

100 South Queen Street, Suite 200, Martinsburg, WV, 25401 / 304.596.2277 T / 304.596.2111 F  
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# WEST VIRGINIA Construction Law Compendium

*The West Virginia Construction Law Compendium is not intended to provide specific legal advice or opinions, but rather to provide general information. If you need additional information regarding Construction law, or in relation to a specific claim, please do not hesitate to call upon us. (January 2020)*

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This outline is intended to provide a general overview of West Virginia's construction law. The discussion on any particular topic is not necessarily an indication of the totality of the law related to any particular area of West Virginia's construction law.

## **I. BREACH OF CONTRACT**

### **A. Statute of Limitations**

Generally, in West Virginia, a breach of contract claim on a written contract must be brought within ten years from the time the right to bring the same shall have accrued. *See*, W. Va. Code § 55-2-6. If the claim of breach of contract is based on an oral, unwritten, or implied contract, the cause of action must be brought within five years from the time the right to bring the same shall have accrued. W. Va. Code § 55-2-6.

The statute of limitations regarding written contracts and oral or unwritten or implied contracts shall apply to suits brought by the State of West Virginia or on its behalf unless otherwise expressly provided. *See*, W. Va. Code § 55-2-19.

### **B. Measure of Damages for Breach of Contract**

Generally, the amount of compensatory damages recoverable by an injured party incurred through the breach of a contractual obligation are those as may be fairly and reasonably considered as arising naturally; that is, according to the usual course of things, from the breach of the contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of its breach, is that which will put the injured party in the monetary position he would have been in had the contract been performed. *See, Kentucky Fried Chicken of Morgantown, Inc. v. Sellaro*, 158 W. Va. 708, 214 S.E.2d 823 (1975). Compensatory damages recoverable by an injured party incurred through the breach of a contractual obligation must be proved with reasonable certainty. *Kentucky Fried Chicken of Morgantown, Inc. v. Sellaro*, 158 W. Va. 708, 214 S.E.2d 823 (1975).

In instances where the breach of a contractual obligation is in the context of a construction contract, the West Virginia Supreme Court of Appeals has held that the proper measure of damages in such cases involving building contracts is the cost of repairing the defects or completing the work and placing the construction in the condition it should have been in if properly done under the agreement contained in the building contract. *See, Steinbrecher v. Jones*, 151 W. Va. 462, 153 S.E.2d 295 (1967).

### **C. Contractual Exculpatory Clauses**

Contractual exculpatory clauses are generally deemed valid and enforceable, as long as they are freely and fairly made between parties who are in an equal

bargaining position, and there is no public interest with which the agreement interferes. *See, Kyriazis v. University of West Virginia*, 192 W. Va. 60, 450 S.E.2d 649 (1994). However, the West Virginia Supreme Court of Appeals has held that a provider of home inspection services may not seek to relieve itself of liability for failure to comply with the State Fire Commissioner's Certification of Home Inspections Rule (87 CSR 5), and thus, the inclusion of a limitation of liability provision, anticipatory release, or exculpatory clause in a contract for home inspection services which does so is invalid and unenforceable as contrary to the public policy of the State. *See, Finch v. Inspectech, LLC*, 229 W.Va. 147, 727 S.E.2d 823 (2012). Please refer to the section on Indemnity, VII below.

## **II. NEGLIGENCE**

### **A. General**

Negligence is defined as a failure to use ordinary care. Ordinary care is that which a "reasonable person" would use under the given circumstances. If this breach of ordinary care is found to be the proximate cause of damage to the plaintiff, the plaintiff may recover. Thus, in West Virginia a prima facie case of actionable negligence is that state of facts which will support a jury finding that the defendant was guilty of negligence which was the proximate cause of plaintiff's injuries, that is, it is a case that has proceeded upon sufficient proof to the stage where it must be submitted to a jury and not decided against the plaintiff as a matter of law. *See, Morris v. City of Wheeling*, 140 W. Va. 78, 82 S.E.2d 536 (1954).

The theory of negligence *per se* suggests that the conduct of the defendant is negligent as a matter of course without the need for further inquiry. Plaintiffs often argue negligence *per se* in conjunction with a statutory provision that allows persons injured by another's violation of any statute to recover for the same. *See*, W. Va. Code § 55-7-9. Thus, plaintiffs argue that if the defendant's conduct violated any statutory obligation, the defendant is guilty of negligence *per se* and plaintiff should automatically recover. While the defendant may be found to be negligent *per se*, the court will still require plaintiff to prove that such negligence is the proximate cause of plaintiff's injury.

### **B. Comparative Fault**

West Virginia is a "modified comparative negligence" jurisdiction. Therefore, a plaintiff can recover as long as the plaintiff's own negligence does not equal or exceed the combined negligence of the other parties involved in the accident. Conversely, a plaintiff may not recover if his or her negligence exceeds or equals the combined negligence of the other parties involved in the accident. *See, Bradley v. Appalachian Power Co.*, 163 W. Va. 332, 256 S.E.2d 879 (1979).

In 2015, the West Virginia Legislature adopted West Virginia Code § 55-7-13a, which defines comparative fault as "the degree to which the fault of a person was a proximate cause of an alleged personal injury or death or damage to property,

expressed as a percentage.” The statute further provides that “[i]n any action based on tort or any other legal theory seeking damages for personal injury, property damage, or wrongful death, recovery shall be predicated upon principles of comparative fault and the liability of each person, including plaintiffs, defendants and nonparties who proximately caused the damages, shall be allocated to each applicable person in direct proportion to that person's percentage of fault.” Finally, “[t]he total of the percentages of comparative fault allocated by the trier of fact with respect to a particular incident or injury must equal either zero percent or one hundred percent.” W. Va. Code § 55-7-13a.

### **C. Violation of a Statute**

The West Virginia Supreme Court of Appeals has held that the violation of a statute is prima facie evidence of negligence, and in order to be actionable, such violation must be the proximate cause of the plaintiff's injury. *See, Anderson v. Moulder*, 183 W.Va. 77, 394 S.E.2d 61 (1990).

### **D. Joint and Several Liability**

As a modified comparative jurisdiction, a plaintiff may elect to sue any or all of those responsible for his injuries and collect his damages from whomever is able to pay, irrespective of their percentage of fault. *See, Sitzes v. Anchor Motor Freight, Inc.*, 169 W. Va. 698, 289 S.E.2d 679 (1982). However, the State of West Virginia has abolished joint liability, and adopted several liability in any action based on tort or any other legal theory seeking damages for personal injury, property damage, or wrongful death, predicated on the amount of compensatory damages allocated to a defendant in direct proportion to that defendant's percentage of fault. *See, W.Va. Code § 55-7-13(c)*. Joint and Several Liability still applies where a defendant whose conduct constitutes driving a vehicle under the influence of alcohol, a controlled substance, or any drug or combination thereof, which is a proximate cause of the damages suffered by the plaintiff; where a defendant whose acts or omissions constitute criminal conduct, which is a proximate cause of the damages suffered by the plaintiff; or where a defendant whose conduct constitutes an illegal disposal of hazardous waste, which is a proximate cause of the damages suffered by the plaintiff. If a plaintiff through good faith efforts is unable to collect from a liable defendant, the plaintiff may, not one year after judgment becomes final, move the court for the reallocation of any uncollectible amount among the other parties found to be liable. The court may not reallocate to any defendant an uncollectible amount greater than that defendant's percentage of fault multiplied by the uncollectible amount, and there shall be no reallocation against a defendant whose percentage of fault is equal to or less than the plaintiff's percentage of fault.

As a modified comparative jurisdiction, a right of comparative contribution exists between joint tortfeasors inter se based upon their relative degrees of primary fault or negligence. *See, Sitzes v. Anchor Motor Freight, Inc.*, 169 W. Va. 698, 289 S.E.2d 679 (1982). Once comparative fault in regard to contribution is recognized, recovery can be had by one joint tortfeasor inter se regardless of their respective degree of fault so long as the one has paid more than his pro tanto share to the plaintiff. *Sitzes v.*

*Anchor Motor Freight, Inc.*, 169 W. Va. 698, 289 S.E.2d 679 (1982).

### **III. BREACH OF WARRANTY**

Breach of warranty claims in construction cases generally involve defect claims and/or workmanship claims. These types of breach of warranty claims may be based on express warranty terms contained within a written contract, or on implied warranty terms. At common law, a plaintiff was required to prove four elements: 1) the existence of a warranty, 2) the breach of that warranty, 3) causation, and 4) damages. West Virginia follows the majority rule, which does not require privity of contract between the plaintiff and defendant in an action for breach of an express or implied warranty. *See, Dawson v. Canteen Corp.*, 158 W. Va. 516, 212 S.E.2d 82 (1975).

#### **A. Breach of Express Warranty**

Written warranty clauses in contracts typically define the warranty terms and quantify the length of time that a contractor will be liable to the owner for defects. Moreover, these written clauses often define each party's obligations relative to the giving of notice regarding a defect, and the period of time necessary to either replace or repair said defect after notice is given. It is important to note that on many jobs, contractors utilize subcontractors for the performance of work contained in the main contract between the contractor and the owner. To that end, the subcontractors will be liable to the contractor for breach of their own warranty as defined in their written subcontractor agreement. It is typical in West Virginia for subcontractors to warrant their work for a period of one year from the final acceptance of the project.

Under the West Virginia Uniform Commercial Code (U.C.C.), express warranties may be created by the seller of goods even though the seller did not use formal words or have a specific intention to make an express warranty. Specifically, the U.C.C. provides that express warranties are created by the seller by any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain, or any description of the goods which is made part of the basis of the bargain, or by any sample or model with is made part of the basis of the bargain. *See, W. Va. Code §46-2-313.*

The U.C.C. also provides that words or conduct of the parties can negate or limit an express warranty and can exclude or modify the implied warranty of merchantability. *See, W. Va. Code §46-2-316.* In construing the foregoing U.C.C. provision in the context of the sale of used mining and construction equipment wherein the seller made express assurances as to repairs and performance of said equipment, the West Virginia Supreme Court of Appeals held that where a seller promises to pay for repairs to goods delivered to the buyer in a defective condition and the buyer accepts the defective goods in reliance upon the



promise to repair, such promises of the seller constitute express warranties. *See, Mountaineer Contractors, Inc. v. Mountain State Mack, Inc.*, 165 W. Va. 292, 268 S.E.2d 886 (1980).

Similar in fashion to the creation of the foregoing U.C.C. express warranties, the West Virginia legislature has created express warranties of quality for the protection of purchasers who buy units created under the West Virginia Uniform Common Interest Ownership Act. *See*, W. Va. Code §36B-4-113. Under the Act, the express warranties made by the seller to a purchaser of a unit, if relied upon by the purchaser, are created by any affirmation of fact or promise which relates to the unit, any model or description of the physical characteristics of the common interest community, and any model of the quantity or extent of the real estate comprising the common interest community.

## **B. Breach of Implied Warranty**

An implied warranty of fitness for particular purpose exists if, at the time of contracting, the seller has reason to know any particular purpose for which the goods are required and that the buyer is relying of the seller's skill or judgment to select or furnish suitable goods. *See*, W. Va. Code §46-2-315.

An implied warranty of merchantability exists when a merchant sells goods. Merchantable goods must: pass without objection in the trade under the contract description; in the case of fungible goods, be of fair and average quality within the description; be fit for the ordinary purposes for which such goods are used; run within the variations permitted by the contract, of even kind, quality and quantity within each unit and among all units involved; be adequately contained, packaged, and labeled as the contract may require; and conform to any promises or affirmations of fact made on the container or label. *See*, W. Va. Code §46-2-314.

The foregoing implied warranties created under the U.C.C. also extend to subcontractors and their liability to contractors relative to the workmanlike manner of their work and fitness for the intended use.

In the area of home construction and implied warranties, the West Virginia Supreme Court of Appeals has held that the purchaser of a new home is entitled to an implied warranty of habitability or fitness which requires that the dwelling be constructed by the builder in a workmanlike manner and that the property be reasonably fit for its intended use of human habitation. *See, Gamble v. Main*, 171 W. Va. 469, 300 S.E.2d 110 (1983). While creating the implied warranty of habitability or fitness, the Court also evaluated the Plaintiff's claims relative to adverse soil conditions, and further held that the implied warranty of habitability or fitness does not extend to adverse soil conditions which the builder is unaware of or could not have discovered by the exercise of reasonable care. *Gamble v. Main*, 171 W. Va. 469, 300 S.E.2d 110 (1983).

Subsequently, the West Virginia Supreme Court of Appeals has held that the implied warranties of habitability and fitness for use as a family home may be extended to second and subsequent purchasers for a reasonable length of time after construction, but such warranties are limited to latent defects which are not discoverable by the subsequent purchasers through reasonable inspection and which become manifest only after purchase. *See, Sewell v. Gregory*, 179 W. Va. 585, 371 S.E.2d 82 (1988). Thus, in applying the discovery rule to such latent defects, the Court further held that the two year statute of limitation for a tort action arising from latent defects in the construction of a house begins to run when the injured parties knew, or by the exercise of reasonable diligence should have known, of the nature of their injury and its sources, and determining that point in time is a question of fact to be determined by the jury. *Sewell v. Gregory*, 179 W. Va. 585, 371 S.E.2d 82 (1988).

The West Virginia legislature has created implied warranties of quality for the protection of purchasers who buy units created under the West Virginia Uniform Common Interest Ownership Act. *See*, W. Va. Code §36B-4-114. Under the Act, the declarant and any dealer impliedly warrants that a unit and the common elements in the common interest community are suitable for the ordinary uses of real estate of its type and that any improvements will be free from defective materials, and will be constructed in accordance with applicable law, according to sound engineering and construction standards, and in a workmanlike manner.

#### **IV. BREACH OF CONTRACT/WARRANTY UNDER THE U.C.C.**

The statute of limitations on contracts for sales of goods is four years after the cause of action accrued. The original agreement between the parties can reduce the period of limitations to not less than one year, but may not extend it. *See*, W. Va. Code §46-2-725. The cause of action accrues when the breach occurs, regardless of whether or not the injured party knows of the breach. W. Va. Code §46-2-725.

#### **V. FRAUD AND MISREPRESENTATION**

In West Virginia, the essential elements in an action for fraud are: 1) that the act complained to be fraudulent was the act of the defendant or induced by him; 2) that it was material and false; that plaintiff relied on it and was justified under the circumstances in relying upon it; and 3) that he was damaged because he relied on it. *See, Lengyel v. Lint*, 167 W. Va. 272, 280 S.E.2d 66 (1981). Moreover, the West Virginia Supreme Court of Appeals has examined fraud in the contractual context, and has held that where one person induces another to enter into a contract by false representations, which he is in a situation to know, and which it is his duty to know, are untrue, he, in contemplation of law, does know the statements to be untrue, and, consequently, they are held to be fraudulent, and the person injured has a remedy for the loss sustained by an action for damages. *See, Horton v. Tyree*, 104 W. Va. 238, 139 S.E. 737 (1927).

In West Virginia, the statute of limitations for an action for fraud is two years from the date of the fraud or misrepresentation. *See*, W. Va. Code § 55-2-12. However, the West Virginia Supreme Court of Appeals has held that the discovery rule applies such that the statute of limitations for a claim for an action for fraud does not begin to run until the injured person knows, or by the exercise of reasonable diligence should know, of the nature of his injury, and determining that point in time is a question of fact and should be answered by the jury. *See, Stemple v. Dobson* 184 W. Va. 317, 400 S.E.2d 561 (1990).

## **VI. STRICT LIABILITY CLAIMS**

Strict liability is not generally recognized in West Virginia, except for "abnormally dangerous and ultra-hazardous activities" (such as blasting, aviation, and aerial broadcast spraying). *See, Bailey v. S. J. Groves & Sons Co.*, 159 W. Va. 864, 230 S.E.2d 267 (1951); *Parcell v. United States*, 104 F. Supp. 110 (S.D. Wa. 1951); *Kell v. Appalachian Power Co.*, 170 W. Va. 14, 289 S.E.2d 450 (1982).

To that end, the West Virginia Supreme Court of Appeals has held that the use of explosives in blasting operations, though necessary and lawfully used by a contractor in the performance of a construction contract, being intrinsically dangerous and extraordinary hazardous, renders the contractor liable for damages proximately resulting to the property of another from such blasting, without negligence on the part of the contractor; and no exception to this general rule results from the fact that the contractor, while using the explosives in blasting operations, is on the land of the complaining property owner and using such explosives in blasting operations pursuant to a written contract with the landowner to perform a construction project on the complaining property owner's land. *See Moore, Kelly, & Reddish, Inc. v. Shannondale, Inc.*, 152 W. Va. 549, 165 S.E.2d 113 (1968).

Moreover, the West Virginia Supreme Court of Appeals has adopted the Restatement (Second) of Torts, § 519 (1976), to determine abnormally dangerous activities that trigger strict liability based on the following six factors: 1) existence of a high degree of risk of some harm to the person, land or chattels of others; 2) likelihood that the harm that results from it will be great; 3) inability to eliminate the risk by the exercise of reasonable care; 4) extent to which the activity is not a matter of common usage; 5) inappropriateness of the activity to the place where it is carried on; and 6) extent to which its value to the community is outweighed by its dangerous attributes. *See Peneschi v. National Steel Corp.*, 170 W. Va. 511, 295 S.E.2d 1 (1982).

## **VII. INDEMNITY CLAIMS**

The right to indemnity – the right to be held harmless or to be secure against loss or damage from the occurrence of an anticipated loss – can arise from either a written agreement amongst the parties (express), or from the parties conduct and actions as a matter of law (implied). Typically, the parties to construction contracts negotiate the right of indemnification from and against all claims, damages, losses, and expenses

arising out of and resulting from performance of the work where such claims are caused by any negligent act or omission of a party, including its subcontractors, or their agents or employees.

In determining the type of indemnity between parties, the West Virginia Supreme Court of Appeals has held that there are two basic types of indemnity: express indemnity, based on a written agreement, and implied indemnity, arising out of the relationship of the parties. One of the fundamental distinctions between express indemnity and implied indemnity is that an express indemnity agreement can provide the person having the benefit of the agreement, the indemnitee, indemnification even though the indemnitee is at fault. Such a result is allowed because express indemnity agreements are based on contract principles. Courts have enforced indemnity rights so long as they are not unlawful. *See, Valloric v. Dravo, Corp.*, 178 W. Va. 14, 357 S.E.2d 207 (1987).

#### **A. Express Indemnity**

When a potential liability exists, that may be covered by an indemnity agreement, the indemnitee must show in his indemnity suit that the original claim is covered by the indemnity agreement, that he was exposed to liability which could reasonably be expected to lead to an adverse judgment, and that the amount of settlement was reasonable. *See, Valloric v. Dravo, Corp.*, 178 W. Va. 14, 357 S.E.2d 207 (1987). In addition, the indemnitee has a duty to notify the indemnitor, and where an indemnitor is given reasonable notice by the indemnitee of a claim that is covered by the indemnity agreement and is afforded an opportunity to defend the claim and fails to do so, the indemnitor is then bound by the judgment against the indemnitee if it was rendered without collusion on the part of the indemnitee. *See, Vankirk v. Green Construction Company*, 195 W. Va. 714, 466 S.E.2d 782 (1995). Finally, in regard to attorney's fees and costs, if an indemnitor does not assume control of the indemnitee's defense, he will be held liable for the attorney's fees and costs incurred by the indemnitee in the defense of the original action. This rule is predicated on the fact that the indemnitor has originally been notified of the underlying action, has been requested to assume the defense, and has refused to do so. *See, Valloric v. Dravo, Corp.*, 178 W. Va. 14, 357 S.E.2d 207 (1987).

The West Virginia legislature enacted West Virginia Code §55-8-14 which specifically states as follows:

“ A covenant, promise, agreement or understanding in or in connection with or collateral to a contract or agreement entered into on or after the effective date of this section, relative to the construction, alteration, repair, addition to, subtraction from, improvement to or maintenance of any building, highway, road, railroad, water, sewer, electrical or gas distribution system, excavation or other structure, project, development or improvement attached to real estate, including moving and demolition in connection therewith, purporting to indemnify against liability for damages arising out of bodily injury to persons or damage to property caused

by or resulting from the sole negligence of the indemnitee, his agents or employees is against public policy and is void and unenforceable and no action shall be maintained thereon. This section does not apply to construction bonds or insurance contracts or agreements.”

**B. Implied Indemnity**

The right to implied indemnity is based upon principles of equity and restitution and one must be without fault to obtain implied indemnity. *See, Sydenstricker v. Unipunch Products, Inc.*, 169 W. Va. 440, 288 S.E.2d 511 (1982). In the context of multi-party non-product liability civil actions, the West Virginia Supreme Court of Appeals has held that a good faith settlement between a plaintiff and defendant will extinguish the right of a non-settling defendant to seek implied indemnity unless such non-settling defendant is without fault. *See, Hager v. Marshall*, 202 W. Va. 577, 505 S.E.2d 640 (1998).

**C. Comparative Indemnity**

West Virginia courts have not addressed the issue of comparative indemnity.

**D. Third Party Beneficiary**

Currently, a third party outside the scope of a contract cannot maintain a cause of action for indemnification in West Virginia. Specifically, the West Virginia Supreme Court of Appeals has held that in the absence of a provision in a contract specifically stating that such contract shall inure to the benefit of a third person, there is a presumption that the contracting parties did not so intend and in order to overcome such presumption the implication from the contract as a whole and the surrounding circumstances must be so strong as to be tantamount to an express declaration. *See, Ison v. Daniel Crisp Corp.*, 146 W. Va. 786, 122 S.E.2d 553 (1961).

**VIII. STATUTE OF REPOSE**

West Virginia has enacted a statute of repose that seeks to protect architects and builders from claims asserted many years after construction is complete. West Virginia’s statute of repose states that no action to recover damages for any deficiency in the planning, design, surveying, observation or supervision of any construction or the actual construction of any improvement to real property, or, to recover damages for any injury to real or personal property, or, for an injury to a person or for bodily injury or wrongful death arising out of the defective or unsafe condition of any improvement to real property, may be brought more than ten years after the performance or furnishing of such services or construction: provided, that the above period shall be tolled according to the provisions of section twenty-one of this article. The period of limitation provided in this section shall not commence until the improvement to the real property in question has

been occupied or accepted by the owner of the real property, whichever occurs first. *See*, W. Va. Code § 55-2-6a.

In an attempt to harmonize issues regarding other statutes of limitations, as well as the relationship of the statute of repose time limit and original construction and modifications relative to the “improvements,” the West Virginia Supreme Court of Appeals has held that the statute of repose time limit begins to run when the builder or architect relinquishes access and control over the construction or improvement and the construction of the improvement is (1) occupied or (2) accepted by the owner of the real property, whichever occurs first, and that pre-existing statutes of limitations for both contract and tort actions continue to operate within this outside limit. *See*, *Neal v. Marion*, 222 W. Va. 380, 664 S.E.2d 721 (2008). In its further analysis of the Plaintiff’s claims arising from the foundation of the house, the Court provided that the statute of repose governs only the alleged defects themselves, not claims arising from a representation that there were no defects or knowingly concealing the extent of the defects or prior repairs. *Neal v. Marion*, 222 W. Va. 380, 664 S.E.2d 721 (2008).

#### **IX. ECONOMIC LOSS RULE**

The economic loss rule prevents a plaintiff from recovering pure economic losses in tort actions that have no physical injury or damage to real property. Typically, this rule arises when a plaintiff alleges negligence in a case that is truly a breach of contract case in order to try to avoid certain procedural problems and damage limitations inherent in contract law. In its analysis of this rule, the West Virginia Supreme Court of Appeals held that an individual who sustains purely economic loss from an interruption in commerce caused by another’s negligence may not recover damages in the absence of physical harm to that individual’s person or property, a contractual relationship with the alleged tortfeasor, or some other special relationship between the alleged tortfeasor and the individual who sustains purely economic damages sufficient to compel the conclusion that the tortfeasor had a duty to the particular plaintiff and that the injury complained of was clearly foreseeable to the tortfeasor. *See*, *Aikens v. Debow*, 208 W. Va. 486, 541 S.E.2d 576 (2000).

#### **X. RECOVERY FOR INVESTIGATIVE COSTS**

In West Virginia, if the investigative costs are included as part of an express written contract, those costs may be recoverable. Conversely if investigative costs are not included as a provision in the express written contract between the parties, those costs are not recoverable.

#### **XI. EMOTIONAL DISTRESS**

The West Virginia Supreme Court of Appeals has not addressed whether a cause of action would lie for emotional distress associated with a construction defect. However, the Court, in the context of a breach of contract action between the owner and builder stated that a claim for emotional distress made under a Commercial

General Liability policy as a “bodily injury” resulting from defective workmanship would, at a minimum, need to have physically manifested itself in order to trigger coverage under the policy for “bodily injury.” *Cherrington v. Erie Ins. Prop. & Cas. Co.*, 231 W. Va. 470, 484, 745 S.E.2d 508, 522 (2013). Despite this absence, West Virginia recognizes the tort of negligent infliction of emotional distress. To recover under this theory, a plaintiff must prove that the serious emotional injury suffered by the plaintiff was reasonably foreseeable to the defendant based on the following factors: (1) the plaintiff was closely related to the injury victim; (2) the plaintiff was located at the scene of the accident and was aware that it was causing injury to the victim; (3) the victim is critically injured or killed; and (4) the plaintiff suffers serious emotional distress. *See Heldreth v. Marrs*, 188 W. Va. 481, 425 S.E.2d 157 (1992). Moreover, the West Virginia Supreme Court has held in the context of a negligent infliction of emotional distress claim absent physical injury, that a party may assert a claim for expenses related to future medical monitoring necessitated solely by fear of contracting a disease from exposure to toxic chemicals. *See Bower v. Westinghouse Electric Corporation*, 206 W. Va. 133, 522 S.E.2d 424 (1999).

In addition, West Virginia recognizes the tort of intentional infliction of emotional distress. To recover under this theory, a plaintiff must prove that: (1) the defendant’s conduct was atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency; (2) the defendant acted with the intent to inflict emotional distress, or acted recklessly when it was certain or substantially certain emotional distress would result from his conduct; (3) the actions of the defendant caused the plaintiff to suffer emotional distress; and (4) the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it. *See Travis v. Alcon Laboratories*, 202 W. Va. 369, 504 S.E.2d 419 (1998).

## **XII. ECONOMIC WASTE**

As stated in a previous section above, in instances where the breach of a contractual obligation is in the context of a construction contract, the West Virginia Supreme Court of Appeals has held that the proper measure of damages in such cases involving building contracts is the cost of repairing the defects or completing the work and placing the construction in the condition it should have been in if properly done under the agreement contained in the building contract. *See, Steinbrecher v. Jones*, 151 W. Va. 462, 153 S.E.2d 295 (1967). In the instance of a damaged building, the measure of recovery for property destroyed through negligence is the fair market value of the property at the time of destruction. *See, Stenger v. Hope Natural Gas Co.*, 139 W. Va. 549, 80 S.E.2d 889 (1954). The measure of recovery for negligent damage to property not destroyed, where the damage is of a permanent nature, is the diminution in the market value of the property by reason of the injury. *Stenger v. Hope Natural Gas Co.*, 139 W. Va. 549, 80 S.E.2d 889 (1954).

## **XIII. DELAY DAMAGES**

### **A. Actual**

The West Virginia Supreme Court of Appeals has held, in a case in which the defendant owner terminated the contract prior to full performance by the

plaintiff contractor, that the plaintiff contractor is entitled to damages for delay, caused by the defendant owner, in beginning or completing the work. *See, Miller v. County Court of Barbour County*, 116 W. Va. 380, 180 S.E. 440 (1935). Moreover the Court further held that the item of damages claimed for delay caused by the defendant before its formal breach of the contract and his damages for anticipated profits, had he been permitted to complete the contract after the delay, are distinct and separate. *Miller v. County Court of Barbour County*, 116 W. Va. 380, 180 S.E. 440 (1935).

## **B. Liquidated**

Liquidated damage clauses are commonplace in today's construction contracts. Generally, liquidated damage clauses are negotiated between the owner and the contractor in the context of each party's risk of loss relative to the possibility of actual damages exceeding the established liquidated damage amount. Moreover, once the owner and contractor have established the liquidated damage amount to be forfeited under the clause, the damage amount cannot be so large as to constitute a penalty.

In West Virginia, there are two rules for inferring if the sum to be paid for a breach of contract is to be construed as liquidated damages, and not a penalty: (1) Where the damages are uncertain and not readily capable of ascertainment in amount by any known or safe rule, whether such uncertainty lies in the nature of the subject, or in the particular circumstances of the case; or (2) where from the nature of the case and the tenor of the agreement it is apparent that the damages have already been the subject of actual fair estimate and adjustment between the parties. *See, Charleston Lumber Co. v. Friedman*, 64 W. Va. 151, 61 S.E. 815 (1908). Moreover, a clause for damages in a contract is a penalty rather than a liquidated damage provision when the amount is grossly disproportional in comparison to the damages actually incurred. This is true even though the provision is denominated as liquidated damages in the contract. *See, Stonebraker v. Zinn*, 169 W. Va. 259, 286 S.E.2d 911 (1982). Finally, when a building contract provides that the contractor shall pay the owner a sum per day for delay in completion of the building, and the case is such that such provision is one of liquidated damage, there need be no proof of actual damage from delay. *See, Charleston Lumber Co. v. Friedman*, 64 W. Va. 151, 61 S.E. 815 (1908).

## **C. "No damages for delay" Clause**

"No damages for delay" clauses are generally drafted to provide that if a contractor is delayed due to reasons beyond the contractor's control, the contractor will be limited to a time extension only to complete his performance. These clauses are generally valid and enforceable, unless the delay was unreasonable or caused by the actions of the owner.



## **XIV. RECOVERABLE DAMAGES**

### **A. Direct Damages**

Generally, the amount of compensatory damages recoverable by an injured party incurred through the breach of a contractual obligation are those that may be fairly and reasonably considered to arise naturally; that is, according to the usual course of things, from the breach of the contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of its breach, is that which will put the injured party in the monetary position he would have been in had the contract been performed. *See, Kentucky Fried Chicken of Morgantown, Inc. v. Sellaro*, 158 W. Va. 708, 214 S.E.2d 823 (1975). Compensatory damages recoverable by an injured party incurred through the breach of a contractual obligation must be proved with reasonable certainty. *Kentucky Fried Chicken of Morgantown, Inc. v. Sellaro*, 158 W. Va. 708, 214 S.E.2d 823 (1975). In instances where the breach of a contractual obligation is in the context of a construction contract, the West Virginia Supreme Court of Appeals has held that the proper measure of damages in such cases involving building contracts is the cost of repairing the defects or completing the work and placing the construction in the condition it should have been in if properly done under the agreement contained in the building contract. *See, Steinbrecher v. Jones*, 151 W. Va. 462, 153 S.E.2d 295 (1967).

Where time is of the essence in the performance of a contract, a delay in performance beyond the period specified in the contract, unless caused by the other party or waived by such party, will constitute a breach of the contract, entitling the aggrieved party to terminate it. *See, Elkins Manor Associates v. Eleanor Concrete Works, Inc.* 183 W. Va. 501, 396 S.E.2d 463 (1990). The Court further held that an owner does not waive his rights to damages occasioned by the contractor's delay in constructing a building by permitting the contractor to proceed with the work, that where a construction contract provides for inspection of the work to assure compliance with the contract specifications, the contractor is required to remedy such defects found at its own expense and is chargeable with the delay occasioned thereby. *Elkins Manor Associates v. Eleanor Concrete Works, Inc.* 183 W. Va. 501, 396 S.E.2d 463 (1990).

### **B. Quantum Meruit**

A party who furnishes labor or materials to another without benefit of an enforceable contract may be entitled to recover the benefit of that labor and material under quantum meruit. There can be no valid, express, contract between the parties. To state a claim under quantum meruit, the party must state that the other party accepted and received its services and that the party is entitled to reasonable compensation. The West Virginia Supreme Court of Appeals has held that it is a general rule, that where one has rendered services, paid a consideration,

or sold and delivered goods in execution of an oral contract, which on account of the statute of frauds cannot be enforced against the other party, such one can in a court of law recover the value of the services or goods upon a quantum meruit or valebant. *See, Kimmins v. Oldham*, 27 W. Va. 258 (1885). This general rule, however, is limited and confined to cases, in which the services rendered, the goods delivered or consideration paid inured to the benefit of the defendant; and in such cases the recovery is not upon the contract but upon the quantum meruit or valebant or upon the money counts. *Kimmins v. Oldham*, 27 W. Va. 258 (1885).

### C. Punitive Damages

In 2015, the West Virginia legislature, in an effort to clarify punitive damages in West Virginia, adopted West Virginia Code § 55-7-29, which establishes limitations on punitive damages in West Virginia. First, the statute requires a “clear and convincing” standard for plaintiff to prove that the damages suffered were the result of the conduct that was carried out by the defendant with actual malice toward the plaintiff or a conscious, reckless and outrageous indifference to the health, safety and welfare of others. Next, the statute permits the defendant to decide whether to bifurcate the trial on punitive damages from the underlying liability for compensatory damages. Once compensatory damages are found, the trial court then determines whether sufficient evidence was established to proceed with a consideration of punitive damages. If the trial court finds that such evidence exists, then the same jury that determined liability shall determine punitive damages, if any. The maximum amount allowable under the statute is four times the amount of compensatory damages or \$500,000, whichever is greater. If the jury does award punitive damages, the trial court instructs the jury on the factors that are to be considered when deciding on an amount; said factors are contained in Syllabus Point 3 of *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 658, 413 S.E.2d 897, 899 (1991), holding modified by *Perrine v. E.I. du Pont de Nemours & Co.*, 225 W. Va. 482, 694 S.E.2d 815 (2010), and include: reasonable relationship to the harm that is likely to occur from the defendant's conduct; the reprehensibility of the defendant's conduct; how long the defendant continued in his actions; whether he was aware his actions were causing or were likely to cause harm; whether he attempted to conceal or cover up his actions or the harm caused by them; whether/how often the defendant engaged in similar conduct in the past; whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him; if the defendant profited from his wrongful conduct; and the financial position of the defendant is relevant. *Id.*

Conceptually, the purposes of punitive damages still remain the same, which are to punish the wrongdoer and deter others from similar conduct. Accordingly, punitive damages are generally not awarded against a defendant who is merely vicariously liable for the acts of another, unless they authorized or ratified the conduct of the wrongdoer, or the wrongdoer was acting within the scope of his employment. *See, Jarvis v. Modern Woodmen of America*, 185 W. Va. 305, 406 S.E.2d 736 (1991).

Evidence of a defendant's financial position is admissible because it is material to this purpose and is relevant to a determination of the size of the award and whether it is so large as to be excessive.

The West Virginia Supreme Court of Appeals has held that the public policy of West Virginia does not preclude insurance coverage for punitive damages arising from gross, reckless or wanton conduct. *See, Hensley v. Erie Insurance Co.*, 168 W. Va. 172, 283 S.E.2d 227 (1981). This excludes, however, coverage for punitive damages awarded as a result of intentional acts.

For cases involving a drunk driver, the driver's conduct will be deemed to show a reckless disregard for the rights of others when the evidence proves that the person drove a vehicle in the state while under the influence of alcohol; or under the influence of any controlled substance; or under the influence of any other drug; or under the combined influence of alcohol and any controlled substance or any other drug; or has the alcohol concentration in his or her blood of eight hundredths of one percent or more, by weight; and when so driving does any act forbidden by law or fails to perform any duty imposed by law in the driving of the vehicle, which act or failure proximately causes the death of any person within one year next following the act or failure. *See, W. Va. Code § 17C-5-2(a)*.

#### **D. Lost Profits/Loss of Use**

Ordinarily, lost profits may be an element of damages which arise from a breach of contract. In the context of an existing business, loss of profits cannot be based on estimates which amount to mere speculation and conjecture but must be proved with reasonable certainty. *See, State ex rel. Shatzer v. Freeport Coal Company*, 144 W. Va. 178, 107 S.E.2d 503 (1959). If the business is new, it can recover lost profits in a breach of contract action, but only if the plaintiff establishes the lost profits with reasonable certainty; lost profits may not be granted if they are too remote or speculative. *See, Cell, Inc. v. Ranson Investors*, 189 W. Va. 13, 427 S.E.2d 447 (1992).

The West Virginia Supreme Court of Appeals has held that when realty is injured the owner may recover the cost of repairing it, plus his expenses stemming from the injury, including loss of use during the repair period. If the injury cannot be repaired or the cost of repair would exceed the property's market value, then the owner may recover its lost value, plus his expenses stemming from the injury including loss of use during the time he has been deprived of his property. *See, Jarrett v. E.L. Harper & Son, Inc.*, 160 W. Va. 399, 235 S.E.2d 362 (1977). In addition, annoyance and inconvenience can be considered as elements of proof in measuring damages for loss of use of real property. *Jarrett v. E.L. Harper & Son, Inc.*, 160 W. Va. 399, 235 S.E.2d 362 (1977).

#### **E. Duty to Mitigate**

West Virginia requires a party to use ordinary care and to make reasonable efforts and reasonable expense to lessen the damages he would otherwise sustain as a result of another's breach of contract. *See, Hurxthal v. Boom Co.*, 53 W. Va. 87, 44 S.E.2d 520 (1930).

## **F. Attorney's Fees**

Absent a contractual or statutory provision, West Virginia follows the American rule, which states that the prevailing party is not entitled to its attorney's fees. The West Virginia Supreme Court of Appeals has held that a mutual covenant contained in a written contract, providing for the recovery of reasonable attorneys' fees and expenses in litigation, available to either party who successfully recovers for breach of the contract or enforces its position, is valid and enforceable in the courts of West Virginia. *See, Moore v. Johnson Service Company*, 158 W. Va. 808, 219 S.E.2d 315 (1975).

## **G. Expert Fees & Costs**

In West Virginia, if expert fees and costs are included as part of an express written contract, those fees and costs may be recoverable. Conversely if expert fees and costs are not included as a provision in the express written contract between the parties, those fees and costs are not recoverable.

## **H. Tortious Interference with Contract**

In West Virginia, to establish prima facie proof of tortious interference, a plaintiff must show: 1) existence of a contractual or business relationship or expectancy; 2) an intentional act of interference by a party outside that relationship or expectancy; 3) proof that the interference caused the harm sustained; and 4) damages. *See, Torbett v. Wheeling Dollar Sav. & Trust Co.*, 173 W. Va. 210, 314 S.E.2d 166 (1983). If a plaintiff makes a prima facie case, a defendant may prove justification or privilege as affirmative defenses. Defendants are not liable for interference that is negligent rather than intentional, or if they show defenses of legitimate competition between plaintiff and themselves, their financial interest in the induced party's business, their responsibility for another's welfare, their intention to influence another's business policies in which they have an interest, their giving of honest, truthful requested advice, or other factors that show the interference was proper. *Torbett v. Wheeling Dollar Sav. & Trust Co.*, 173 W. Va. 210, 314 S.E.2d 166 (1983).

## **XV. INSURANCE COVERAGE**

Under a typical liability policy, an insurer has a duty to provide the insured with a defense and a duty to indemnify the insured for a judgment up to policy limits. The sole source of these duties is the insurance contract. Typically, policy coverage is determined by the terms of coverage contained in the insurance contract and the allegations pled by a plaintiff in the complaint.

If excluded under the contract, commercial general liability policies do not cover damages that result from the insured's defective performance of a contract, if they are limited to the insured's work or product. This is because the damages are expected from the standpoint of the insured. When the insured poorly performs contractual obligations, which damage only the insured's work or product, the contractual liability that results is "expected" under the terms of its general liability policy. However, the West Virginia Supreme Court of Appeals has held that defective workmanship causing bodily injury or

property damages is an “occurrence” under a policy of commercial general liability insurance. *See, Cherrington v. The Pinnacle Group, Inc., et al.*, 231 W.Va. 470, 745 S.E.2d 508 (2013).

A great majority of construction contracts contain clauses which require one contracting party to carry a determined amount of insurance for the specific project while adding the other contracting party as an additional insured. This usually occurs in the contractor-subcontractor contractual relationship, and is accomplished by the endorsement to the applicable policy of insurance and the issuance of a Certificate of Insurance. Black’s Law Dictionary defines a Certificate of Insurance as a document evidencing the fact that an insurance policy has been written, and that it contains a statement of the coverage of the policy in general terms. Many commentators believe that companies mistakenly rely on just the issuance of a Certificate of Insurance without documentation regarding the proper endorsement to the affected policy. Many say that a bare Certificate of Insurance is meaningless because it only evidences the fact that the policyholder had insurance coverage at the very moment the certificate was issued. Central to this problem is that when there is a conflict or discrepancy between a Certificate of Insurance and the actual policy, the policy controls. Moreover, the policy can be changed without the consent of the holder of the Certificate of Insurance. Thus, when dealing with an additional insured clause in a construction contract, make sure that the language is clear regarding the level of insurance coverage required, that the endorsement of the policy is required to add your company as an additional insured, and that upon completion of the policy endorsement that your company will be provided with the issued endorsement and the appropriate Certificate of Insurance.

## **XVI. MECHANIC’S LIENS**

West Virginia provides for mechanic’s liens by statute. *See, W. Va. Code § 38-2-1 et seq.* This statutory framework allows contractors, subcontractors, materialmen, mechanics, laborers, architects, surveyors, engineers, and landscape architects to file mechanic’s liens. The purpose of the West Virginia mechanic’s lien statute is to protect any person who increases the value of another person’s real property by furnishing labor or materials. To that end, the West Virginia mechanic’s lien statute is remedial, and therefore, is to be liberally construed in order that it serves the purpose for which it has been enacted. *See, Carolina Lumber Co. v. Cunningham*, 156 W. Va. 272, 192 S.E.2d 722 (1972).

Pursuant to the operation of the West Virginia mechanic’s lien statute, a mechanic’s lien attaches to the real property on the day work commenced or material was first furnished, and if properly perfected, the mechanic’s lien will be superior to subsequent purchasers, deeds of trust and other liens that arise after the date of attachment. *See, W. Va. Code § 38-2-17.* To that end, perfection of one’s right under the statute requires proper notice of a mechanic’s lien.

### **A. Notice of Mechanic’s Lien**

In order to preserve one’s rights under a mechanic’s lien, the claimant must prepare a Notice of Mechanic’s Lien that substantially acquaints the owner with all

of the facts and costs relative to the claim. In addition, the Notice of Mechanic's Lien for materialmen must provide a detailed accounting regarding dates, materials, quantities and price. *See*, W. Va. Code § 38-2-11. The West Virginia mechanic's lien statute contains form notices of mechanic's liens for all classes of claimants. It is suggested that any Notice of Mechanic's Lien filed in the State of West Virginia comport with the appropriate statutory form, as West Virginia courts have held that a notice of mechanic's lien is valid when the substance and effect of said notice provided by mechanic's lien statute is contained in said notice of mechanic's lien. *See, Gray Lumber Co. v. Devore*, 145 W. Va. 91, 112 S.E.2d 457 (1960).

The following constitutes the statutory form for a Contractor's Notice of Mechanic's Lien. *See*, W. Va. Code § 38-2-8.:

Notice of Mechanic's Lien.

To.....

Notice is hereby given, in accordance with the laws of the State of West Virginia, that the undersigned claims a lien to secure the payment of the sum of \$..... upon your interest in and to lot number ..... of block number ..... as shown on the official map of the city of..... (or other adequate and ascertainable description of the real estate to be charged) and upon the following buildings, structures and improvements thereon: (List the buildings, structures or improvements sought to be charged.)

Given under my hand this ..... day of ....., 20....

.....

State of West Virginia,

County of....., being first duly sworn, upon his oath says that the statements contained in the foregoing notice of lien are true, as he verily believes.

Taken, subscribed and sworn to before me this ..... day of ....., 20....

My commission expires .....

.....

(Official Capacity)

(The remainder of this page intentionally left blank.)

The following constitutes the statutory form for a Subcontractor's Notice of Mechanic's Lien.  
See, W. Va. Code § 38-2-9.:

Notice of Mechanic's Lien.

To .....

You will please take notice that the undersigned ..... was and is subcontractor with ..... who was and is general contractor for the furnishing of materials and doing of the work and labor, necessary to the completion of (here describe the nature of the subcontract) on that certain building (or other structure or improvement as the case may be), owned by you and situate on lot number ..... of block number ..... as shown on the official map of ..... (or other definite and ascertainable description of the real estate) and that the contract price and value of said work and materials is \$ ..... You are further notified that the undersigned has not been paid therefor (or has been paid only \$ ..... thereof) and that he or she claims and will claim a lien upon your interest in the said lot (or tract) of land and upon the buildings, structures and improvements thereon to secure the payment of the said sum.

.....

State of West Virginia,

County of....., being first duly sworn, upon his or her oath says that the statements in the foregoing notice of mechanic's lien are true, as he or she verily believes.

Taken, subscribed and sworn to before me this ..... day of ....., 20.....

My commission expires .....

.....

(Official Capacity)

(The remainder of this page intentionally left blank.)

The following constitutes the statutory form for a Materialmen's Notice of Mechanic's Lien. See, W. Va. Code § 38-2-11.:

Notice of Mechanic's Lien.

To .....

You will please take notice that the undersigned ..... has furnished and delivered to ..... who was contractor with you (or subcontractor with ....., who was contractor with you, as the case may be) for use in the erection and construction (or repair, removal, improvement or otherwise, as the case may be) of (here list the buildings or other structure or improvement to be charged) on the real estate known as (here insert an adequate and ascertainable description of the real estate to be charged) and the said materials were of the nature and were furnished on the dates and in the quantities and at the price as shown in the following account thereof:

(Here insert itemized account.)

You are further notified that the undersigned has not been paid the sum of \$. .....(or that there is still due and owing to the undersigned thereon the sum of \$. .....) and that he claims a lien upon your interest in the said lot (or tract) of land and upon the buildings, structures and improvements thereon, to secure the payment of the said sum.

.....

State of West Virginia,

County of....., being first duly sworn, upon his oath says that the statements in the foregoing notice of lien contained are true, as he verily believes.

Taken, subscribed and sworn to before me this ..... day of ....., 20.....

My commission expires .....

.....

(Official Capacity)

**B. Time for Filing Notice of Mechanic's Lien**

In order to perfect one's rights under a Notice of Mechanic's Lien, the claimant must record the Notice of Mechanic's Lien in the office of the clerk of the county commission of the county where the real property is located within one hundred (100) days of completing the work or providing the materials. If the claimant fails to timely record the Notice of Mechanic's Lien, it shall operate as a complete discharge of the owner and the property from all liens for claims and charges from the claimant. See, W. Va. Code § 38-2-14.

**C. Enforcement of Notice of Mechanic's Lien**

If the claimant has properly prepared and perfected its Notice of Mechanic's Lien, the claimant can file suit to enforce the mechanic's lien in the event that the claimant has not received payment within six months of the date of recordation of the Notice of Mechanic's Lien in the clerk's office. See, W. Va. Code § 38-2-34.



The claimant's Complaint in a suit to enforce should allege the existence of the contract and terms thereof, that the work was done or material furnished in pursuance thereof, the filing of the account with proper officer within the time required, the description of the property against which a lien is claimed, the name of the owner at the time the work was performed or material furnished, that the suit was brought with the time frame required, and the existence of the debt at the time of the suit. *See, Lunsford v. Wren*, 64 W. Va. 458, 63 S.E. 308 (1908). If the claimant prevails in its suit to enforce, the court shall order a sale of the property on which the liens are established, or so much thereof as may be sufficient to satisfy such claims, and the court may, in addition, give a personal decree in favor of such creditors for the amount of their claims against any party against whom they may be established, and such decree shall have the effect of, and be enforced as, other decrees for money. *See, W. Va. Code § 38-2-35.*

**D. Demand for Account by Owner**

An owner may, at any time, by notice in writing, request from a party performing work an itemized account of the work done or caused to be done by such party performing work and said account shall show the dates of work, materials furnished, priced charged therefor, and the nature of such work or materials. A party's failure to produce such itemized statement to the owner within ten (10) days of receipt of the request shall release such owner for all labor and materials furnished by the person performing work, and failing to provide such written itemized account. W. Va. Code § 38-2-19(d)

**E. Effect of Payment by Owner to Contractor or Subcontractor**

Any payment by an owner to a contractor or subcontractor made after July 1, 2015, may be an affirmative defense in an action to enforce a mechanic's lien in West Virginia when: (1) the property is an existing single-family dwelling; (2) the property is a residence constructed by the owner or under a contract entered into by the owner prior to its occupancy as the owner's primary residence; or (3) the property is a single family, owner-occupied dwelling, including a residence constructed and sold for occupancy as a primary residence. W. Va. Code § 38-2- 21

**This Compendium outline contains a brief overview of certain laws concerning various litigation and legal topics as they existed at the time of drafting. The compendium provides a simple synopsis of current law and is not intended to explore lengthy analysis of legal issues. This compendium is provided for general information and educational purposes only. It does not solicit, establish, or continue an attorney-client relationship with any attorney or law firm identified as an author, editor or contributor. The contents should not be construed as legal advice or opinion. While every effort has been made to be accurate, the contents should not be relied upon in any specific factual situation. These materials are not intended to provide legal advice or to cover all laws or regulations that may be applicable to a specific factual situation. If you have matters or questions to be resolved for which legal advice may be indicated, you are encouraged to contact a lawyer authorized to practice law in the state for which you are investigating and/or seeking legal advice.**

**100 S. Queen Street  
Suite 200  
Martinsburg, West Virginia 25401  
304.596.2277  
304.596.2111 Fax**

The B & O Building  
2 N. Charles Street, Suite 600  
Baltimore, MD 21201  
410.752.8700  
410.752.6868 Fax

---

8603 Commerce Drive  
Suite 7A  
Easton, Maryland 21601  
410.820.0600  
410.820.0300 Fax

---

1101 Opal Court  
Hub Plaza, Suite 210  
Hagerstown, Maryland 21740  
301.745.3900  
301.766.4676 Fax

---

2325 Dulles Corner Boulevard  
Suite 1150  
Herndon, Virginia 20171  
703.793.1800  
703.793.0298 Fax

---

500 Creek View Road  
Suite 502  
Newark, DE 19711  
302.594.9780  
302.594.9785 Fax

5516 Falmouth Street  
Suite 203  
Richmond, VA  
804.932.1996  
804.403.6007 Fax