Commercial Law

Linda Rae Artimez
West Virginia University College of Law

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Commercial Law Commons, and the Legislation Commons

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol86/iss2/15

This Survey of Developments in West Virginia Law: 1983 is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.
COMMERICAL LAW

I. Wage Payment and Collection Act


Following a modern trend in many American jurisdictions to increase the personal liability of corporate officers,1 the Supreme Court of Appeals of West Virginia, in Mullins v. Venable,2 held that a corporate officer can be personally liable to the employees of the corporation for wages, fringe benefits, and liquidated damages, when the officer knowingly permits the corporation to violate provisions of the West Virginia Wage Payment and Collection Act.3 Mullins followed the 1981 decision of Farley v. Zapata Coal Corp.,4 in which the court also interpreted several provisions of the Wage Payment and Collection Act. Both cases reveal a general expansive attitude by the court in interpreting the Act to protect the wage earner. In Farley, the court expanded the reach of the Act beyond the exclusive employer-employee relationship.5 The Act's liability provisions were held to encompass the corporation which had hired the workers' employer as a general contractor.6 In Mullins, the court continued this expansion, holding that a corporate officer can be per-

1 See Knepper, Liability of Corporate Officers for Debts of Financially Troubled Corporations, 81 Com. L.J. 389 (1976) (In addition to traditional legal liability for fraud against the company or stockholders, or for negligence regarding the corporation's assets, the trend is to make corporate directors responsible to creditors); McAdams & Tower, Personal Accountability in the Corporate Sector, 16 Am. Bus. L.J. 67 (1978) (Legislative and judicial movement toward personal accountability, as illustrated in United States v. Park, 421 U.S. 658 (1975), generally has expanded in public welfare areas); Shanefelt, The Personal Liability Maze of Corporate Directors and Officers, 58 Neb. L. Rev. 692 (1979) (Increased personal liability of directors and officers for improper actions taken in the corporate name is discussed regarding shareholder derivative suits, third-party actions under federal law, the Nebraska Business Corporation Act, and Nebraska common law). See also Ill. Ann. Stat. ch. 48, § 39m-13 (Smith-Hurd Supp. 1982) (Wage and Payment Collection Act holds officers of a corporation who knowingly permit an employer to violate the Act as the employers of the employees for purposes of liability under the Act); Kan. Stat. Ann. § 44-323(b) (1981) (Labor and Industries statute holds any officer having management of the corporation as the employer for purposes of the Act where the officer knowingly permits the corporation to engage in violations of the statute); Nev. Rev. Stat. § 608.010 (1979) (Wage and Hour Regulation statute defines employer as "every person, firm, corporation, ... agent, manager, representative or other person having control or custody of any employment, ... or any employee"); N.M. Stat. Ann. § 50-4-1A (1978) (Under Payment of Wages statute, employer definition includes any agent or officer of a corporation); S.C. Code Ann. § 41-11-110(1) (Law. Co-op. Supp. 1981) (Under Labor and Employment statute employer defined to include any agent or officer of a corporation).


4 281 S.E.2d 238 (W. Va. 1981). Employees filed suit for unpaid wages against the corporation which had hired their employer as a general contractor. The court held that a lien for liquidated damages, through the terms of W. Va. Code § 21-5-4 of the Wage Payment and Collection Act, could be enforced against the corporation pursuant to W. Va. Code § 38-2-31 which provides for a mechanic's lien for unpaid value of work performed.

5 Id. at 242.

6 Id. at 243.
sonally liable to an employee-wage earner when he knowingly permits illegal acts by the employer-corporation.7

The appellants in Mullins were thirteen former employees of Venable and Billups Corporation, a coal mining enterprise which had ceased operation.8 Venable and Billups Corporation subcontracted the operation from Olentangy, Ltd., an Ohio limited partnership.9 The workers, who were owed approximately two weeks of wages and other fringe benefits, were not paid on the next regular payday as is required by the Act.10 Appellants filed suit to recover their wages, fringe benefits, and liquidated damages. In addition, the appellants sought to hold the corporate president, James T. Venable, personally liable for knowingly acquiescing in the corporation's failure to pay its employees' wages.11

In Mullins, the trial court had granted the appellee's motion to dismiss, ruling that the Wage Payment and Collection Act did not authorize a liability action against a corporate officer in his personal capacity.12 The supreme court, however, in an opinion written by Justice McGraw, reversed that decision, holding that corporate officers have a duty to see that their corporation obeys the law.13 As in Farley,14 the court recognized the Act as remedial legislation, stating that the goal of the legislation is to protect working people and assist them in collecting wrongfully withheld compensation.15

Appellee Venable made several arguments before the court, contending that he should not be held personally liable. He first argued that the language of the statutory provisions of the Act did not subject officers of a corporation to liability.16 The court examined the phrase, "person, firm, or corporation," as used throughout the Act, and stressed the language of West Virginia Code section 21-5-1(h)17 in refuting the appellee's argument. The court recognized both the comprehensive nature of the Act as well as the legislative intent to "impose personal liability on corporate officers who knowingly permit violations of the Act." 18 Since a corporation is an artificial or jur-

7 297 S.E.2d at 868.
8 Id.
9 Id. at 871 n.3.
10 Id. at 868; W. Va. Code § 21-5-4(c) (1981) provides in pertinent part: "Whenever an employee quits or resigns, the person, firm or corporation shall pay the employee's wages no later than the next regular payday . . . ." 297 S.E.2d at 868.
11 Id. at 869.
12 Id. at 872.
13 281 S.E.2d at 244.
14 297 S.E.2d at 869.
15 Id.
16 W. Va. Code § 21-5-1(h) (1981) provides in pertinent part: "The term 'officer' shall include officers or agents in the management of a corporation or firm, who knowingly permits the corporation or firm to violate the provisions of this article."
17 297 S.E.2d at 869-70.
istic creation which acts solely through its corporate officers or agents, the court maintained that responsibility for a corporation's actions must ultimately fall upon the persons acting for the corporation, that is the corporate officers. In addition, the court stressed the intent of the Legislature, as evidenced by the enactment of the Wage Payment and Collection Act, to prevent corporate officers from escaping liability for their "unlawful mischief" by hiding behind the "corporate skirt."

Second, Venable argued that obtaining a judgment against the corporation, along with an unsatisfied return of execution on that judgment, should be conditions precedent to maintaining an action against him personally. The court rejected this argument, maintaining that the Act "does not create a suretyship relationship between the corporation and its officers with respect to unsatisfied wage claims." Instead, the court recognized a "quasi-public" duty placed upon corporate officers by the Legislature in enacting the Wage Payment and Collection Act. This duty was found consistent with the general duty of corporate officers to see that their corporation obeys the law. The court viewed the imposition of a "quasi-public" duty upon corporate officers as furthering the important public policy of insuring that employers pay the wages of their workers. Since the liability of corporate officers under the Act was determined to be direct and absolute, the court held that it was not necessary for corporate employees to obtain a judgment against the corporation prior to maintaining an action against a corporate officer who knowingly permits the corporation to violate the Act.

The court likewise rejected the appellee's third argument that all remedies should be exhausted against the prime contractor, Olentangy, Ltd., before proceeding against the subcontractor. Although the court found that West Virginia Code section 21-5-7 states that a prime contractor may be held liable for wages which the subcontractor does not pay, the Code section

17 Id. at 869.
18 Id. at 870.
19 Id.
20 Id. at 871.
21 Id.
22 Id. at 870-71.
23 Id.
24 Id.
25 Id.
26 Id. at 871-72.
27 W. Va. Code § 21-5-7 (1981) provides in part:
Whenever any person, firm or corporation shall contract with another for the performance of any work which the prime contracting person has undertaken to perform for another, the prime contractor shall become civilly liable to employees engaged in the performance of work under such contract for the payment of wages and fringe benefits, exclusive of liquidated damages... to the extent that the employer of such employee fails to pay such wages and fringe benefits: Provided, that such employees have exhausted all feasible remedies contained in this article against such employer...
also specifically instructs that all other feasible remedies under the Act must be taken before an employee can proceed against the prime contractor.\footnote{29}{297 S.E.2d at 872.}

Finally, Venable argued that the Act as applied was unconstitutional, as it represented a taking of his property without due process of law.\footnote{30}{Id.} He asserted that under the corporation's contract with the prime contractor, the prime contractor was to provide the payroll so that he could pay the workers.\footnote{31}{Id.} Venable contended that holding him liable for the prime contractor's wrong amounted to strict liability.\footnote{32}{Id.} The court did not find the appellee's constitutional argument convincing. It stressed that the Act only subjects personal liability to those corporate officers who \textit{knowingly} permit the corporation to violate the law.\footnote{33}{Id.} If at retrial appellee Venable is adjudged not to have \textit{knowingly} permitted the corporation's illegal acts, then he would not be personally liable.\footnote{34}{Id.} Further, the court held that the legislation itself was clearly within the police powers of the state, since it was "neither arbitrary nor unreasonable, and . . . designed to further a legitimate and important public purpose."\footnote{35}{Id.} In addition, the court noted that at trial Venable could assert his claim against the prime contractor if he so desired.


The expansion toward personal accountability of corporate officers will undoubtedly be accompanied by problems and benefits. Businesses, for example, may need to extend insurance coverage for officers and directors to cover claims against the wrongful acts of the corporation. This of course will result in increased business costs which ultimately must be borne by the consumer. The legislatively imposed personal liability on corporate officers may induce increased corporate involvement in the political sphere. Overshadowing the present concerns and costs to business, however, is the positive, long-
term effects of increased corporate accountability. Directors and officers will be more inclined to take affirmative action to prevent and correct violations of laws and regulations. As a result, the livelihoods of workers will be better protected pursuant to the Wage Payment and Collection Act and its interpretation by the court. Corporations will benefit, as directors and officers will need to restructure avenues within the corporate system for the flow of vital information concerning liabilities of both the corporation and the directors and officers themselves.38

Providing employees with the ability to sue corporate officers in their personal capacity does not seem likely to encourage increased litigation. Violation of the Wage Payment and Collection Act provided for employee suits against employers to recover wrongfully withheld wages and fringe benefits prior to the Mullins decision.39 The court's decision in Mullins provides employees with another avenue to collect wrongfully withheld compensation by placing the liability upon the officers of the corporation who have the intent, "knowingly," to permit corporate violations of the Act.40

II. DEBTOR-CREDITOR RELATIONS


In the case of Morris v. Marshall,41 the West Virginia Supreme Court of Appeals addressed several issues relating to (1) supervised lenders and consumer loans pursuant to the West Virginia Consumer Credit and Protection Act,42 (2) actions constituting "the banking business" in West Virginia, and (3) homestead exemptions pursuant the West Virginia Code.43

Appellants, Ralph and Helen Morris, appealed to the West Virginia Supreme Court of Appeals after a circuit court refused to grant a permanent injunction to prevent a trustee's foreclosure sale on their real property.44 The real estate had been pledged as security for several loans issued to the appellants to finance their corporation, A.C. Morris Garage, Inc.45 The corporation was in the business of buying and selling used cars and trucks, but eventually became defunct after a variety of problems arose.46 The loans in default, total-

---

40 297 S.E.2d at 869-70.
44 305 S.E.2d at 582.
45 Id.
46 Id.
ing $234,731.92, were obtained in part from Ashland Finance Company, a Kentucky corporation, and from Ashland Finance Company of West Virginia, a subsidiary of the Kentucky corporation.47

The appellants advanced four arguments for consideration on appeal in support of their request for a permanent injunction: First, that Ashland Finance Company of West Virginia was a supervised lender under the West Virginia Consumer Credit and Protection Act;48 second, that Ashland Finance Company of West Virginia was solely a supervised lender;49 third, that Ashland Finance Company of Kentucky acted as an unauthorized bank when making loans;50 and fourth, that a homestead exemption in West Virginia can prevent the sale of real estate under a deed of trust.51 The court failed to agree with any of appellants' arguments and ultimately affirmed the holding of the trial court.52

First, appellants asserted that Ashland Finance Company of West Virginia was a supervised lender under the West Virginia Consumer Credit and Protection Act.53 Based on this contention, the appellants claimed to be protected under the Act. They sought "to void the loans based on W. Va. Code, 46A-5-101(2), or to claim excessive interest charges under W. Va. Code, 46A-4-111, or [claim] improper acquisition of a deed of trust under W. Va. Code, 46A-4-109(1)." 57

The court examined the definitions of "supervised lender"58 and "supervised loan"58 as provided in the Act and determined that in order to be a

47 Id. at 582-83.
48 Id. at 583.
49 Id. at 584.
50 Id. at 585.
51 Id. at 586.
52 Id. at 588.
53 Id. at 583; W. VA. CODE § 46A-1-102(44) (1983) defines "[s]upervised lender" as "a person authorized to make or take assignments of supervised loans."
54 W. VA. CODE § 46A-5-101(2) (1980) provides in pertinent part:
If a creditor has violated the provisions of this chapter respecting authority to make supervised loans (§ 46A-4-101), the loan is void and the consumer is not obligated to pay either principal or the loan finance charge.
55 The applicable provision of W. VA. CODE § 46A-4-111 (Supp. 1983) reads:
No licensee shall . . . charge . . . greater than six percent per annum upon the loan . . . when the amount or value thereof is more than sixteen hundred dollars.
56 W. VA. CODE § 46A-4-109(1) (Supp. 1983) states in pertinent part:
A supervised lender may not contract for an interest in land as security. A security interest taken in violation of this subsection is void . . . .
57 305 S.E.2d at 584.
59 W. VA. CODE § 46A-1-102(45) (Supp. 1983) provides:
"Supervised loan" means a consumer loan made by other than a supervised financial organization, including a loan made pursuant to revolving loan account, where the prin-
supervised lender, one must grant "consumer loans."\textsuperscript{69} To determine what constitutes a "consumer loan" the court then examined the definition of "consumer loan" pursuant to West Virginia Code section 46A-1-102\textsuperscript{(14)}\textsuperscript{61} and several cases from other jurisdictions\textsuperscript{62} which had statutory definitions of "consumer loan" similar or identical to that of West Virginia.\textsuperscript{63} One recurring proposition was found throughout the cases: if a loan was made in pursuit of a commercial venture, it was not a consumer loan. The court adopted this limitation and held that loans made for commercial purposes, such as the appellants' loan to finance their automobile dealership, "are not 'consumer loans' within the purview of the West Virginia Consumer Credit and Protection Act."\textsuperscript{64}

The court refused to address appellants' second argument that "Ashland Finance Company of West Virginia was only a supervised lender . . . and, therefore, could not have made commercial loans."\textsuperscript{65} This refusal was based upon the court's prior determination that the appellants' loan was not a consumer loan, along with the undeveloped factual record concerning the finance company.\textsuperscript{66}

Third, the appellants argued that the Kentucky lending institution acted as an unauthorized bank when making loans.\textsuperscript{67} The appellants hoped to enjoin Ashland Finance Company of Kentucky from collecting its loans for failure to comply with West Virginia banking law.\textsuperscript{68} The court, however, refused to adopt the appellants' position. Since neither the definitions of bank, banking institution, and banking business,\textsuperscript{69} nor the banking powers elicited under the

\begin{itemize}
  \item \textsuperscript{69} See West Virginia Code §§ 46A-1-102\textsuperscript{(14)} (Supp. 1983) provides: "Consumer loan" is a loan made by a person regularly engaged in the business of making loans in which:
    \begin{itemize}
      \item (a) The debtor is a person other than an organization;
      \item (b) The debt is incurred primarily for personal, family, household or agricultural purpose;
      \item (c) Either the debt is payable in installments or a loan finance charge is made; and
      \item (d) Either the principal does not exceed twenty-five thousand dollars or the debt is secured by an interest in land.
    \end{itemize}


  \item \textsuperscript{61} See 305 S.E.2d at 583-84.

  \item \textsuperscript{62} See Id. at 584.

  \item \textsuperscript{63} See Id. at 584-85.

  \item \textsuperscript{64} See Id. at 585.

  \item \textsuperscript{65} See W. Va. Code §§ 31A-1-1 to 31A-8B-5 (1982).

  \item \textsuperscript{66} See W. Va. Code § 31A-1-2\textsuperscript{(b)} - (c) (Supp. 1983) provides:
    \begin{itemize}
      \item (b) The words "bank" and "banking institution" mean a corporation heretofore or
West Virginia banking statutes\textsuperscript{76} defined which, if any, of the many functions of banks constitutes "the banking business," the court followed the general rule that a fundamental function of the banking business is the receipt and payment of deposits.\textsuperscript{71} Since Ashland Finance Company of Kentucky was a private corporation which did not have depositors, but instead loaned monies from its own assets, the court held that the lending of money alone from a corporation's own assets did not constitute banking.\textsuperscript{72}

Finally, the appellants asserted their rights to a homestead exemption\textsuperscript{73} in support of a permanent injunction enjoining the sale of their real estate. The court noted that a homestead exemption automatically arises by operation of law and that it is subject to the provision of the West Virginia Constitution\textsuperscript{74} which exempts a homestead, up to $5,000 in value, from forced sale.\textsuperscript{75} The court emphasized that the Legislature retained the "exempt from forced sale" language when this section of the constitution was altered and article chartered to conduct a banking business under the laws of West Virginia or an association heretofore or hereafter authorized to conduct a banking business in West Virginia under the laws of the United States and having its principal office in this State and shall embrace and include a trust company or an institution combining banking and trust company facilities, functions and services so chartered or authorized to conduct such business in this State, and shall include industrial banks authorized by article seven [§ 31-7-1 et seq.], chapter thirty-one of this Code, subject to the limitations therein imposed on such industrial banks and further subject to the limitations imposed thereon in this article;

c) The term "banking business" means the functions, services and activities contained, detailed and embraced in sections thirteen and fourteen [§§ 31A-4-13 and 31A-4-14], article four of this chapter and as elsewhere defined by law . . .

\textsuperscript{76} W. VA. CODE § 31A-4-13 (Supp. 1983) provides in pertinent part:

Any banking institution . . . shall have the right to buy or discount promissory notes and bonds, negotiate drafts, bills of exchange and other evidences of indebtedness, borrow money, receive deposits on such terms and conditions as its officers may prescribe, buy and sell exchange, bank notes, bullion or coin, loan money on personal or other security, rent safe-deposit boxes and receive on deposit, for safekeeping, jewelry, plate, stocks, bonds and personal property of whatsoever description and provide customer services incidental to the business of banking, including but not limited to the issuance and servicing of and lending money by means of credit cards as letters of credit or otherwise. Any banking institution may accept, for payment at a future date, . . . drafts drawn upon it by its customers . . .

\textsuperscript{71} 305 S.E.2d at 586 (quoting Warren v. Shook, 91 U.S. 704, 710 (1875)) ("Having a place of business where deposits are received and paid out on checks, and where money is loaned upon security, is the substance of the business of a banker.").

\textsuperscript{72} 305 S.E.2d at 586. Accord, Oregon & W. Trust Inv. Co. v. Rathburn, 18 F. Cas. 764 (No. 10,555) (C.C.D. Ore. 1877); Meserole Sec. Co. v. Cosman, 253 N.Y. 130, 170 N.E. 519 (1930).

\textsuperscript{73} W. VA. CODE § 38-9-1 to -6 (Supp. 1983).

\textsuperscript{74} W. VA. CONST. art. VI, § 48 provides in part that "[a]ny husband or parent, residing in this State, or the infant children of deceased parents, may hold a homestead of the value of five thousand dollars, and personal property to the value of one thousand dollars, exempt from forced sale . . . ."

\textsuperscript{75} 305 S.E.2d at 587.
subsequently amended by voter ratification in 1973. The court found the retained language to be significant, especially in light of the court’s previous holding in the case of Moran v. Clark.

In Moran, the court held that a sale of a homestead under deed of trust or a decree of mortgage foreclosure was not a forced sale within the purview of the state constitution. The court in Morris interpreted the legislature’s retention of “exempt from forced sale” as evidencing an intent to reaffirm the Moran holding. Thus, the court denied the homestead exemption claim by appellants, stating “a sale under a deed of trust is not a forced sale under Section 48 of Article VI of our [West Virginia] Constitution.”

In Clendenin Lumber and Supply Co., Inc. v. Carpenter, the supreme court of appeals reasserted the fundamental principle that a motion for summary judgment should only be granted when there is no genuine issue of fact to be tried, and in doing so interpreted two statutory provisions of the West Virginia Consumer Credit and Protection Act and the West Virginia Wage Payment and Collection Act. As illustrated in the court’s prior interpretation of the Wage Payment and Collection Act in Mullins v. Venable, the court again protected the interests of the wage earner over those of the employer. In Clendenin the court held a payroll deduction agreement between

---

16 Id.
17 30 W. Va. 355, 4 S.E. 303 (1887).
18 Id.
19 305 S.E.2d at 588.
21 W. Va. CODE § 46A-2-116(2)(b) (1980) provides:
“Assignment of earnings” includes all forms of assignments, deductions, transfers, or sales of earnings to another, either as payment or as security, and whether stated to be revocable or nonrevocable, and includes any deductions authorized under the provisions of section three [§ 21-5-3], article five, chapter twenty-one of this Code, except deductions for union or club dues, pension plans, payroll savings plans, charities, stock purchase plans and hospitalization and medical insurance. (emphasis supplied).
22 W. Va. CODE § 21-5-3 (1981) provides in pertinent part:
No assignment of or order for future wages shall be valid for a period exceeding one year from the date of such assignment or order. Such assignment or order shall be acknowledged by the party making the same before a notary public or other officer authorized to take acknowledgements, and such order or assignment shall specify thereon the total amount due and collectible by virtue of the same and three fourths of the periodical earnings or wages of the assignor shall at all times be exempt from such assignment or order and no assignment or order shall be valid which does not so state upon its face: Provided further, that no such order or assignment shall be valid unless the written acceptance of the employer of the assignor to the making thereof, is endorsed thereon: Provided further, that nothing herein contained shall be construed as affecting the right of employer and employees to agree between themselves as to deductions to be made from the payroll of employees . . . .
employer and employee an invalid assignment of earnings pursuant to the applicable statutory provisions.\(^4\)

Following an adverse judgment in circuit court, the appellant in Clendenin raised two issues of error on appeal. Both issues of error resulted from the trial court’s ruling that both as a matter of law and fact (1) there had been no assignment of earnings between the appellant, Carpenter, and the appellee, Clendenin Lumber and Supply Company, and (2) that the credit extended to appellant Carpenter by appellee was not part of an open-end credit plan.\(^5\)

Appellant Carpenter was employed by Clendenin Lumber and Supply Company. On several occasions he charged goods that he had purchased from Clendenin under a company policy extending credit to Clendenin employees.\(^6\) Carpenter made irregular payments on the credit balance, and, at one point, made no payments at all for an approximate nine month period.\(^7\) Subsequently, pursuant to an agreement with Clendenin, Carpenter signed an authorization for Clendenin to deduct thirty dollars per pay period from his wages, to be credited to the balance on his account.\(^8\) After eight consecutive payroll deductions, Carpenter ceased his employment with Clendenin, leaving an unpaid credit balance of $689.90.\(^9\) Clendenin thereafter instituted an action to collect the outstanding credit balance plus interest and costs.\(^10\)

In appealing the adverse judgment of the circuit court, appellant Carpenter asserted two major arguments. First, he argued that his agreement with Clendenin for the deduction of thirty dollars each pay period was an assignment of earnings pursuant to the West Virginia Code,\(^11\) and as such, was in violation of the form requirements for a valid assignment of earnings as set forth in the Wage Payment and Collection Act.\(^12\) Additionally, Carpenter asserted that his agreement with Clendenin was not exempt from the form requirements of West Virginia Code section 21-5-3 as a deduction,\(^13\) since the Wage Payment and Collection Act specifically limits deductions to those de-

\(^4\) 305 S.E.2d at 338.
\(^5\) Id. at 334-35.
\(^6\) Id. at 333.
\(^7\) Id. at 334.
\(^8\) Id.
\(^9\) Id.
\(^10\) Id.
\(^12\) W. VA. CODE § 21-5-3 (1981).
\(^13\) The applicable provision of W. VA. CODE § 21-5-3 (1981) reads: [N]othing herein contained shall be construed as affecting the right of employer and employees to agree between themselves as to deductions to be made from the payroll of employees . . . .
fined in the Act. The Appellee Clendenin, on the other hand, argued that the agreement was not an assignment, since the thirty dollars per pay period taken from Carpenter's earnings was not transferred "to another" as an assignment is defined in the Act, but was paid to itself.

The court went through a three-part analysis to resolve the first issue regarding whether or not the agreement between Carpenter and Clendenin was an assignment of earnings under the Act provisions. First, following well-established precedent in West Virginia, the court read the two statutes in pari materia. In construing these statutes together, the court found a concurring protective function. The court's opinion, written by Justice McHugh, emphasized the legislative intent behind the West Virginia Consumer Credit and Protection Act, which is to protect consumers of credit, and its consistency with the purpose behind the enactment of the West Virginia Wage Payment and Collection Act, which is to "protect working people and assist them in collection of compensation wrongly withheld." With these considerations in mind, the court held that it would be inconsistent with the protective functions of the Acts to exempt employers from the provisions of both Acts.

Second, as additional support to impose the Acts' restrictions upon employers, the court found that it was the Legislature's intent to impose the restrictions upon employers. The court found this legislative intent evidenced by use of the word "deductions" throughout the statutes, and the similarity of the definitions of "deductions" in both statutes. Deductions, as defined in both statutes, included general employer/employee matters. As

---

94 W. Va. Code § 21-5-1(g) (1981) provides:
The term "deductions" includes amounts required by law to be withheld, and amounts authorized for union or club dues, pension plans, payroll saving plans, credit unions, charities and hospitalization and medical insurance.

95 W. Va. Code § 46A-2-116(b) (1980) provides in pertinent part:
"Assignment of earnings" includes all forms of assignments, deductions, transfers, or sales of earnings to another . . . . (emphasis added).

96 305 S.E.2d at 336.


98 305 S.E.2d at 336.


101 305 S.E.2d at 337.

102 Id.

103 Id.
defined by the Wage Payment and Collection Act, deductions include those specific deductions enumerated within the statutory definition, such as union and credit dues, pension plans, and medical insurance, plus those deductions required by law.\textsuperscript{104} The Consumer Credit and Protection Act provides similar language in defining deductions.\textsuperscript{105}

Having determined that employers are subject to the provisions of the Acts, the court turned to the third part of its analysis to determine whether the agreement between Carpenter and Clendenin was a type of deduction which was exempt from the requirements of West Virginia Code section 21-5-3.\textsuperscript{110} The final provision of section 21-5-3 states that the form requirements therein will not affect the right of employer and employee to agree between themselves as to deductions to be made from the payroll of the employee.\textsuperscript{111} The court took a very restrictive view of this provision, concentrating on the word “deductions.” Reasserting its earlier analysis of “deductions,” the court held it only applied to the specifically enumerated categories in the statutory definition of “deductions” or those required by law.\textsuperscript{112} Since the agreement between Carpenter and Clendenin was not an exempted type, described by the statutory definitions, the court held that the agreement must meet the form requirements of section 21-5-3.\textsuperscript{113} These form requirements require that an assignment (1) not extend beyond one year, (2) be notarized, (3) specify the total amount due, (4) state that three-fourths of the wages are exempt from assignment, and (5) contain a written acceptance by the employer.\textsuperscript{114}

Following the conclusions from its three point analysis, the court rejected Clendenin’s argument and held that the phrase “to another,” as used in West Virginia Code section 46A-2-116(2)(b) “includes an employer when that employer is also the creditor of the employee.”\textsuperscript{115} Thus, the court found the agreement between appellant and Clendenin to be assignment of wages which must adhere to the form requirements of West Virginia Code section 21-5-3.\textsuperscript{116} When viewed in light of the five form requirements set forth in section 21-5-3,\textsuperscript{117} the court found the assignment between Clendenin and

\textsuperscript{104} Id.; W. VA. Code § 21-5-1(g) (1981) lists the specific deductions as “union or club dues, pension plans, payroll savings plans, credit unions, charities and hospitalization and medical insurance.”

\textsuperscript{105} 305 S.E.2d at 337; see W. VA. Code § 46A-2-116(2)(b) (1980).

\textsuperscript{106} 305 S.E.2d at 337.

\textsuperscript{107} W. VA. Code § 21-5-3 (1981).

\textsuperscript{108} 305 S.E.2d at 337.

\textsuperscript{109} Id.; W. VA. Code § 21-5-3 (1979).

\textsuperscript{110} W. VA. Code § 21-5-3 (1979).

\textsuperscript{111} 305 S.E.2d at 338.

\textsuperscript{112} Id.

\textsuperscript{113} The five form requirements are that the assignment shall:

(1) not extend beyond one year;
Carpenter lacking in all the requirements, and therefore the assignment was void.\textsuperscript{114}

Appellant's second major argument of error in \textit{Clendenin} was based upon the trial court ruling both as a matter of law and fact that the credit extended by Clendenin was not part of an open-end credit plan pursuant to the Truth in Lending Act\textsuperscript{115} and Regulation Z.\textsuperscript{116} Treating the trial court's ruling as one for summary judgment, the court reviewed the record of the case closely to determine if there was a genuine issue as to any material fact regarding the credit relationship between appellant and Clendenin. Contrary to the trial court's ruling, the court found several factual issues in conflict. Although Clendenin asserted that its credit policy did not permit installment payments, the record showed that the appellant made several such payments.\textsuperscript{117} In addition, credit memoranda issued by Clendenin seemed to contradict sworn statements by the general manager of Clendenin concerning the regular terms of its credit.\textsuperscript{118} Finally, the billing practices of Clendenin indicated that a debtor could defer an outstanding credit balance until the next billing period simply by assuming a monthly finance charge.\textsuperscript{119}

Based upon these conflicting issues of fact the court concluded that there was a genuine issue as to the credit relationship existing between appellant Carpenter and his employer, Clendenin Lumber and Supply Company.\textsuperscript{120} Thus, the court followed the well-established general principle that "[a] motion for summary judgment should be granted only when it is clear that there is not genuine issue of fact to be tried,"\textsuperscript{121} and reversed the trial court's order.\textsuperscript{122}

(2) be notarized;
(3) specify the total amount due;
(4) state that three fourths of the wages are exempt from assignment;
(5) contain a written acceptance by the employer.

\textit{Id.}

\textsuperscript{114} \textit{Id.}

\textsuperscript{115} 15 U.S.C. §§ 1601-1677e (1976 & Supp. V 1981) (Purpose is to assure a meaningful disclosure of credit terms so that a consumer will be able to compare more readily the various credit terms available and avoid uninformed use of credit, and to protect the consumer regarding inaccurate and unfair credit billing and credit card practices. Open End Credit plan means a plan under which the creditor reasonably contemplates repeated transactions, prescribes terms of transactions and provides for a finance charge on the outstanding balance.).

\textsuperscript{116} 12 C.F.R. §§ 226.1-.29 (1983) (Issued to implement the federal Truth in Lending and Fair Credit Billing Acts. Its purpose is "to promote the informed use of consumer credit by requiring disclosure about its terms and costs.").

\textsuperscript{117} 305 S.E.2d at 339.

\textsuperscript{118} \textit{Id.}

\textsuperscript{119} \textit{Id.} at 339-40.

\textsuperscript{120} \textit{Id.} at 340.


\textsuperscript{122} 305 S.E.2d at 340.
In deciding Corte Company v. County Commission, the West Virginia Supreme Court of Appeals followed the generally held rule that "if a municipality wrongfully receives, holds, diverts, or disposes of . . . money or property . . . it becomes liable for interest for the period covered by the wrong . . . ." The court's heavy reliance upon fault analysis tempered its general holding that county commissions may be liable in contract actions for interest pursuant to provisions of the West Virginia Code.

Corte Company, Inc. appealed the lower court's denial of prejudgment interest on a contractual debt owed by the appellee, County Commission of McDowell County. Pursuant to a contract with the County Commission, Corte had performed certain remodeling work. Upon completion of the work, an unpaid balance of $32,555.75 remained outstanding. The County Commission admitted that it owed the unpaid balance, but asserted that the non-payment was through no fault of its own. The remodeling had been funded through money from the United States government. The final installment was still forthcoming. Approximately seven months after completion of the remodeling, the County Commission received the federal monies and paid the appellant the principal amount, but with no interest. The appellant argued that it should receive interest on the late payment pursuant to West Virginia Code section 56-6-27.

To determine if the code section applied to county commissions as well as to private litigants, the court first reviewed the general trend of its past decisions removing county commissions and local boards of education from beneath the umbrella of state constitutional immunity from suit. The court emphasized that it had not distinguished between actions based upon contract and those founded in tort when holding that boards of education do not have state constitutional immunity nor common law governmental immunity

123 299 S.E.2d 16 (W. Va. 1982).
124 56 AM. JUR. 2d Municipal Corporations, Counties and Other Political Subdivisions § 836 (1971).
125 W. VA. CODE § 55-6-27 (1966 & Supp. 1983) provides:
The jury, in any action founded on contract, may allow interest on the principal due, or any part thereof, and in all cases they shall find the aggregate of principal and interest due at the time of the trial, after allowing all proper credits, payments and sets-off; and judgment shall be entered for such aggregate with interest from the date of the verdict.
126 299 S.E.2d at 17.
127 Id.
128 Id. at 17-18.
129 Id. at 18.
130 See Ohio Valley Contractors v. Board of Educ., 293 S.E.2d 437 (W. Va. 1982) (consolidated contract and tort actions in which the court stated that local boards of education do not have state constitutional nor common law governmental immunity from suit); Boggs v. Board of Educ., 244 S.E.2d 799 (W. Va. 1978), overruled, 293 S.E.2d 437 (W. Va. 1982) (tort action in which court held County Commissions not within the state constitutional immunity from suit).
131 299 S.E.2d at 18.
from suit. From this review the court decided that there was also no basis for distinguishing between actions founded upon contract and those founded upon tort when deciding whether a county commission is immune from suit. Second, the opinion pointed out that in West Virginia county commissions have long been liable for breaches of valid contracts. The court, therefore, agreed with the appellant, holding that county commissions are subject to the provisions of West Virginia Code section 56-6-27, and consequently may be liable for interest on contractual debts.

The opinion, written by Justice McHugh, did not stop with this conclusion, but went on to consider the concept of fault as it relates to interest paid on contractual debts by municipal corporations. Looking first to past precedent in West Virginia, the court found that relying exclusively upon fault analysis, without any reference to section 56-6-27 of the West Virginia Code, a municipal corporation was adjudged liable for post-judgment interest where it had been partly responsible for the injury of the plaintiff. The court also looked at the national trend, finding that generally, even in the absence of statute, municipal corporations have been held liable for interest where they wrongfully receive, hold, divert, or dispose of money or property.

Turning back to the facts in Corte Company, the court outlined a two step procedure for determining the issue of fault. The court first held that fault depended upon two possible acts by the McDowell County Commission: (1) failure to make a reasonable effort to secure final payment from the federal government; or (2) the occurrence of an unreasonable delay in payment after receipt of the funds. The court indicated that if either of the foregoing acts is demonstrated, then the county commission had wrongfully withheld the funds and was at fault. If neither of those two acts is found, however, the County Commission may still not be free from all liability and the analysis proceeds to step two. Step two depends upon the contractor’s knowledge as to the source of the funding for the project. If Corte knew that the funds would have to be received from the federal government before he could be paid, then ideas of equity and fairness would prevent the court

133 299 S.E.2d at 18.
134 Id.
135 Id. at 19.
136 Id.
139 299 S.E.2d at 20.
140 Id.
from penalizing the McDowell County Commission for the federal government's tardiness.\textsuperscript{141}

In summary, the court held:

When a contract is entered into between a county commission and a contractor for certain construction work, and the contractor knew, or had reason to believe, that funds from the federal government would be used for such work, then the contractor may not recover interest on the amount owed by the county commission if a delay in payment from the federal government occurs, provided that the county commission makes a reasonable effort to insure that payment of the debt will be made in a timely manner.\textsuperscript{142}

The case was then remanded to fully develop the facts needed for the fault analysis.\textsuperscript{143}

III. SUGGESTEE EXECUTION


In the factual circumstances leading to the case of \textit{AFC Industries, Inc. v. Credithrift of America, Inc.},\textsuperscript{144} the appellee, Credithrift of America, sought to execute a judgment it had obtained against the appellants, Mr. and Mrs. Jackie E. Stewart, by issuing a suggestee execution\textsuperscript{145} against Mr. Stewart's wages. Appellant Stewart, in response to the execution, sought to exempt $1,000.00 of his wages pursuant to West Virginia Code section 38-8-1.\textsuperscript{146} In compliance with the personal property exemption requirement of this statute, AFC Industries excluded the first $1,000.00 of the appellant's full salary, thereafter withholding a portion of his wages under the suggestee ex-

\textsuperscript{141} Id.

\textsuperscript{142} Id.

\textsuperscript{143} Id.

\textsuperscript{144} No. 15595 (W. Va. Mar. 10, 1983).

\textsuperscript{145} W. VA. CODE § 38-5A-3 (Supp. 1983) 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.

\textsuperscript{146} The applicable provision of W. VA. CODE § 38-8-1 (Supp. 1983) reads:

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 or other process. . . .
Upon Stewart’s objection to this withholding, AFC Industries filed an interpleader action in circuit court.\(^{148}\)

In the lower court Stewart argued that the $1,000.00 exemption should apply only to that portion of his wages which could be attached by suggestee execution.\(^{145}\) Creditthrift asserted that the statutory $1,000.00 exemption applied to the debtor’s total wages.\(^{159}\) The circuit court read the code sections\(^{151}\) in pari materia and held the exemption applied to the debtor’s full salary or wages after deductions for state and federal taxes.\(^{152}\)

On appeal, Justice Neely, writing for the majority, found AFC Industries, Inc. a case of first impression.\(^{153}\) The court emphasized that the case turned upon the proper interpretation of West Virginia Code section 38-5A-9.\(^{154}\) This code section applies the $1,000.00 statutory exemption of section 38-8-1 to levies against the wages or salary of a debtor. Ordinarily, the exemption is applied to the personal property of the debtor.\(^{155}\)

The court illustrated that under the appellant’s interpretation of the statutes, if a debtor chooses to apply the exemption to personal property or, for example, cash in a bank account, the debtor is limited to a $1,000.00 exemption. However, if the debtor chooses to apply the exemption to wages or salary, and if it can only be applied, as argued by the appellant, to the twenty percent which can be attached by suggestee execution, the $1,000.00 exemption increases to a $5,000.00 exemption.\(^{156}\)

The West Virginia Supreme Court of Appeals followed the traditional

---

\(^{147}\) By suggestee execution, pursuant to W. Va. Code § 38-5A-3 (Supp. 1983), a judgment creditor may either attach up to 20% of a debtor’s wages or the amount of the debtor’s wages in excess of 30 times the federal minimum hourly wage, whichever is greater.


\(^{149}\) Id. at 1.

\(^{150}\) Id. at 2.


\(^{152}\) No. 15595, slip op. at 4.

\(^{153}\) Id.

\(^{154}\) Id.; W. Va. Code § 38-5A-9 (1966) provides:

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.

\(^{155}\) The pertinent part of W. Va. Code § 38-8-1 reads: "[a]ny head of a household . . . may set apart and hold personal property not exceeding one thousand dollars in value to be exempt from execution. . . . (emphasis supplied).

\(^{156}\) AFC Indus., No. 15595, slip op. at 5.
cardinal rule for construing exemption statutes. First and foremost, the court must ascertain the intent of the Legislature, and see that this intent is carried out. Relying upon the explicit wording of West Virginia Code section 38-5A-9, the court found that the result suggested by the appellant was not intended by the legislature. First, in drafting the statute, the Legislature did not limit the exemption of money just from suggestee execution, but from all levy. Second, the statute specifically provided that the exemption should be "in the manner and to the extent provided for by Article 8 [§ 38-8-1 et seq.] of this chapter."

Therefore, the court affirmed the holding of the circuit court, and stated:

[The Legislature intended for a debtor to be able to protect the first thousand dollars of money owed to him from any process of execution whatsoever, but that once his or her thousand dollar exemption had been exhausted, all subsequent money would be liable to suggestee execution to the extent authorized by Code, 38-5A-3 [1979].

The $1,000.00 debtor's exemption applied against the appellant's actual salary due, not against only that portion of his salary which was determined to be subject to suggestee execution.

IV. CONTRACTS


The West Virginia Supreme Court of Appeals joined the modern weight of authority favoring arbitration over litigation in the 1977 case of Board of Education v. W. Harley Miller, Inc. At that time the court espoused a rule of law whereby arbitration provisions which have been bargained for by parties to a contract would be held binding and strictly enforceable. In so holding the court overruled all prior inconsistent West Virginia cases. The per curiam holding in Baker Mine Service, Inc. v. Nutter reaffirmed the

---

118 A cardinal rule of construing exemption laws generally shown in the case law is that the intention of the lawmaker must prevail over the literal sense of the terms. 35 C.J.S. Exemptions § 4 (1960).
120 W. Va. Code § 38-5A-9 (1966) provides in pertinent part: "A judgment debtor to whom money is due or to become due . . . may have the same exempted from levy . . ." (emphasis added).
122 No. 15595, slip op. at 6.
124 Id. at 447.
125 Id. at 448.
126 301 S.E.2d 860 (W. Va. 1983) (per curiam).
court's continued preference for the speedy and economical conflict resolution of arbitration over the often expensive, formal, and time consuming judicial proceeding.\textsuperscript{167}

The parties in \textit{Baker Mine Service, Inc.}, entered into a sales contract consisting of three documents: a plan of re-organization and merger, an escrow agreement, and a covenant not to compete.\textsuperscript{168} Both the plan and the escrow agreement contained arbitration clauses. The plan provided that “[a]ny controversy or claim arising out of or relating to this Plan or Escrow Agreement, or this breach of the Plan or Escrow Agreement shall be settled by arbitration.”\textsuperscript{169} In a section entitled “Arbitration Exclusive Remedy,” the escrow agreement provided that the sellers could only dispute any setoffs or retentions in the escrow stock by “initiating an arbitration proceeding.”\textsuperscript{170}

Petitioner-buyer, Baker International Corporation, retained portions of escrow stock which were to be distributed to the respondent-seller, Daniel Minnix.\textsuperscript{171} This retention was due to alleged breaches of the respondent's fiduciary duty to Baker Mine Services.\textsuperscript{172} The respondent filed a civil action in circuit court to settle the dispute, asserting that the notification of retention sent by Baker International occurred after the termination date provided by the plan for such claims.\textsuperscript{173} The petitioners maintained that respondent should be prohibited from proceeding with the civil action, arguing that the dispute should be settled by arbitration as provided for in the contract.\textsuperscript{174} The trial court denied the petitioners' motion to dismiss, and the petitioners appealed.

Noting that parties to a contract can narrow the scope of arbitration agreements by limiting them to specific subjects or particular time periods, the court stressed that the parties in this case did not specifically limit the arbitration agreement. Instead, the contract between the parties expressly provided that arbitration would be the exclusive remedy to settle their disputes.\textsuperscript{175} Following its own precedent,\textsuperscript{176} the court reviewed the entire written contract, finding that the parties bargained for and intended to arbitrate their differences, rather than subject their differences to litigation, as ex-

\textsuperscript{167} 236 S.E.2d at 442; 5 Am. Jur. 2d Arbitration and Award § 1 (1982).
\textsuperscript{168} 301 S.E.2d at 861.
\textsuperscript{169} Id. at 862.
\textsuperscript{170} Id.
\textsuperscript{171} Id.
\textsuperscript{172} Id.
\textsuperscript{173} Id.
\textsuperscript{174} Id. at 861.
\textsuperscript{175} Id. at 862.
\textsuperscript{176} "Where parties to a contract agree to arbitrate either all disputes or particular limited disputes arising under the contract, and where the parties bargained for the arbitration provision, then, arbitration is mandatory..." Board of Educ. v. W. Harley Miller, Inc., 236 S.E.2d 439, 447 (W. Va. 1977).
pressed by the broad language of the arbitration provisions. \textsuperscript{177} Furthermore, the court re-asserted the general rule it adopted in \textit{State ex rel. Ranger Fuel v. Lilly} \textsuperscript{178} that “the duty to arbitrate under an arbitration clause in a contract survives the termination of the contract.” \textsuperscript{179} Thus, a writ of prohibition was awarded by the court, and the respondent was prevented from proceeding with the civil action until the dispute had been arbitrated as provided for under the contract provisions. \textsuperscript{180}

\textit{Linda Rae Artimesz}

\textsuperscript{177} 301 S.E.2d at 862.
\textsuperscript{179} 301 S.E.2d at 862 (quoting \textit{Ranger Fuel}, 267 S.E.2d at 437).
\textsuperscript{180} \textit{Id.}