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Prosecutors renounce funding incentives to pile on charges

By Peter Vieth

One aspect of the 2020 Virginia criminal justice reform agenda may already have been achieved, even as reform legislation was parked for a year.

Virginia prosecutors responding to a call for revision of the state's formula for allocating staff positions deny there has been any practical incentive to overcharge defendants, but they have agreed to removal of a link between funding and the number of sentencing orders.

Newly empowered Democrats intent on remaking the criminal justice system took up the issue this year, urging a law that would bar any prosecutor staff funding based on the number of charges brought or the number of convictions obtained. Two such bills were carried over to the 2021 session after prosecutors pledged to look into the issue.

Now – after a short-term adjustment – prosecutors are asking for patience as they try to craft a formula to provide the right number of positions based on actual workload.

Representatives of Virginia's counties are following the issue, but they tend to look at the entire state court system, urging full funding for – not just commonwealth's attorneys' offices – but also clerks, magistrates, public defenders, and probation office employees.

Incentive for added charges?

The pressure for change came from lawyer legislators who long suspected there was a financial inducement for commonwealth's attorneys to boost the number of charges, the severity of charges or their list of convictions.

A 2019 essay by a criminal justice advocacy group contended there was a link between prosecutor funding and the number of felony charges pursued.

"Essentially, Virginia rewards prosecutors for being as aggressive and punitive as possible," the advocacy group concluded.

Sen. Creigh Deeds, D-Bath County, said he always suspected there might be an incentive for prosecutors to ring up multiple charges.

"I support the idea of looking into that and seeing if my instinct is right," Deeds said Nov. 23.

Sen. Joe Morrissey, D-Richmond, said he is sure some prosecutors overcharge. He recalled that he once took charge as a special prosecutor in a bad check case where the local commonwealth's attorney had sought 600 charges, with charges for grand larceny, forgery and uttering for each and

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Virginia comp bar won't apply to Maryland employees

By Peter Vieth

The Virginia statute that blocks tort recovery against a fellow employee for on-the-job injuries doesn't apply when those injuries were covered by Maryland, not Virginia, workers' comp law, a circuit judge has ruled.

The Nov. 13 decision by Fairfax Circuit Judge Richard E. Gardiner clears the way for a personal injury claim by a passenger in a company truck against the truck's driver. The passenger also has sued the driver of another vehicle involved in the collision at issue.

Gardiner cited a 1932 ruling of the Supreme Court of Virginia approving a civil negligence action even though the plaintiff had received workers' compensation benefits under Pennsylvania law.

The opinion is *Gerben v. Edwards* (VLW 020-8-131).

Exclusivity provision

Both Anthony Gerben and Brad Edwards worked for Service 1st Vending of Maryland. They were traveling on Virginia's Interstate 66 to stock a vending machine at Tysons Corner Mall. Edwards was at the wheel; Gerben was a passenger.

The vending company vehicle was involved in a collision with another vehicle driven by Chin Van Nguyen. Gerben received workers' compensation benefits under Maryland law. He then sued both Edwards and Nguyen in Fairfax Circuit Court. Edwards filed a plea in bar based on the exclusivity provision of the Virginia Workers' Compensation Act, Virginia Code § 65.2-307 (A).

Gardiner cited case law on the exclusion principle. The purpose of the VWCA is to limit recovery to com-

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Suit after failure to give COVID info nixed

By Paul Fletcher

A man who was terminated for failure to provide his employer information about his COVID-19 status or that of a family member who tested positive cannot sue the company, a federal judge in Norfolk has ruled.

The plaintiff sought to use the Health Insurance Portability and Accountability Act of 1996, or HIPAA, to bolster his claim, arguing that it would have been a HIPAA violation to share information. But the judge found the man was not a covered party under that statute and dismissed his claim.

The case is *Wells v. Enterprise Leasing Co. of Norfolk/Richmond LLC* (VLW 020-3-568). U.S. District Judge Raymond A. Jackson wrote the opinion.

Anonymous tip

The plaintiff, Wells, worked for Enterprise. In late March of this year, his boss, Mann, called him and said the company had received an anonymous tip that he had been exposed to a family member has tested positive for COVID-19.

Wells told Mann he was going to the doctor the following week. Mann asked Wells to keep the company informed about his status and that of his family member, who was not a company employee.

On April 8, Enterprise fired Wells for "gross insubordination" for his failure to get a COVID test and to provide info about his family member's status.

Wells sued, seeking $250,000 in damages and $200,000 in punitives. Enterprise removed the case to federal court.

HIPAA claim

Wells based his suit on HIPAA, arguing that it would have been a criminal act to share the medical information of his relative.

But Jackson rejected this claim, noting that HIPAA makes it wrong for "covered entities" to share medical information.

That term is defined narrowly, he wrote, to include health care plans, health care clearinghouses and health care providers.

The question of whether HIPAA covers an individual has arisen before in the 4th U.S. Circuit Court of Appeals, and that court dismissed that effort.

Wells further argued that he could have been liable for "aiding and abetting" a HIPAA violation.

Jackson made short work of this approach as well.

Wells would not have been liable for disclosing his own health information, the judge wrote. And the company did not coerce him to disclose his medical records

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pensation under the act for all engaged in the business under consideration, denying recovery against anyone other than a stranger to the business.

But that exclusivity provision explicitly limits its application to those employers and employees who have "accepted the provisions" of the act, Gardiner said.

Prior case 'on point'

The Supreme Court of Virginia's 1932 decision in *Solomon v. Call* featured facts that are "directly on point," the judge said. The plaintiff was a Pennsylvania-based traveling salesman injured in a Virginia car accident. The court reasoned that Solomon could sue the other driver because he could not have maintained any claim for compensation under the VWCA.

The relevant statutory language in *Solomon* was "replicated almost word-for-word" in the current statute, Gardiner said.

The judge distinguished federal cases cited by Edwards. In contrast to those decisions, neither the employer nor the employee involved in Gerben's claim was a Virginia resident, and the question of a "statutory employee" was not present, he said.

Edwards pointed to Va. Code § 65.2-300 (A) which provides that employers and employees generally are "conclusively presumed to have accepted the provisions of this title" and "shall be bound thereby." But Gardiner found no binding case law applying that statutory presumption to cases involving all out-of-state employers and employees.

"Because *Solomon* is directly on point and has never been overruled by the Supreme Court of Virginia, it controls the outcome of this case," Gardiner wrote. "Because Plaintiff is a Maryland resident employed by a Maryland corporation, he could not have received workers' compensation under the VWCA because neither he nor his employer [is] embraced within its terms. The exclusivity provision of the VWCA thus does not apply to Plaintiff, and his civil negligence action against Defendant Edwards is not barred," the judge concluded.

Gardiner overruled Edwards' plea in bar and allowed 14 days for him to file a responsive pleading.

Carriers don't raise issue

Gerben is represented by John R. Kelly of Fairfax, who said the issue may not arise more often because defendants and their insurers don't press the point.

"I think it is settled law based on the *Solomon* case, and the *Solomon* case is found in the annotations to the workers' compensation statutes," Kelly said.

Edwards is represented by Lacey Ullman Conn of Fairfax. She was not available for comment. Nguyen is represented by Jeffrey N. Gaull of Fairfax.

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without consent. Enterprise asked him to keep the company "posted on his status."

Nor did Enterprise ask Wells to disclose the relative's information without that person's consent, he noted.

"Based on his own complaint, Plaintiff was merely asked by Enterprise to keep them updated about his and his family members' COVID-19 status for the safety of other employees," the judge said.

"Plaintiff was only asked to inform Enterprise about whether he or his family member were positive/negative for COVID-19, without needing to identify his family member specifically or to disclose a record," Jackson wrote.

State law claim

Wells sought further to state a claim under state law. In the *Bowman v. State Bank of Keysville case*, the Supreme Court of Virginia in 1985 allowed a narrow exception to the at-will employment doctrine for employees "discharged in violation of public policy."

The long line of *Bowman* cases since have required that the plaintiff identify a Virginia statute that articulates the commonwealth's public policy.

Jackson wrote that Wells sought to use a federal statute, HIPAA, rather than a state law.

As a result, he granted Enterprise's motion to dismiss the complaint.

Wells was represented by Wayne B. Montgomery. Counsel for Enterprise were Scott A. Seigner and Alexander T. Marshall.

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every bad check.

Morrissey sponsored one of the 2020 regular session bills that would forbid using the number of charges, the number of convictions or the severity of charges to affect the funding formula. Del. Marcus Simon, D-Fairfax County, offered similar legislation.

The reformers were correct, to an extent. Prosecutors acknowledged the formula used until recently by the state Compensation Board considered the number of sentencing events as a measure of how busy a prosecutor's office was. More charges could lead to more sentencing orders, which could boost the number of staff positions that might be funded.

"We never thought of them as incentives," said Fluvanna County Commonwealth's Attorney Jeffrey Haislip. The president of the Virginia Association of Commonwealth's Attorneys said the formula that included sentencing events was a reaction to an older standard that did include the number of cases initiated, including indictments.

He's not sure any prosecutors ever saw added charges as a ticket to a larger office staff.

"I think it's the perception. I don't think that's a common practice at all," Haislip said.

But prosecutors wanted a comprehensive look at a bigger picture: What is the best way to measure if a prosecutor's office needs more staff?

Virginia Beach Commonwealth's Attorney Colin Stolle asked Morrissey and Simon for a year's delay to study the issue. The sponsors agreed.

Short-term fix, long-term study'

Since then, a VACA work group has met four times, according to Henrico County Commonwealth's Attorney Shannon Taylor, who co-chairs the panel with Stolle.

Working with the executive secretary of the Compensation Board, the work group eliminated the funding link to sentencing events, but prosecutors described that as only a short-term fix. The staffing formula now is pegged to the number of local arrests, the number of Virginia State Police arrests and the population of the locality.

Prosecutors say they would like to encourage use of diversion programs urged by criminal justice reformers, but they want to be sure their efforts to keep offenders out of the courtroom will be recognized when bureaucrats measure their staff needs.

"Our long-term goal is to do a time study that would allow us to encompass all the things that commonwealth's attorneys do," Stolle said.

Haislip said the time study will likely have to wait until after the COVID-19 pandemic has cooled and office routines return to something more like normal.

"To right that ship and get it moving the right way cannot happen overnight," Taylor said. "You have to have the right data to make the right kind of changes."

"We're hoping the General Assembly will be patient and understand that we're doing our honest best to address the issue they brought up," Haislip added.

Morrissey did not question the good intentions of the prosecutors.

"They're working on it. Everyone is sincere and genuine in their approach," he said. "But at the end of the day, I am unyielding that no staffing or funding decision will be made based on the number of charges brought, whether a conviction was obtained, or the severity of the charges," Morrissey added.

Meanwhile, the Virginia Association of Counties is urging full funding of all authorized court-related positions, since county governments often make up the difference when state funding falls short.

"The Commonwealth must meet its obligations to fund appropriate staffing for the state's system of justice, to include clerks, magistrates, commonwealth's attorneys, public defenders, district court employees, and probation office employees," read a VACo statement.