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Commercial Law

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COMMERCIAL LAW

I. PUBLIC UTILITIES


In *Columbia Gas of W. Va. v. Public Service Commission* the West Virginia Supreme Court of Appeals considered a challenge by Columbia Gas to West Virginia Code section 24-2B-1, by which a one year moratorium was imposed on rate increases for natural gas utilities. Columbia Gas had filed a notice of proposed rate increases with the West Virginia Public Service Commission (Commission) in July of 1982. Pursuant to statute, the Commission suspended the operation of Columbia's proposed rates for the maximum allowable period of two hundred seventy days beyond the thirty-day notice period. Hearings were held in March 1983 concerning the proposed rate increase, and in May 1983, a hearing examiner entered his recommended order that Columbia should be granted a rate increase of less than one-half of that requested. The examiner also recommended that the increase be suspended until March 12, 1984, as permitted by the new act, West Virginia Code section 24-2B-1. The original two hundred seventy day suspension period was due to expire on June 8, 1983, so, in order to prevent the requested rates from taking effect, the Commission entered an order on June 7, 1983, affirming the hearing examiner's recommendations, thereby suspending the recommended rate increase until March 12, 1984. Columbia appealed the decision to suspend its rate increase until March 12, 1984, claiming that West Virginia Code section

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2 W. VA. CODE § 24-2B-1 (Supp. 1984) provides in part: [U]pon the effective date [March 12, 1983] of this article, the commission shall authorize no increase of rates charged by any utility for natural gas to any customer of any class for a period of twelve months. With respect to cases for rate increases which are pending before the commission on the effective date [March 12, 1983] of this section, such cases may be suspended by the commission and held in abeyance by the commission during the pendency of the period of suspension mandated by this section or any such cases may proceed to completion and the commission may rule thereon upon the same to the same extent as if this section had not been enacted, all within the sound discretion of the commission.
3 *Columbia*, 311 S.E.2d at 138.
4 W. VA. CODE § 24-2-4a (1980 & Supp. 1984) requires public utilities to provide thirty days notice of any proposed rate changes, during which time the Commission may suspend the operation of the proposed rate changes. The statute further provides that "the Commission may suspend the operation of such schedule and defer the use of such rate . . . but not for a longer period than two hundred seventy days beyond the time when such rate . . . would otherwise go into effect."
5 *Columbia*, 311 S.E.2d at 139.
6 *Id.*
7 *Id.*
9 *Columbia*, 311 S.E.2d at 140. Because Columbia's case for a rate increase had been pending on March 12, 1983, the effective date of § 24-2B-1, it was not mandatory that Columbia's requested rate increase be suspended until March 12, 1984. However, the statute did permit the Public Service Commission to do so at its discretion. 311 S.E.2d at 143.
24-2B-1 was unconstitutional as it applied to Columbia’s pending rate case.10 In a unanimous decision, the court affirmed the Commission’s decision, holding that as it applied to Columbia’s pending rate case, section 24-2B-1 did not violate either the federal or state constitution.11

The court first considered Columbia’s contention that the statutory moratorium on rate increases for natural gas utilities violated the due process or just compensation provisions of either the fourteenth amendment to the United States Constitution or article III, § 10 of the West Virginia Constitution. The court acknowledged that a legislatively designated rate-making authority such as the Public Service Commission may set any rate it believes just and reasonable, provided that the rate so determined does not amount to an unconstitutional confiscation of property without just compensation.12 The court also agreed that "the deprivation of the right to earn a reasonable rate of return, considering facts and circumstances and economic realities of the times"13 is unconstitutionally confiscatory.14 However, rates set by the Commission are presumptively valid,15 and Columbia failed to meet its burden of proving that the Commission’s decision to suspend the requested rate increase, as authorized by section 24-2B-1, was confiscatory.16

The court stressed that rates which are merely unreasonable do not necessarily rise to the level of an unconstitutional confiscation.17 Hope Natural Gas v. Federal Power Commission,18 a Fourth Circuit decision which was cited approvingly by the court, discussed the need for a time lag in the regulatory decisionmaking process since changing economic conditions prompt a reasonable period of rate investigation.19 While what constitutes a "reasonable" period may vary from case to case, the court noted that, in other jurisdictions, rate increase moratoriums of up to three years have been approved.20

The court compared the situation before them with that present in the Permian Basin Area Rate Cases,21 which was cited as strongly supportive of the constitutionality of section 24-2B-1.22 In the Permian Cases, there was a challenge to the Federal Power Commission’s decision to impose a two and one-half year moratorium

10 Columbia, 311 S.E.2d at 140.
11 Id. at 144.
12 Id. at 140.
13 Id. at 141.
14 Id. (citing City of Huntington v. Public Service Comm’n, 89 W. Va. 703, 110 S.E. 192 (1921)).
15 Id.
16 Id.
17 Id.
19 Id.
20 Columbia, 311 S.E.2d at 142 n.3 (citing Trustees of Village of Saratoga Springs v. Saratoga Gas, Electric Light and Power Co., 191 N.Y. 123, 83 N.E. 693, 701 (1908)).
22 Columbia, 311 S.E.2d at 142.
on natural gas prices in excess of maximum area rates established by the Commission.\textsuperscript{23} The United States Supreme Court upheld the validity of the moratorium, stating that the relatively brief time period of the moratorium, combined with the availability of exceptions for companies threatened with undue hardship by the maximum rates, dispelled any potential constitutional problems with confiscation or due process violations.\textsuperscript{24} Drawing upon the reasoning used in the Permian Cases, the West Virginia Supreme Court of Appeals recognized in Columbia that the legislatively created moratorium of section 24-2B-1, as applied to Columbia’s rate case, would only suspend Columbia’s rate increase for, at most, the relatively short period of nine months.\textsuperscript{25} The court also pointed out that the potential danger of extreme financial hardships being imposed by the section 24-2B-1 moratorium was dealt with by the legislature in enacting West Virginia Code section 24-2B-2, which allowed the Commission to grant emergency rate increases during the moratorium period if necessary to prevent such a hardship.\textsuperscript{26} Accordingly, the court held that section 24-2B-1 violated neither the due process nor just compensation clauses of either the West Virginia or United States Constitution.\textsuperscript{27}

The next issue considered by the court was whether section 24-2B-1 was an unconstitutionally standardless delegation of legislative authority since it allowed the Commission to exercise its discretion when deciding whether to apply the moratorium to pending rate cases.\textsuperscript{28} The court readily disposed of this argument, stating that the standards supplied by West Virginia Code section 24-1-1(a) and (b), which are satisfactorily explicit to guide the Commission in exercising its discretion as to basic rate making decisions, are also adequate to guide the Commission in exercising its discretion as to temporary rate suspension decisions under section 24-2B-1.\textsuperscript{29} The “general guidelines” of section 24-1-1, coupled with the legislative purposes behind section 24-2B-1,\textsuperscript{30} were sufficiently explicit in the court’s eyes to support a holding that section 24-2B-1 was a constitutionally valid delegation of legislative authority.\textsuperscript{31}

By its decision in Columbia, the court expressed its reluctance to intervene in the legislative sphere when the regulation of public utility rates is involved. It would appear that, in the future, the legislature will be accorded wide latitude to adopt

\textsuperscript{23} Permian Cases, 390 U.S. 747.
\textsuperscript{24} Id.
\textsuperscript{25} Columbia, 311 S.E.2d at 143.
\textsuperscript{26} Id.
\textsuperscript{27} \textit{Id. See} State ex rel. Knight v. Public Service Comm’n, 245 S.E.2d 144 (W. Va. 1978), in which the court acknowledged the relatively free reign allowed the legislature to balance the interests of consumers and utility companies in determining reasonable rates.
\textsuperscript{28} Columbia, 311 S.E.2d at 143.
\textsuperscript{29} Id.
\textsuperscript{30} In W. Va. Code § 24-1-1(h)(1) and I(i) (Supp. 1984), the legislature expressed its displeasure with the adverse consequences of recent dramatic rate increases. A desire was also expressed to limit utilities’ returns to a level more in line with the return earned by affiliates on transactions with sister utilities.
\textsuperscript{31} Columbia, 311 S.E.2d at 144.
short term rate increase moratoriums in order to deal with perceived social and economic exigencies.

II. DEBTOR-CREDITOR RELATIONS


The West Virginia Supreme Court of Appeals was asked in Tomchin Furniture Co. v. Lester32 to define the scope of the prejudgment hearing provided for in West Virginia’s detinue statute.33 The express language of section 55-6-1 concerning prejudgment hearings was interpreted to mean that a defendant must be allowed to present defenses which would refute the alleged debt or the creditor’s right to assert a security interest.34

In Lester, the appellee, a furniture company, had filed a detinue action seeking to repossess certain furniture which appellants had purchased under two retail installment agreements that had not been satisfied.35 At a prejudgment hearing the appellants, while not disputing the underlying debt, attempted to present evidence concerning two potentially valid defenses to the debt.36 The trial court disallowed this evidence, ruling that only evidence pertaining to the existence or nonexistence of the debt was admissible at the prejudgment hearing.37

On appeal, the supreme court overturned the trial court’s decision. In an opinion written by Justice Miller, the court noted that West Virginia Code sections 55-6-1 and 55-6-238 are to be construed in pari materia and that these two provisions were promulgated by the legislature in response to a number of cases which held that

33 W. VA. Code § 55-6-1 (Supp. 1984) states:
If the plaintiff in a civil action, whether in a circuit court or magistrate court, for the recovery of specific goods, chattels, or intangible personal property, shall demand immediate possession thereof, a prejudgment hearing shall be held in not less than five nor more than ten days after service upon the defendant of the summons, a verified complaint describing said personal property, and a notice of the time, place, and purpose of the prejudgment hearing. At the prejudgment hearing an inquiry shall be held to determine: (a) the nature of the right or contract under which the plaintiff claims a right to immediate possession; and (b) the nature of the defendant’s right to retain possession thereof.
34 Lester, 309 S.E.2d at 77.
35 Id. at 74-75.
36 Id. at 75.
37 Id.
38 W. VA. Code § 55-6-2 (Supp. 1984) provides in part that “If the court or magistrate shall conclude, upon the basis of the evidence adduced at such prejudgment hearing, that there is a substantial probability that the plaintiff will prevail upon trial of the action upon the merits,” then the property may be seized after the plaintiff posts a bond.
certain prejudgment seizures conducted without notice and a hearing were violative of procedural due process.\textsuperscript{39} The court examined a portion of section 55-6-1 which states, "At the prejudgment hearing an inquiry shall be held to determine: (a) the nature of the right or contract under which the plaintiff claims a right to immediate possession; and (b) the nature of the defendant's right to retain possession thereof."\textsuperscript{40} The court then determined from this language that "[T]he statute, by referring to the 'defendant's right to retain possession,' must be taken to mean that the defendant is able to present defenses that would defeat the underlying debt or the right to assert the security interest."\textsuperscript{41} While there is scant authority discussing the exact scope of this type of prejudgment hearing, the holding in \textit{Lester} seems to be in accordance with the other jurisdictions that have dealt with the issue.\textsuperscript{42} By widening the scope of the prejudgment hearing provided for in section 55-6-1, the court is reading the potential danger of mistaken and arbitrary deprivations of debtor's property prior to a trial on the merits.

After ruling that defenses may be presented at the prejudgment hearing, the court next turned its attention to the appellants' specific defenses. The appellants first claimed that the appellee's security interest was invalid under the West Virginia Consumer Credit and Protection Act\textsuperscript{43} because the furniture was inadequately identified in the financing agreement.\textsuperscript{44} While this would not be a defense to the underlying debt, it could destroy the security interest on which the plaintiff based its attempts to repossess the furniture.\textsuperscript{45} Since this was a potentially viable defense to the attempted prejudgment seizure of the appellants' furniture, the supreme court remanded the issue to the trial court for further development of the record in regard to the adequacy of the descriptions contained in the security agreement.\textsuperscript{46}

As a second defense to the seizure, the appellants claimed that the appellee violated West Virginia law\textsuperscript{47} by failing to advise them that they could obtain insurance elsewhere.\textsuperscript{48} The court rejected this claim, stating that even if it was true, such a violation would be neither a defense to the seizure of the property nor a


\textsuperscript{40} \textit{Lester}, 309 S.E.2d at 75. W. VA. CODE § 55-6-1.

\textsuperscript{41} \textit{Lester}, 309 S.E.2d at 77.


\textsuperscript{43} W. VA. CODE § 46A-2-107(3) - 107(4) (1980).

\textsuperscript{44} \textit{Lester}, 309 S.E.2d at 77.

\textsuperscript{45} \textit{Id}.

\textsuperscript{46} \textit{Id}. at 78.

\textsuperscript{47} W. VA. CODE § 46A-3-109(2)(d) - 19(2)(e) (1980) prohibit creditors from requiring consumers to purchase consumer credit insurance from such creditors as a prerequisite to receiving credit.

\textsuperscript{48} \textit{Lester}, 309 S.E.2d at 78.
defense to the underlying debt.  The appellants' second "defense" would therefore be irrelevant to a prejudgment hearing under West Virginia's dectine statute.

In *Sauls v. Howell*, the West Virginia Supreme Court of Appeals addressed the issue of whether due process requirements mandate that a judgment debtor receive notice that suggestion proceedings have been instituted by a judgment creditor under West Virginia Code section 38-5-10. The court answered this question in the affirmative, holding that a judgment debtor is entitled to notice of such proceedings and that the notice should include a copy of the summons issued upon the suggestion pursuant to section 38-5-10.

In *Sauls*, the appellant had been receiving monthly payments, in lieu of alimony, from her ex-husband, pursuant to a divorce decree. After the appellant failed to receive several of these installments, she requested the Boone County Circuit Clerk, the appellee, to issue a summons upon a suggestion, pursuant to section 38-5-10, against her ex-husband's employer, the United States Steel Corporation, to obtain certain profit sharing funds which she believed were owed her ex-husband.

The appellee refused to issue the summons upon the suggestion, stating in essence that in addition to the original divorce decree, the appellant would be required to obtain a judgment in circuit court to determine the amount presently owed the appellant by her ex-husband. In a mandamus proceeding brought by the appellant, the circuit court refused to compel the circuit clerk to issue the summons.

The supreme court, on appeal, overturned the circuit court's decision and held that the appellant was not required to institute ancillary judicial proceedings to reduce the amount owed to a "sum certain" as a prerequisite to the institution of suggestion proceedings under West Virginia Code section 38-5-10. The court further held that the unsatisfied payments ordered in the divorce decree were decretal judgments standing against the ex-husband and in favor of the appellant. As such,

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49 *Id.*
51 W. Va. Code § 38-5-10 (1966) deals with enforcement of an execution lien by providing a procedure whereby a judgment creditor may recover from a third party personal property owed the judgment debtor. The statute provides, in part:

Upon a suggestion by the judgment creditor that some person is indebted or liable to the judgment debtor or has in his possession or under his control personal property belonging to the judgment debtor, which debt or liability could be enforced, when due, or which property could be recovered, when it became returnable, by the judgment debtor in a law court, and which debt or liability or property is subject to the judgment creditor's writ of fieri facias, a summons against such person may be sued out . . . requiring such person to answer such suggestion in writing and under oath.
52 *Sauls*, 309 S.E.2d at 31.
53 *Id.* at 27.
54 *Id.* at 28.
55 *Id.*
56 *Id.*
57 *Id.* at 29.
a simple mathematical calculation would suffice to determine the amount owed at any one point in time. 59 This holding is a logical extension of prior decisions by the court treating monthly alimony and child support payments in similar fashion.60 It alleviates the necessity for persons injured by defaulting ex-spouses to obtain new "supplemental" judgments as installments mature and are unpaid.

The next issue dealt with by the court in Sauls was whether the appellant's ex-husband was entitled to notice that she was instituting suggestion proceedings pursuant to section 38-5-10. While it was admitted that no statute explicitly requires a judgment debtor to be notified that the judgment creditor is instituting section 38-5-10 suggestion proceedings,61 the court also determined that due process of the law requires that debtors receive proper notice and a fair hearing before being deprived of their property.62 In reaching its conclusion, the court was influenced by the reasoning of various cases which held that prejudgment seizure of property without prior notice of the property owner and a hearing is violative of due process under the United States and West Virginia Constitutions.63 The court further pronounced that, in regard to section 38-5-10, "proper" notice means that the judgment debtor is entitled to a copy of the summons to be issued upon the suggestion.64

No specific time period was established which must elapse between notice to the judgment debtor and suggestion. However, the court's declaration that "[n]otice to the judgment debtor of suggestion proceedings under W. Va. Code, 38-5-10 [1931], aids the judgment debtor in seeking appropriate legal remedies to challenge the suggestion"65 indicates that due process requirements probably mandate that a judgment debtor receive a reasonable amount of time between notice and suggestion in which to present legal challenges to the suggestion.

In ACF Industries v. Credithrift of America,66 the court addressed the issue of whether a judgment debtor is entitled under West Virginia law to exempt $1,000.00 from the net amount of wages which would be available for suggestee execution.67

59 Id. (citing Korczyk v. Solonka, 130 W. Va. 211, 42 S.E.2d 814 (1947)).
61 This is in contrast to W. Va. Code §§ 38-5A-1 to -13 (1984) which deal with the issuance of suggestee executions against judgment debtors' wages. Section 38-5A-4 specifically provides that "[a] certified copy of an execution issued under this article against salary or wages shall be served upon judgment debtor, "and the suggestee execution cannot be served upon the employer until at least five days after notice has been given to the judgment debtor."
62 Sauls, 309 S.E.2d at 31.
64 Sauls, 309 S.E.2d at 31.
65 Id. at 32.
66 ACF Indus. v. Credithrift of America, Inc., 312 S.E.2d 746 (W. Va. 1983). This case was originally published in slip opinion on March 10, 1983. It was subsequently recalled, rewritten, and then published on November 14, 1983. The final result was a complete reversal of that originally reached. The case as originally published was discussed in 86 W. Va. L. Rev. 518.
Three statutes were examined in pari materia by the court in an effort to derive the legislature's intent. The court dwelled on the express language of the three statutes in reaching its conclusion that the $1,000.00 exemption under section 38-8-1 was meant to be applied not to total salary and wages, but only to those net amount of wages which would be available for suggestee execution under section 38-5A-3.

In ACF Industries, the appellee, Creditthrift of America, attempted to collect on a judgment it had obtained against the appellants, Mr. and Mrs. Jackie E. Stewart, by issuing a suggestee execution against Mr. Stewart's wages. Responding to the suggestee execution, Mr. Stewart exempted $1,000.00 of his wages pursuant to section 38-8-1. ACF Industries attempted to comply with the personal property exemption requirements by excluding the first $1,000.00 of Stewart's full salary, after taxes, and withholding a portion of his salary in order to satisfy the suggestee execution. After Stewart objected to the manner by which his exemption was computed, ACF Industries filed an interpleader action in circuit court. At trial, the circuit court examined the relevant code sections and held that the $1,000.00 personal exemption was meant to be applied to the appellants' full amount of after-tax salary and wages and not merely to the net amount which is subject to suggestee execution.

The three code sections which were relevant to the court's analysis are:

1. W. Va. Code § 38-5A-3 (Supp. 1984), which provides in pertinent part:
   A judgment creditor may apply to the court . . . for a suggestee execution against any money due or to become due within one year after the issuance of such execution to the judgment debtor as salary or wages arising out of any private employment . . . the execution and expenses thereof shall become a lien and continuing levy upon the salary or wages . . . to an amount equal to twenty per centum thereof and no more, but in no event shall the payments . . . reduce the amount payable to the judgment debtor to an amount per week that is less than thirty times the federal minimum hourly wage then in effect.

2. W. Va. Code § 38-5A-9 (1966), which states:
   A judgment debtor to whom money is due or to become due which would otherwise be subject to suggestion under this article may have the same exempted from levy in the manner and to the extent provided for by article eight [§ 38-8-1 et seq.] of this chapter. The exemption may be claimed for sums currently accruing but must be asserted anew as to any salary or wages which shall begin to accrue after the next payment date. Such exemption shall not be binding upon a suggestee unless and until a certificate of exemption or true copy thereof shall have been delivered to him.

   Any husband, wife, parent or other head of household residing in this State . . . may set apart and hold personal property not exceeding one thousand dollars in value to be exempt from execution of other process . . .

ACF Industries, 312 S.E.2d at 749.

Id. at 750.

Id. at 748.

Id.

Id.

Id.

Id.


ACF Industries, 312 S.E.2d at 749.
On appeal, the supreme court overturned the lower court’s decision.77 Noting that the general rule requires exemption statutes to be liberally construed in favor of the debtor,78 the court analyzed the language of the relevant statutory provisions. Heavy reliance was placed on the express language of section 38-5A-9, which allows a judgment debtor to apply the $1,000.00 personal exemption under section 38-8-1 to those wages “which would otherwise be subject to suggestion” under section 38-5A-3.79 Inasmuch as section 38-5A-3 limits the reach of a suggestee's execution to twenty percent of total wages, or the excess over thirty times the minimum wage, whichever is less, the court felt that this is the amount which is “otherwise subject to suggestion” under section 38-5A-9, and to which the section 38-8-1 personal exemption should be applied.80 Thus, the court concluded that West Virginia law allows a judgment debtor to apply the section 38-8-1 $1,000.00 personal exemption to the net amount of wages available for suggestee execution under section 38-5-3.81

In Southern Electrical Supply Co. v. Raleigh County National Bank82 the court considered the extent to which a bank can exercise its common law right of setoff to transfer funds from one corporate account to another, where one person is the majority and controlling stockholder of both corporations. The court held that, in the absence of adequate evidence justifying a disregard for the separateness of two corporations, banks may not apply funds in one corporation’s account in satisfaction of another corporation’s indebtedness.83

The situation present in Southern Electrical involved two corporations: Gibson Electric Company, an electrical contracting firm; and Southern Electrical Supply Company, a dealer in electric materials. William Gibson was the controlling stockholder of both these companies.84 Each company had its own separate account at the Raleigh County National Bank.85 In 1980, Gibson Electric had contracted with parties known as “Willis” and “Paul” to do electrical work at a coal preparation plant being built in Kentucky.86 In June of 1980, Gibson Electric was delinquent on loan payments owed to Raleigh County National Bank.87 Subsequent to this, Willis and Paul attempted to deposit money in Southern Electrical’s account by wire transfer.88 This money was apparently due Southern Electrical for supplies

77 Id. at 750.
78 Id. at 749.
79 Id.
80 Id.
81 Id. at 750.
83 Id.
84 Id. at 1.
85 Id.
86 Id. at 3.
87 Id. at 1.
88 Id.
furnished to Gibson Electric on the Kentucky project. After initially depositing these funds in Southern Electrical’s account, the bank later canceled this deposit and deposited the funds in Gibson Electric’s account. The money was then appropriated by the bank in partial satisfaction of Gibson Electric’s debt.

Southern Electrical brought suit against the bank, claiming that the bank had converted its funds by transferring them to Gibson Electric’s account without any consent or authority to act in such a manner. The bank attempted to justify its behavior by alleging that Gibson Electric and Southern Electrical were alter egos of William Gibson and, as such, they should be treated as one entity. The bank also contended that by directing Willis and Paul to deposit these funds in Southern Electrical’s account, Gibson Electric was attempting to fraudulently avoid liability on its debt to the bank. At the conclusion of discovery, both sides moved for partial summary judgment concerning the bank’s liability. Based on its conclusion that William Gibson had wrongfully directed funds belonging to Gibson Electric to be deposited in Southern Electrical’s account, the trial court granted summary judgment in favor of the bank.

On appeal, the West Virginia Supreme Court of Appeals reversed the lower court’s decision and granted summary judgment for Southern Electrical. The court recognized that, while banks have a common law right to setoff, certain prerequisites must be met before the right may be exercised. The prerequisites which must be met prior to setoff are: (1) existence of a debtor-creditor relationship between bank and customer; (2) the customer must have a general deposit account in the bank; and (3) mutuality of matured indebtedness. In this case, the court determined that the prerequisites were not met, so the Raleigh County Bank had no right to set off funds in Southern Electrical’s account for Gibson Electric’s debt.

While Southern Electrical did have a general deposit account in the bank, there was no debtor-creditor relationship between them with mutual indebtedness. The bank was indebted to Southern Electrical on the general deposit account, but there was no corresponding debt owed by Southern Electrical to the bank. This lack

99 Id. at 3.
100 Id. at 15 (citing Westerly Community Credit Union v. Industrial Nat'l Bank, 103 R.I. 662, 240 A.2d 586 (1968) (denying a bank its setoff right where there was no mutuality)).
of mutual indebtedness was the main factor in the court’s decision to deny the bank the right to set off funds in Southern Electrical’s account for Gibson Electric’s outstanding debt.\textsuperscript{101} If the bank had been able to demonstrate that the two corporations should be treated as one entity, then the “mutuality” obstacle might have been overcome, in light of Gibson Electric’s outstanding debt to the bank. The court pointed out that, while the “corporate veil” may be pierced in order to make a corporation liable for the actions of another corporation, this is not to be done as a matter of course.\textsuperscript{102} The party asking the court to disregard the corporate structure carries the burden of proving that sufficient factors exist which justify such a disregard.\textsuperscript{103} Some of the factors which will be considered in deciding whether to disregard the corporate form include: whether the corporation is under-capitalized; whether two corporations have comingled their funds so that their accounts are interchangeable; whether corporate formalities have been followed; whether there is a unity of ownership and interest causing one entity to be indistinguishable from another; and whether there is total control of one corporation by another.\textsuperscript{104} These factors must be examined together with any evidence that a corporation attempted to use its corporate structure to commit fraud or grave injustice against the complaining party.\textsuperscript{105}

The court noted the presumptions that two separately incorporated companies are separate entities and that corporations are distinct from their shareholders.\textsuperscript{106} Common ownership or management, without supporting evidence such as fraudulent conduct, comingling of funds, or total control was held insufficient to justify piercing the corporate veil.\textsuperscript{107} The court further pointed out that both of these corporations served a separate purpose, though their businesses were related.\textsuperscript{108} Accordingly, the court held that since Gibson Electric and Southern Electrical are separate, distinct corporations, the bank was wrong in attempting to ignore this corporate separateness by applying money authorized for one corporation’s account in satisfaction of another corporation’s debt. The decision as to whether a corporate structure should be disregarded is exclusively within the judicial province. As a rule of thumb, the court stated, “In questionable situations a bank has a paramount obligation to refrain from encroaching upon its customers’ interests.”\textsuperscript{109}

\begin{footnotes}
\item[101]\textit{Southern Elec.}, No. 15974, slip op. at 18 (citing Southern States Coop. v. Dailey, 280 S.E.2d 821, 827 (W. Va. 1981)).
\item[102]\textit{Southern Elec.}, No. 15974, slip op. at 18 (citing Wheeling Kitchen Equip. Co. v. R & R Sewing Center, 154 W. Va. 715, 179 S.E.2d 587, 590 (1971)).
\item[103]\textit{Southern Elec.}, No. 15974, slip op. at 19.
\item[104] \textit{Id.} at 20.
\item[105] \textit{Id.}
\item[106] \textit{Id.} at 20-21.
\item[107] \textit{Id.} at 22.
\item[108] \textit{Id.} at 25.
\item[109] \textit{Id.}
\end{footnotes}
III. MINERAL LEASES


The recent West Virginia Supreme Court of Appeals decision of *McGinnis v. Cayton* discussed the availability of relief for those who have become successors in interest to old, long-term natural gas leases providing for fixed yearly payments which have become ridiculously inadequate as gas prices have risen over the years. The appellants in *McGinnis* purchased land in Ritchie County and thereby became parties to an oil and gas lease granted on the property in 1893. The lease was perpetually renewable, so long as oil or gas production on the property continued. The lease’s terms required the lessee to pay the lessor a one-eighth royalty on all oil produced and one hundred dollars per year for the natural gas in each year that gas was produced. The appellants brought suit, seeking that the original lease be reformed or voided on the ground that payment by the lessees of one hundred dollars per year for the right to produce all of the natural gas on the property was no longer commercially reasonable. Upon motion by the appellees, the trial court dismissed the action prior to trial, ruling that the appellants stated no claim upon which relief could be granted.

The supreme court, in an opinion written by Justice Neely, reversed the lower court’s decision and remanded the case for trial, reiterating its policy favoring resolution of disputes on the merits. While expressing no opinion as to the ultimate merits of the case, the court pointed out that a fair examination of all the facts and allegations presented reveals at least two legal theories upon which the appellants might prevail at trial.

First, the court examined the potential applicability of the doctrine of mutual mistake to the appellants’ situation. The general proposition was put forth that a mutual mistake as to a material assumption or fact underlying a contract is sufficient to void the agreement, provided that the risk was not contractually allocated. Because of its ruling that contractual rights are controlled by the law in effect when the contract was executed, the court felt it useful to look at *Bluestone Coal Co. v. Bell*, a somewhat analogous case which was decided at about the same time that the lease in question was entered into.

In *Bell*, a long-term lease was established which gave the lessee the right to mine coal and cut timber. As the lessor expected to make substantial profits from

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111 Id. at 767.
112 Id. at 767-68.
113 Id. at 770.
114 Id. at 768.
115 Id. at 769.
116 Id. at 768.
118 Id.
coal royalties, he only charged a nominal price for the timber. It subsequently turned out that little mineable coal existed, and the lessor argued that the lease ought to be rescinded.\textsuperscript{119} After discussing the doctrine of mutual mistake, the supreme court agreed that, since the existence of coal was a basic assumption upon which the agreement was made, the nonexistence of coal was a sufficient ground for voiding the lease.\textsuperscript{120}

The \textit{McGinnis} court contrasted and compared the situation to that in \textit{Bell}.\textsuperscript{121} While allowing that it might be possible that both of the original parties to the \textit{McGinnis} lease operated under a basic assumption that the value of natural gas would remain negligible, the court also stressed that it was highly possible "that the lessee was aware of the burgeoning market for natural gas and struck a very advantageous bargain."\textsuperscript{122} It was also noted that an argument could be made that the original lessor, by accepting a fixed price for the production of natural gas on his land, bore the risk of an increase in its value.\textsuperscript{123} In any case, the supreme court left the determination of the original parties' intentions to the trial court on remand, where the appellants must bear the burden of proving that the original parties operated under a mistaken assumption that went to the very essence of the contract and that the lease did not allocate the risk of increasing gas values. The court also stated that, on remand, the appellants should be permitted to develop further their theory that the appellees had abandoned the lease.\textsuperscript{124}

The majority opinion in \textit{McGinnis} failed to provide much overt guidance on the extent to which various equitable principles may be utilized to reform or void outdated gas leases. The court discussed the case, at least superficially, in terms of a contract law analysis, yet the court narrowly restricted the grounds upon which the appellants could challenge the lease at trial, to the neglect of other equitable principles which are sometimes used as "outs" in contract cases. The court stated that it was limiting the availability of equitable principles in aid of the appellants because (1) the appellants were not original parties to the contract but became parties to it after the increased value of natural gas had become apparent,\textsuperscript{125} and (2) the appellants' demands were stale because they had allowed the lease to stand unchallenged for an appreciable length of time.\textsuperscript{126} The court did allow the appellants to utilize the doctrine of mutual mistake on remand, but their chances of success with this doctrine would seem tenuous at best, for they must somehow prove what was in the mind of the original parties to the lease at the time of its execution almost one hundred years ago.

\textsuperscript{119} \textit{Id.} at 496.
\textsuperscript{120} \textit{Id.} at 498.
\textsuperscript{121} 312 S.E.2d at 769.
\textsuperscript{122} \textit{Id.} (footnote omitted).
\textsuperscript{123} \textit{Id.}
\textsuperscript{124} \textit{Id.} at 770.
\textsuperscript{125} \textit{Id.}
\textsuperscript{126} \textit{Id.}
Though the analysis in *McGinnis* was based only upon the facts of that case, the language used does not bode well for those who would desire to reform or void outdated gas leases by relying upon the full range of equitable principles which are sometimes used in contract situations. Persons not original parties to the gas lease (or perhaps their heirs) would be severely restricted in their attempts to utilize such principles. The mutual mistake doctrine would not be of much help so long as the court requires that the intent of the original parties be proved, since many of these oil and gas leases were executed in the 1800’s.

In a lengthy concurring opinion, Justice Harshbarger disagreed with the narrow scope of the majority opinion. He felt that the court should have permitted the appellants to utilize the much broader range of equitable principles, such as unilateral mistake,\(^{127}\) commercial impracticability,\(^{128}\) and unconscionability,\(^{129}\) which are sometimes used to reform or rescind contracts. Justice Harshbarger also pointed out that the court appeared to be closing the door which had been opened in *Iafolla v. Douglas Pocahontas Coal Corp.*,\(^{130}\) where the court had indicated that it might be receptive to an unconscionability-type argument to void a mineral lease where unforeseen, changing circumstances had rendered the lease grossly unfair.\(^{131}\)

*James Robert Williamson*

\(^{127}\) *Id.* at 773.

\(^{128}\) *Id.* at 774.

\(^{129}\) *Id.* at 776.

\(^{130}\) 250 S.E.2d 128 (W. Va. 1978).

\(^{131}\) *Id.* at 133.