Id. at 616.
\item Id. at 615.
\end{enumerate}
\end{footnotesize}
is consistent with a number of decisions handed down from other jurisdictions that have statutes similar to section 55-2-8.  

It is often difficult to know if a check with notations on it or accompanied by another writing is sufficient to constitute a new "acknowledgment" under section 55-2-8. The doctrine of partial payment alleviates much of this difficulty. West Virginia's most recent case on the partial performance doctrine is Greer Limestone Co. v. Nestor.  

The issue that was presented in Nestor was whether the statute of limitations barred a suit to recover the remaining balance on an open account where the last credit charge on account took place nearly seven years before the suit was filed but where the debtor made periodical payments on the account with the last payment being made less than a year and one-half before the suit was filed. The trial court ruled that the partial payments tolled the statute of limitations, and the supreme court affirmed the decision.  

In an opinion written by Justice Miller, the court overruled principles set forth in In re Estate of Kneeream in which the supreme court had held that under section 55-2-8 partial payment of a debt does not in any way affect the running of the statute of limitations thereon. The Kneeream court based its decision on an analysis that section 55-2-8 extends the statute of limitations by a new written promise to pay.  

The court in Nestor felt that Kneeream was overly broad in holding that partial payment on a debt would not toll the statute of limitations. The supreme court reasoned that section 55-2-8 was only concerned with a promise to pay a debt or an acknowledgment of the debt from which one may imply a promise to pay and not with the doctrine of partial payment. Section 55-2-8 was designed to prevent oral promises to pay which could cause ambiguities and conflict. Partial payment on a debt does not present this problem.  

The court then pointed out that partial payment "must impliedly be taken as an acknowledgment of the debt." The partial payment must be made voluntarily by the debtor under circumstances that provide a clear inference that the debtor recognizes the whole debt to be existing and demonstrates his willingness or obligation to pay the balance of the existing debt. If the partial payment is qualified or restricted in any way which indicates that the debtor does not intend to pay the balance of the debt, the statute of limitations will not be tolled.  

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11 See generally 51 Am. Jur. 2d Limitations of Actions § 345 at 841-42 (1970); 54 C.J.S. Limitations of Actions § 317 at 400 n.1-12 (1948); Annot., 125 A.L.R. 271 (1940); Annot., 28 A.L.R. 84 (1924).  
13 Id. at 592.  
14 Id.  
15 In re Estate of Kneeream, 120 W.Va. 147, 196 S.E. 362 (1938).  
16 Id. at 149, 196 S.E. at 363.  
17 Nestor, 332 S.E.2d at 596.
The decision in Nestor regarding the doctrine of partial payment accurately reflects today's commercial realities. As the court pointed out, the consequence of failing to recognize the doctrine would be to require the creditor to bring suit against a debtor who is making partial payments when the account nears the end of the statute of limitations period.\(^9\) The doctrine of partial payment, supported by the overwhelming weight of authority in this country,\(^20\) alleviates the need for creditors to bring suits solely to avoid the consequence of the statute of limitations.

By recognizing the doctrine of partial payment in this situation, the supreme court significantly lowered the significance of possible ambiguities arising from the issue of a check with a notation on it in determining whether the writing satisfies the requirements of a new acknowledgment under section 55-2-8. The creditor can now achieve the same result, the tolling of the statute of limitations, by utilizing the check with other extrinsic evidence to bring the case within the boundaries of the doctrine of partial payment.\(^21\)

II. DUE PROCESS


The West Virginia Supreme Court of Appeals also addressed procedural and substantive due process issues arising from commercial transactions during the survey period. With regard to procedural due process, the supreme court held that notice to a judgment debtor that his wages are being suggested must also include notice of his exemption rights. Concerning substantive due process, the supreme court gave substantial deference to the West Virginia Legislature in upholding the constitutionality of the Unfair Practices Act.

\textit{Vanscoy v. Neal}\(^22\) was one of four consolidated cases involving creditors who were trying to satisfy a judgment by suggestion of a judgment debtor's property. The suggested properties dealt with were wages and bank accounts. In the cases, the petitioners claimed that the West Virginia suggestion statutes were unconstitutional because they required no notice to a judgment debtor of his statutory rights to exemptions and because they did not provide adequate prior notice of the taking of his property to satisfy State and federal constitutional requirements.\(^23\) The peti-
tioners sought to prevent suggestion of wages pursuant to West Virginia Code section 38-5A-1 and to prevent suggestion of bank accounts pursuant to West Virginia Code section 38-5-10. The supreme court agreed with the petitioners’ claim and held that “state due process entitles a judgment debtor to notice of the existence of exemptions which may be applicable to him.”

The West Virginia Supreme Court of Appeals, in an opinion written by Justice Neely, noted that its decision was consistent with the principles set forth in Mullane v. Central Hanover Trust Co. In Mullane, the United States Supreme Court stated that “an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” The West Virginia Supreme Court of Appeals applied this standard in setting forth its requirements for the exemptions notice in holding that “notice to a judgment debtor that his wages are being suggested must include a clear statement that exemptions exist under state or federal law that may apply to him along with a statement of the proper office in which to file exemption claims.” The supreme court also held that notice of wage suggestions by certified mail return receipt requested did give adequate notice and was constitutionally sound.

The court’s decision in Vanscoy is consistent with its previous holding in Sauls v. Howell. In Sauls, the court held in part that a judgment debtor is entitled to notice that suggestion proceedings have been instituted against him under section 38-5-10, which requires no notice itself. By its recent decisions, the court has shown that it will step in to insure that proper notice is given to those whose property interests may be adversely affected by actions taken against them to provide an opportunity to raise timely objections or defenses.

Despite the fact that the court will step in quickly in cases that deal with procedural due process issues, it has shown a more “hands off,” deferential approach to substantive due process and related issues dealing with economic regulation. The

24 W.Va. Code § 38-5A-3 (1985) provides for the suggestion of a judgment debtor’s wages upon the application of the judgment creditor by proper affidavit. W.Va. Code § 38-5A-9 (1985) provides for the exemption of certain property from suggestion, but no prior notice of these rights is required. W.Va. Code § 38-5-10 (1985) covers execution against the property of a judgment debtor that is in the possession of a third party. Under this statute the judgment debtor is not entitled to notice of his exemption rights.


26 Id. at 314.

27 Vanscoy, 322 S.E.2d at 41.

28 Id.

29 Id.


31 Id. at 31.
most recent case in this area is *Hartsock-Flesher Candy Co. v. Wheeling Wholesale Grocery Co.*

In *Wheeling Wholesale*, the supreme court was faced with a case questioning the constitutionality of the Unfair Practices Act in West Virginia Code sections 47-11A-1 through -14. The Unfair Practices Act was adopted in 1939. The main reason for its adoption is summarized in West Virginia Code section 47-11A-1 which states that the selling of goods for less than their cost results in economic maladjustments and destroys fair and healthy competition. Section 47-11A-2 makes it unlawful for a retailer or a wholesaler to sell any product below its cost to a vendor "for the purposes of unfairly diverting trade from or otherwise injuring one or more competitors and destroying competition."

Hartsock-Flesher alleged that Wheeling Wholesale was selling cigarettes below cost in violation of section 47-11A-2 and requested an injunction and treble damages pursuant to section 47-11A-9. Wheeling Wholesale moved unsuccessfully to dismiss the complaint on the grounds that the Unfair Practices Act was unconstitutional. The following four certified questions were then presented to the trial judge.

(1) Is the Unfair Practices Act unconstitutional under the substantive due process standard established in Article III, Section 10 of the West Virginia Constitution?
(2) Is the Unfair Practices Act unconstitutionally vague under Article III, Section 10 of the West Virginia Constitution and the Fourteenth Amendment to the United States Constitution?
(3) Is the Unfair Practices Act special legislation in violation of Article VI, Section 39 of the West Virginia Constitution?
(4) Is the Unfair Practices Act violative of the Sherman Act (15 U.S.C. § 1)?

The trial judge answered no to all four questions from which ruling Wheeling Wholesale appealed. The supreme court upheld the lower court's decision.

The supreme court, in an opinion written by Justice Miller, dealt first with the substantive due process challenge. The court cited *State v. Wender* to establish the appropriate standards for judicial review of economic legislation. The language in *Wender* gave to the Legislature wide discretion in determining the economic policy that is deemed best to promote the public welfare. Legislative action must merely "bear a reasonable relationship to a proper legislative purpose and be neither arbitrary or discriminatory."
Despite approving of the standard of review for economic legislation as set forth in *Wender*, the court did not approve of the overly intrusive manner that the *Wender* court applied it. In *Wender*, the court had held that the Cigarette Sales Act was unconstitutional because due process was violated under the West Virginia Constitution.\(^3^8\) The court in *Wheeling Wholesale* noted that *Wender* was indicative of a time when courts used substantive due process to invalidate various laws regulating economic matters.\(^3^9\) Legislation regarding economic matters is now rarely overturned by the courts. The court then quoted language from *Ferguson v. Skrupa*\(^4^0\) which said that courts must not substitute their beliefs regarding socioeconomic matters for the judgment of elected legislative bodies.\(^4^1\)

Drawing on the deferential position taken by modern court decisions, the supreme court ruled that the *Wender* decision was not controlling.\(^4^2\) The court rejected Wheeling Wholesale’s argument that section 47-11A-6, West Virginia’s cost definition statute, was arbitrary and irrational in violation of substantive due process. Section 47-11A-6 includes language that provides for stated markups for the cost of doing business “in the absence of proof of a lesser cost” and includes the phrase “there shall be deducted (from the invoice cost of an article) all trade discounts, except customary discounts for cash.”\(^4^3\) The court cited language from a Utah case, *Trade Commission v. Skaggs Drug Centers, Inc.*,\(^4^4\) which pointed out that the inconvenience or difficulty of applying a cost statute will not determine the constitutionality of a statute.\(^4^5\)

Using a deferential standard of review, the supreme court came to the conclusion that the promotion of healthy competition was a legitimate legislative goal, and the Unfair Practices Act, which permits injured parties to sue for damages and for an injunction, was a rational means to attain this goal.\(^4^6\) The court said that they were not suggesting that they would never invalidate economic legislation, but as a general rule the legislature would be accorded great deference.\(^4^7\)

The court next considered Wheeling Wholesale’s claim that the Unfair Practices Act was unconstitutionally vague. The provisions of the Act that Wheeling Wholesale specifically challenged were section 47-11A-6, which included the terms “applicable taxes,” “trade discounts,” and “customary discounts for cash,” and section 47-11A-8(d) which stated that the Act does not apply to any sale made “[i]n an endeavor in good faith to meet the legal prices of a competitor.”\(^4^8\) The
supreme court again showed that it was taking a deferential position regarding economic matters by using a less restrictive vagueness standard to come to their ruling that the Unfair Practices Act was not unconstitutionally vague.\textsuperscript{49} The court's adoption of the less restrictive standard followed the lead of the United States Supreme Court in \textit{Village of Hoffman Estates v. Flipside, Hoffman Estates}.\textsuperscript{50} In \textit{Hoffman}, the United States Supreme Court said that economic regulation is reviewed under a less strict vagueness test because the subject matter of economic regulation is narrow and because businesses can be expected to consult relevant legislation before they take action.\textsuperscript{51}

Wheeling Wholesale's next argument, that the Unfair Practices Act was unconstitutional "special legislation," was also rejected by the court. First, Wheeling Wholesale contended that the Act did not operate uniformly on all retailers because independent retailers must buy products from wholesalers that were required by the Act to markup their prices while chainstore retailers could buy their goods directly from manufacturers that were not subject to the same markup requirements because the Act did not cover them. Second, Wheeling Wholesale contended that the Act under section 47-11A-8(d) allowed different standards and prices to be imposed depending upon the trade area location of the wholesaler or retailer.\textsuperscript{52}

To determine whether the Unfair Practices Act was special legislation, the court utilized equal protection concepts. Since economic rights were concerned, the court, in deciding the equal protection issue, again looked to see if the classification was rational and bore a reasonable relationship to a proper governmental purpose. Applying this standard, the court ruled that the classification of retailers and wholesalers was reasonable because goods were sold both by retailers or wholesalers. Furthermore, chainstore retailers were not exempt from the Act when they sell at retail.\textsuperscript{53} The court answered Wheeling Wholesale's second argument by stating that it was not irrational for the cost provision in section 47-11A-8(d) to be tied to the geographical area because that provision related to an exemption from the provisions of the Act to meet local competition.\textsuperscript{54}

Wheeling Wholesale's final argument was that the Unfair Practices Act violated the Sherman Act. Wheeling Wholesale argued that the Unfair Practices Act was analogous to fair trade laws which violated the Sherman Act.\textsuperscript{55} The court held that the Unfair Practices Act was instead analogous to the Sherman Act because both acts protected competition by prohibiting sales below cost.\textsuperscript{56}

\textsuperscript{49} \textit{id.} at 153.
\textsuperscript{51} \textit{id.} at 498-99.
\textsuperscript{52} \textit{Hartsock-Flesher}, 328 S.E.2d at 154.
\textsuperscript{53} \textit{id.}
\textsuperscript{54} \textit{id.}
\textsuperscript{55} \textit{id.}
\textsuperscript{56} \textit{id.} at 156.
The court's deferential approach toward economic legislation in *Wheeling Wholesale* is typical of decisions handed down by other courts. Courts feel that economic legislation is best left up to legislatures. One should not expect the courts to invalidate economic legislation unless the legislature exceeds express or implied restrictions on its wide scope of powers relating to the public welfare.

_Mark B. D'Antoni_