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A Mountain State Transformation: West Virginia's Move into the Mainstream

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**A MOUNTAIN STATE TRANSFORMATION:
WEST VIRGINIA’S MOVE INTO THE MAINSTREAM**

Cary Silverman* & Richard R. Heath, Jr.**

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I. INTRODUCTION

A decade ago, an article in this law review explored why West Virginia's civil justice system had developed a reputation as one in which defendants did not get a fair shake.¹ State law was viewed as outside the mainstream as the Supreme Court of Appeals of West Virginia issued liability-expanding rulings in areas including premises liability, product liability, workers' compensation, and damages. Individuals and businesses litigating in state courts also faced procedural unfairness, such as the ability of lawyers to handpick favorable courts in West Virginia to bring claims with little or no connection to the state. A threat of unlimited punitive damage awards loomed with no right to appeal. In addition, companies doing business in West Virginia were concerned that they could be the next target of an attorney general enforcement action sparked and litigated by private lawyers motivated by personal profit rather than publicly-employed government attorneys sworn to represent the public interest.

For years, little changed. A survey of business executives and corporate counsel conducted by the U.S. Chamber Institute for Legal Reform consistently ranked the Mountain State dead last or second to last of the states for the overall fairness of its legal environment between 2002 and 2015.² Since that time, however, West Virginia has made significant strides to improve its legal climate, prompting a revisiting of the earlier article.

This Article guides readers through the state's encouraging transformation and highlights areas where it may continue this progress. Section

¹ See Victor E. Schwartz, Sherman Joyce, & Cary Silverman, *West Virginia as a Judicial Hellhole: Why Businesses Fear Litigating in State Courts*, 111 W. VA. L. REV. 757, 758 (2009).

² See U.S. CHAMBER INST. FOR LEGAL REFORM, 2017 LAWSUIT CLIMATE SURVEY: RANKING THE STATES 92 (2017) (indicating West Virginia ranked 49th or 50th for its overall liability climate in each of ten surveys conducted between 2002 and 2015), <https://www.instituteforlegalreform.com/uploads/pdfs/Harris-2017-Full-Report-with-Questionnaire-FINAL.pdf>.

I examines areas where West Virginia law fell out of the mainstream and how the legislature responded between 2015 and 2018. Section II explores changes in how the attorney general's office and other state agencies retain and oversee outside counsel. Section III considers the path forward, providing recommendations for five additional steps the legislators should consider to further improve the state's legal climate. The Article concludes that West Virginia has made significant progress in bringing state tort law into the mainstream and that, as new areas of excessive liability or abuse emerge, the legislature should maintain balance in the civil justice system.

II. THE 2015-2018 CIVIL JUSTICE REFORMS

In 2014, a seismic shift in the West Virginia Legislature set the stage for a four-year period in which nearly two dozen meaningful civil justice reforms became law in the state. West Virginia Republicans saw “unprecedented gains” during the 2014 general election, resulting in the W. Va. GOP winning control of the House of Delegates for the first time in 83 years, and the state Senate deadlocked in a 17-17 tie for the first time since 1912.³ One day after Republicans won control of the House of Delegates, Democratic State Senator Daniel Hall switched parties, giving the W. Va. GOP control of the state Senate as well.⁴

With Republicans in charge of the West Virginia Legislature for the first time since the Great Depression, civil justice reforms topped the legislative agenda of incoming Senate President Bill Cole and House of Delegates Speaker-elect Tim Armstead.⁵ As the radio “dean” of West Virginia broadcasters, Hoppy Kercheval noted at the time, “Republicans and business interests have been pushing that agenda for years [in West Virginia], but now they finally have a majority in the legislature to make it happen.”⁶ It is against this backdrop that the Legislature passed more than a dozen civil justice reform measures during the

³ See Jared Hunt, *Republicans Will Control Both Chambers of State Legislature*, CHARLESTON GAZETTE-MAIL (Nov. 5, 2014), https://www.wvgazettemail.com/news/republicans-will-control-both-chambers-of-state-legislature/article_27be11d8-79c9-567d-8308-2358d0c8777e.html; see also 93 W. VA. BLUE BOOK 510–11 (Clark S. Barnes ed., 2015-2016), http://www.wvlegislature.gov/legisdocs/2016/BlueBook/0337_WVS_BlueBook.pdf.

⁴ See Reid Wilson, *Party Switch Gives Republicans Control of West Virginia Senate*, WASH. POST (Nov. 5, 2014), https://www.washingtonpost.com/blogs/govbeat/wp/2014/11/05/party-switch-gives-republicans-control-of-west-virginia-senate/?noredirect=on&utm_term=.d87fdd3827b7.

⁵ See Chris Dickerson, *Tort Reform on GOP Legislative Agenda*, W. VA. REC. (Dec. 24, 2014), <https://wvrecord.com/stories/510588207-tort-reform-on-gop-legislative-agenda>.

⁶ Hoppy Kercheval, *Fight Over “Judicial Hellhole” Brewing in Legislature*, METRONNEWS (Dec. 23, 2014, 12:37 AM), <http://wvmetronews.com/2014/12/23/fight-over-judicial-hellhole-brewing-in-legislature/>.

2015 legislative session and additional significant reform measures in the three years that followed.

West Virginia's recent civil justice reforms generally fall in three areas, which are explored in the subsections below. First, the state addressed core areas of tort law where the state had either fallen out of the mainstream or lagged behind progress made in other states. Second, West Virginia responded to documented abuses in the civil justice system, such as forum shopping and "gotcha" litigation tactics. Third, the state brought rationality to damages, addressing the lack of any reasonable constraint on punitive damage awards, recovery of inflated medical expenses, extraordinary awards in employment suits, and a judgment interest rate that significantly exceeded inflation.

A. *Moving West Virginia's Tort Liability Laws Into the Mainstream*

Laws that fairly determine liability based on a person's responsibility for an injury are critical to a well-functioning civil justice system. Recent changes to West Virginia law advance this goal in the diverse areas of personal injury litigation, product liability actions against manufacturers of prescription drugs and retailers, premises liability claims against individuals who own or lease property, and lawsuits brought by plaintiffs who have themselves engaged in wrongful conduct.

1. Allocating Fault in Proportion to Responsibility

West Virginia has gradually transitioned from imposing full joint and several liability on defendants to allocating fault in proportion to each defendant's responsibility for a plaintiff's injury. It completed its transition to several liability in 2015,⁷ while codifying modified comparative fault and clarifying that juries may consider the responsibility of all parties when allocating fault.

In 1979, the West Virginia Supreme Court of Appeals abandoned the doctrine of contributory negligence to correct the "obvious injustice" of barring a plaintiff from recovery "no matter how slight the plaintiff's negligence."⁸ The court replaced contributory negligence with comparative fault, under which the jury allocates fault to each party and the plaintiff's damages are reduced in proportion to his or her level of responsibility.⁹ Under the rule as adopted by the court, a plaintiff may recover so long as his or her level of fault does not equal

⁷ H.B. 2002, 2015 Leg., Reg. Sess. (W. Va. 2015) (passed as Enrolled Committee Substitute for H.B. 2002, Feb. 24, 2015) (codified at W. VA. CODE ANN. § 55-7-13c (West 2018)).

⁸ *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879, 883–84 (W. Va. 1979).

⁹ *See id.* at 885.

or exceed the combined negligence of the other parties involved in causing the injury.¹⁰ Most states follow a similar approach.¹¹

When the court moved from contributory negligence to modified comparative fault—a change that favored plaintiffs while promoting personal responsibility—it also considered, but rejected, a change in the law that would apply principles of proportionality when deciding the liability of defendants. The court held that its adoption of comparative fault had “no effect” on application of joint and several liability, which allows a plaintiff to seek full recovery from any party that was even minimally responsible for his or her injury.¹² Joint and several liability encourages plaintiffs to target businesses they consider to have “deep pockets,” while settling with or not pursuing those with limited assets who may be most responsible for an injury.

Over a quarter century later, the legislature began to correct this imbalance. In 2005, the legislature limited joint liability against parties minimally at fault (less than 30%).¹³ This threshold, while a positive shift, still left many defendants subject to liability in excess of their responsibility and imposed joint liability on more defendants than most other states with a similar approach.¹⁴

Under the 2015 law, several liability is now the rule in West Virginia, with individuals and businesses typically paying damages in proportion to their level of responsibility for an injury.¹⁵ If a party cannot collect the judgment from a responsible party then, after a good faith effort to do so, the plaintiff can ask the court to reallocate uncollectable shares of liable defendants among other liable defendants in proportion to each party’s percentage of fault.¹⁶ A defendant that is equally or less at fault than the plaintiff, however, is not subject to

¹⁰ *See id.*

¹¹ *See generally* VICTOR E. SCHWARTZ, *COMPARATIVE NEGLIGENCE* (5th ed. 2010).

¹² *Bradley*, 256 S.E.2d at 886.

¹³ S.B. 421, 2005 Leg., Reg. Sess. (W. Va. 2005) (codified at W. VA. CODE ANN. § 55-7-24(b)) (repealed 2015). The inclusion of a partial judicial reallocation of damages deemed “uncollectable” to parties found to be more than 10% at fault also limited the efficacy of these reforms.

¹⁴ *See, e.g.*, IOWA CODE ANN. § 668.4 (West 2018) (joint liability for economic damages when 50% or more at fault); MINN. STAT. § 604.02 Subdivision 1(1) (2018) (greater than 50%); MO. REV. STAT. § 537.067 (2018) (51% or more); MONT. CODE ANN. § 27-1-703(2) (2018) (50% or less); NEV. REV. STAT. ANN § 41.141 (West 2018) (not greater than plaintiff’s fault) ; N.H. REV. STAT. ANN. § 507:7-e (2018) (greater than 50%); N.J. STAT. ANN. § 2A:15-5.3 (West 2018) (60% or more) ; N.Y. C.P.L.R. §§ 1601, 1602 (MCKINNEY 2018) (joint liability for economic damages when more than 50% at fault); OHIO REV. CODE ANN. § 2307.22 (West 2018) (joint liability for economic damages when more than 50% at fault); 42 PA. STAT. AND CONS. STAT. ANN. § 7102 (West 2018) (not less than 60%); S.C. CODE ANN. § 15-38-15 (2018) (50% or more); S.D. CODIFIED LAWS § 15-8-15.1 (2018) (50% or more); TEX. CIV. PRAC. & REM. CODE ANN. § 33.013 (West 2018) (greater than 50%); WIS. STAT. ANN. § 895.045(1) (West 2018) (51% or more).

¹⁵ H.B. 2002, 2015 Leg., Reg. Sess. (W. Va. 2015) (passed as Enrolled Committee Substitute for H.B. 2002, February 24, 2005) (codified at W. VA. CODE ANN. § 55-7-13c(a), (b) (West 2018)).

¹⁶ *Id.* (codified at W. VA. CODE ANN. § 55-7-13c(d) (West 2018)).

reallocation.¹⁷ The law retains limited exceptions where joint liability continues to apply, such as where a defendant has engaged in conspiracy, driven under the influence of alcohol or drugs, engaged in criminal conduct, or illegally disposed of hazardous waste.¹⁸ In adopting this law, West Virginia has joined 19 states that have fully replaced joint liability with several liability or sharply limited joint liability to narrow situations.¹⁹

The same legislation also codified modified comparative fault.²⁰ What the new law clarifies is that when juries allocate fault, they may consider the responsibility of anyone that may have contributed to a plaintiff's injury, not just those that happen to be present in court.²¹ This approach recognizes that some responsible people or entities may not be named as defendants in a lawsuit because they have no resources to pay a judgment, have filed for bankruptcy, are immune from suit, or for other reasons. As an authoritative treatise on tort law recognizes, "the failure to consider the negligence of *all* tortfeasors, whether parties or not, prejudices the joined defendants who are thus required to bear a greater proportion of the plaintiff's loss than is attributable to their fault."²²

Before adoption of the 2015 law, West Virginia courts recognized that juries may consider the fault of nonparties where evidence indicates shared responsibility, but the ability and process for doing so was uncertain.²³ The new law provides clarity through adopting a procedure for a defendant to give fair

¹⁷ *Id.*

¹⁸ *Id.* (codified at W. VA. CODE ANN. § 55-7-13c(h) (West 2018)).

¹⁹ See ALASKA STAT. § 09.17.080(d) (2018); ARIZ. REV. STAT. ANN. § 12-2506(A) (2018); ARK. CODE ANN. § 16-55-201(b) (West 2018); COLO. REV. STAT. § 13-21-111.5 (2018); FLA. STAT. ANN. § 768.81(1) (West 2018); GA. CODE ANN. § 51-12-33 (West 2018); IDAHO CODE § 6-803 (2018); IND. CODE ANN. § 34-20-7-1 (West 2018); KAN. STAT. ANN. § 60-258a(d) (West 2018); KY. REV. STAT. ANN. § 411.182(3) (West 2018); LA. CIV. CODE ANN. arts. 1804, 2323, 2324 (2018); MICH. COMP. LAWS ANN. §§ 600.6304(4), 600.6312 (West 2018); MISS. CODE ANN. § 85-5-7 (West 2018); N.D. CENT. CODE § 32-03.2-02 (2018); OKLA. STAT. ANN. tit. 23, § 15 (West 2018); TENN. CODE ANN. § 29-11-107 (West 2018); UTAH CODE ANN. §§ 78B-5-818, 78B-5-819 (West 2018); VT. STAT. ANN. tit. 12, § 1036 (West 2018); WYO. STAT. ANN. § 1-1-109(e) (West 2018).

²⁰ W. VA. CODE ANN. §§ 55-7-13a, 55-7-13c(c) (West 2018).

²¹ *Id.* § 55-7-13d(1) ("In assessing percentages of fault, the trier of fact shall consider the fault of all persons who contributed to the alleged damages regardless of whether the person was or could have been named as a party to the suit.").

²² See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 475–76 (5th ed. 1984) (emphasis added).

²³ See *Modular Bldg. Consultants of W. Va., Inc. v. Poerio, Inc.*, 774 S.E.2d 555, 565–66 (W. Va. 2015) ("[T]here is no *per se* ban on 'empty chair' arguments in West Virginia."); *Syl. Pt. 2, Doe v. Wal-Mart Stores, Inc.*, 558 S.E.2d 663, 667 (W. Va. 2001) ("It is improper for counsel to make arguments to the jury regarding party's omission from a lawsuit or suggesting that the absent party is solely responsible for the plaintiff's injury *where the evidence establishing the absent party's liability has not been fully developed.*") (emphasis added); *Bowman v. Barnes*, 282 S.E.2d 613, 621 (W. Va. 1981) (holding that properly calculating damages requires considering the fault of anyone who may have caused an accident, not merely parties to the litigation).

notice to a plaintiff that it plans to assert that a nonparty is wholly or partially at fault for the plaintiff's injuries.²⁴ This law is similar to how allocation of fault to nonparties is treated in many other states.²⁵

2. Adopting the Learned Intermediary Doctrine

State courts have “almost universally” recognized the learned intermediary doctrine, which provides that a manufacturer of a prescription drug or medical device fulfills its duty to warn by informing the prescribing physician of a product's risks.²⁶ This doctrine recognizes that doctors are in the best position to communicate this information to patients based on each individual's condition.²⁷ For that reason, the doctrine does not require manufacturers to directly communicate information about risks to patients.

In 2007, the West Virginia Supreme Court of Appeals became the first state high court in the nation to fully reject this doctrine. Its 3-2 decision in *State ex rel. Johnson & Johnson Corp. v. Karl* reasoned that television advertising for prescription drugs made the doctrine “outdated,”²⁸ even as physicians continue to play an indispensable role in a patient's decision to take medication and ability to obtain it. The ruling opened the door to lawsuits against pharmaceutical companies viewed as having deep pockets, while not providing better

²⁴ S.B. 411, 2015 Leg., Reg. Sess. (W. Va. 2015) (codified at W. VA. CODE ANN. § 55-7-13d (West 2018)).

²⁵ Several states have adopted statutes explicitly permitting juries to allocate fault to nonparties. Some state laws, like the new West Virginia law, provide a specific procedure for a defendant to provide notice to the plaintiff of its intention to allocate fault to a nonparty. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-2506 (2018); COLO. REV. STAT. § 13-21-111.5 (2018); FLA. STAT. ANN. § 768.81(3) (West 2018); GA. CODE ANN. § 51-12-33 (West 2018); IND. CODE ANN. § 34-51-2 (West 2018); MICH. COMP. LAWS ANN. §§ 600.2957, 600.6304 (West 2018); TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.003, 33.004 (West 2018); UTAH CODE ANN. § 78B-5-818(2) (West 2018). Other state statutes authorize allocation of fault to nonparties, but do not provide detailed procedures for doing so. *See, e.g.*, LA. CIV. CODE ANN. art. 2323(A) (2018); N.M. STAT. ANN. § 41-3A-1(B) (West 2018); N.D. CENT. CODE § 32-03.2-02 (2018). In additional states, courts interpret the law as permitting juries to allocate fault to nonparties. *See, e.g.*, *DaFonte v. Up-Right, Inc.*, 828 P.2d 140 (Cal. 1992); *Idaho Dep't of Labor v. Sunset Marts, Inc.*, 91 P.3d 1111 (Idaho 2004); *Brown v. Keill*, 580 P.2d 867 (Kan. 1978); *Estate of Hunter v. Gen. Motors Corp.*, 729 So. 2d 1264 (Miss. 1999); *Bode v. Clark Equip. Co.*, 719 P.2d 824 (Okla. 1986).

²⁶ *In re Zimmer*, 884 F.3d 746, 751–52 (7th Cir. 2018) (predicting the Wisconsin Supreme Court would adopt the doctrine).

²⁷ *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 6 cmt. b (AM. LAW INST. 1998).

²⁸ *State ex rel. Johnson & Johnson Corp. v. Karl*, 647 S.E.2d 899, 906 (W. Va. 2007), *superseded by statute*, S.B. 15, 2016 Leg., Reg. Sess. (W. Va. 2016) (codified at W. VA. CODE ANN. § 55-7-30 (West 2018)).

information to patients. It was subject to heavy criticism and widely viewed as an outlier.²⁹

The legislature overturned *Karl* in 2016.³⁰ In doing so, West Virginia joined every other state in adopting the learned intermediary doctrine. The new law provides that a manufacturer or seller of a prescription drug or medical device is not liable in a failure to warn claim unless it “acted unreasonably in failing to provide reasonable instructions or warnings regarding foreseeable risks of harm to prescribing or other health care providers who are in a position to reduce the risks of harm in accordance with the instructions or warnings” and where “[f]ailure to provide reasonable instructions or warnings was a proximate cause of harm.”³¹

3. Limiting the Liability of Innocent Product Sellers

In July 2017, West Virginia joined the majority of states that have an “innocent seller” law.³² Until that time, any business in the chain of distribution of a product—including businesses that merely sold a product in West Virginia made by others—were liable to the same extent as the companies that designed,

²⁹ See *Watts v. Medicis Pharm. Corp.*, 365 P.3d 944, 950 (Ariz. 2016) (“No other court has followed *Karl*, and several courts have criticized it.”); *Centocor, Inc. v. Hamilton*, 372 S.W.3d 140, 158 (Tex. 2012) (recognizing “[o]ur sister states have overwhelmingly adopted the learned intermediary doctrine” and only West Virginia has “rejected the doctrine altogether,” and concluding “[t]he underlying rationale for the validity of the learned intermediary doctrine remains just as viable today” as when first adopted); see also Kyle T. Fogt, *The Road Less Traveled: West Virginia’s Rejection of the Learned Intermediary Doctrine in the Age of Direct-to-Consumer Advertising*, 34 J. CORP. L. 587, 609 (2009) (characterizing *Karl* as “quite a departure from the common law approach” and predicting other states will not follow the decision); Richard B. Goetz & Karen R. Growdon, *A Defense of the Learned Intermediary Doctrine*, 63 FOOD & DRUG L.J. 421, 430 (2008) (observing *Karl* made no attempt to address the practical problems it raised); Victor E. Schwartz et al., *Marketing Pharmaceutical Products in the Twenty-First Century: An Analysis of the Continued Viability of Traditional Principles of Law in the Age of Direct-to-Consumer Advertising*, 32 HARV. J.L. & PUB. POL’Y 333, 363–64 (2009) (rebutting statement in *Karl* that courts had adopted a “plethora” of exceptions to the doctrine).

³⁰ S.B. 15, 2016 Leg., Reg. Sess. (W. Va. 2016) (codified at W. VA. CODE ANN. § 55-7-30 (West 2018)).

³¹ W. VA. CODE ANN. § 55-7-30(a) (West 2018).

³² Twenty-four states had enacted innocent seller laws as of 2005. See Steven B. Hantler et al., *Is the “Crisis” in the Civil Justice System Real or Imagined?*, 38 LOY. L.A. L. REV. 1121, 1147 n.112 (2005) (citing statutes). Since that time, several states, in addition to West Virginia, have enacted similar laws. See, e.g., S.B. 184, 2011 Leg., Reg. Sess. (Ala. 2011) (amending ALA. CODE § 6-5-501 (2018)); H.B. 3365, 54th Leg., 2d Reg. Sess. (Okla. 2014) (codified at OKLA. STAT. tit. 76, § 57.2 (2018)); H.B. 2008, 107th Gen. Assemb., Reg. Sess. (Tenn. 2011) (amending TENN. CODE ANN. § 29-28-106 (West 2018)); S.B. 1, 2011 Leg., Jan. 2011 Spec. Sess. § 31 (Wis. 2011) (codified at WIS. STAT. ANN. § 895.047(2), (3)(e) (West 2018)).

manufactured, and labeled them.³³ A retailer, for example, could be liable if it sold a product in a closed box and had no reason to know the product was defective.

The new law provides that a seller that did not manufacture a product is not subject to a product liability action unless the seller had actual knowledge of the defect, exercised substantial control over how it was made, altered the product, removed labeling or instructions, or sold the product under its own brand name, among other circumstances.³⁴ A seller is also subject to a product liability claim if the court determines by clear and convincing evidence that the party bringing the action would be unable to enforce judgment against the manufacturer.³⁵

4. Eliminating Liability for “Open and Obvious” Hazards and Preserving the No Duty to Trespassers Rule

The legislature also responded to a 2013 Supreme Court of Appeals of West Virginia decision that increased the liability exposure of anyone who owns or leases a home, business, or other property. Departing from a century of law, the court held that individuals and businesses can be held liable when a person is injured on their property even when the condition that resulted in the injury was “open and obvious.”³⁶

Before this decision, West Virginia law provided that a land possessor only has a duty to correct hidden dangers, not address every hole or rock that might present a hazard. The court’s decision in *Hersh v. E-T Enterprises*,³⁷ however, effectively required a full trial for every slip-and-fall claim to allocate fault between the plaintiff and defendant. This result exposed West Virginians to higher insurance rates and relieved visitors of personal responsibility.

To the relief of West Virginia homeowners and businesses, the legislature restored the longstanding constraint on premises liability. The 2015 law provides that

[a] possessor of real property, including an owner, lessee or other lawful occupant, owes no duty of care to protect others against dangers that are open, obvious, reasonably apparent or as well known to the person injured as they are to the owner or

³³ See *Dunn v. Kanawha Cty. Bd. of Educ.*, 459 S.E.2d 151, 157 (W. Va. 1995) (“[A]n innocent seller can be subject to liability that is entirely derivative simply by virtue of being present in the chain of distribution of the defective product.”).

³⁴ H.B. 2850, 2017 Leg., Reg. Sess. (W. Va. 2017) (codified at W. VA. CODE ANN. § 55-7-31(b) (West 2018)).

³⁵ W. VA. CODE ANN. § 55-7-31(b)(13) (West 2018).

³⁶ See *Hersh v. E-T Enters., Ltd. P’ship*, 752 S.E.2d 336, 339 (W. Va. 2013).

³⁷ See *id.*

occupant, and shall not be held liable for civil damages for any injuries sustained as a result of such dangers.³⁸

A separate law, also enacted in 2015, preemptively avoids further expansions of premises liability by codifying and preserving the traditional common law rule that a person who owns or leases property generally has no duty to trespassers except to refrain from willfully or wantonly causing the trespasser injury.³⁹ As recently as 1999, the West Virginia Supreme Court of Appeals had reaffirmed this rule.⁴⁰ The legislation was adopted to avoid the potential for West Virginia courts to adopt a radical approach endorsed by the American Law Institute (“ALI”) in its *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* (2012).⁴¹ The ALI recommended that courts impose a broad new duty on possessors to exercise reasonable care for all entrants on their land, including unwanted trespassers.⁴² The only exception to this new duty is for harms to so-called “flagrant trespassers”⁴³—a concept that would lead to litigation because the term is undefined and appears in no state’s law. In enacting the 2015 law, West Virginia joined the majority of states that have codified the general “no duty to trespassers” rule,⁴⁴ while recognizing narrow exceptions long recognized by state common law.⁴⁵

³⁸ S.B. 13, 2015 Leg., Reg. Sess. (W. Va. 2015) (codified at W. VA. CODE ANN. § 55-7-28 (West 2018)).

³⁹ S.B. 3, 2015 Leg., Reg. Sess. (W. Va. 2015) (codified at W. VA. CODE ANN. § 55-7-27 (West 2018)).

⁴⁰ *Mallet v. Pickens*, 522 S.E.2d 436, 446 (W. Va. 1999) (abandoning the common law distinction between licensees and invitees while “retain[ing] our traditional rule with regard to a trespasser, that being that a landowner or possessor need only refrain from willful or wanton injury”).

⁴¹ RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 51 (AM. LAW INST. 2012).

⁴² *Id.*

⁴³ *Id.* § 52 cmt. a.

⁴⁴ See ALA. CODE § 6-5-345 (2018); ARIZ. REV. STAT. ANN. § 12-557 (2018); ARK. CODE ANN. § 18-60-108 (West 2018); COLO. REV. STAT. § 13-21-115(3)(a) (2018); FLA. STAT. ANN. § 768.075(3)(b) (West 2018); GA. CODE ANN. § 51-3-3 (West 2018); IND. CODE ANN. §§ 34-31-11-1 to -5 (West 2018); KAN. STAT. ANN. § 58-821 (West 2018); KY. REV. STAT. ANN. § 381.232 (West 2018); MICH. COMP. LAWS ANN. § 554.583 (West 2018); MISS. CODE ANN. § 95-5-31 (West 2018); MO. ANN. STAT. § 537.351 (West 2018); NEV. REV. STAT. ANN. § 41.515 (West 2018); N.C. GEN. STAT. §§ 38B-1 to -4 (2018); N.D. CENT. CODE § 32-47-02 (2018); OHIO REV. CODE ANN. § 2305.402 (West 2018); OKLA. STAT. ANN. tit. 76, § 80 (West 2018); S.C. CODE ANN. § 15-82-10 (2018); S.D. CODIFIED LAWS §§ 20-9-11.1 to -11.6 (2018); TENN. CODE ANN. § 29-34-208 (West 2018); TEX. CIV. PRAC. & REM. ANN. § 75.007 (West 2018); UTAH CODE ANN. § 57-14-301 (West 2018); VA. CODE ANN. § 8.01-219.1 (West 2018); WIS. STAT. ANN. § 895.529 (West 2018); WYO. STAT. ANN. §§ 34-19-201 to -204 (West 2018).

⁴⁵ See W. VA. CODE ANN. § 55-7-27(d) (West 2018) (expressing intent to “codify and preserve the common law in West Virginia on the duties owed to trespassers by possessors of real property as of the effective date of this section”); see also *Mallet*, 522 S.E.2d at 447 (quoting Sutton v.

5. Adopting the Wrongful Conduct Rule

An increasing number of states have recognized or adopted the wrongful conduct rule,⁴⁶ which provides that “[a] person cannot maintain an action if, in order to establish his cause of action, he must rely, in whole or in part, on an illegal or immoral act or transaction to which he is a party.”⁴⁷ More simply stated, the wrongful conduct rule prohibits an individual from profiting legally from his or her own criminal activity. Application of the wrongful conduct rule has often arisen in prescription drug abuse litigation, and it is in this context that the West Virginia Supreme Court of Appeals refused to recognize the rule as part of the state’s common law in 2015.

In *Tug Valley Pharmacy, L.L.C. v. All Plaintiffs Below in Mingo County*,⁴⁸ the Court allowed 29 individuals to maintain causes of action against pharmacies and physicians for allegedly causing or contributing to the plaintiffs’ drug addictions, even where the plaintiffs had admitted to illegal conduct in their acquisition and abuse of controlled substances from the defendants.⁴⁹ A majority of the Court found that West Virginia’s “system of comparative negligence offers the most legally sound and well-reasoned approach to dealing with a plaintiff

Monongahela Power Co., 158 S.E.2d 98, 104 (W. Va. 1967)) (recognizing West Virginia’s version of the “attractive nuisance doctrine,” which provides a duty to trespassing children when the owner or possessor “knew, or should have known, of the dangerous condition and that children frequented the dangerous premises either for pleasure or out of curiosity).

⁴⁶ See generally *Foister v. Purdue Pharma, L.P.*, 295 F. Supp. 2d 693 (E.D. Ky. 2003) (barring failure-to-warn claim of addicted plaintiff brought against narcotic manufacturers); *Oden v. Pepsi Cola Bottling Co. of Decatur*, 621 So. 2d 953 (Ala. 1993) (barring claim of estate of minor killed by vending machine that fell on him while he attempted to steal soft drinks); *Lord v. Fogcutter Bar*, 813 P.2d 660 (Alaska 1991) (barring action by plaintiff against bar for plaintiff’s subsequent criminal activity); *Greenwald v. Van Handel*, 88 A.3d 467 (Conn. 2014) (barring claim by patient against social worker for failure to treat patient’s child pornography habit); *Kaminer v. Eckerd Corp. of Fla.*, 966 So. 2d 452 (Fla. Dist. Ct. App. 2007) (barring claim against pharmacy by estate of student who overdosed on prescription drugs); *Rimert v. Mortell*, 680 N.E.2d 867 (Ind. Ct. App. 1997) (barring claim by convicted murderer’s conservator against physician who released murderer from mental hospital prior to murder); *Pappas v. Clark*, 494 N.W.2d 245 (Iowa Ct. App. 1992) (barring action by wife against physician and pharmacist for husband’s drug addiction); *Orzel v. Scott Drug Co.*, 537 N.W.2d 208 (Mich. 1995) (barring suit against pharmacy for alleged negligent filling of controlled substance resulting in addiction); *Price v. Purdue Pharma Co.*, 920 So. 2d 479 (Miss. 2006) (barring claim against doctors, pharmacies, and drug manufacturers for injuries plaintiff sustained as result of drug addiction); *Patten v. Raddatz*, 895 P.2d 633 (Mont. 1995) (barring negligence claims among parties who engaged in prostitution and drug abuse); *Barker v. Kallash*, 468 N.E.2d 39 (N.Y. 1984) (barring claim by minor injured while making pipe bomb against retailer who sold firecrackers from which bomb was made); *Lee v. Nationwide Mut. Ins.*, 497 S.E.2d 328 (Va. 1998) (barring claim by minor injured while operating stolen car); *Feltner v. Casey Family Program*, 902 P.2d 206 (Wyo. 1995) (barring claim by foster family and biological son against foster care placement program arising out of son’s sexual abuse of foster child).

⁴⁷ See *Orzel*, 537 N.W.2d at 212.

⁴⁸ 773 S.E.2d 627 (W. Va. 2015).

⁴⁹ *Id.* at 628.

who has engaged in immoral or illegal conduct,” rather than the complete bar to recovery which typically results from application of the wrongful conduct rule.⁵⁰ As a result, the Court held that

a plaintiff’s immoral or wrongful conduct does not serve as a common law bar to his or her recovery for injuries or damages incurred as a result of the tortious conduct of another. *Unless otherwise provided at law*, a plaintiff’s conduct must be assessed in accordance with our principles of comparative fault.⁵¹

Criticism of the *Tug Valley Pharmacy* decision was strong and swift,⁵² with state lawmakers reversing the decision through the codification of a wrongful conduct rule the next legislative session.⁵³ In doing so, the legislature amended the comparative fault statute passed just one year prior, and discussed herein, to clarify that an individual may not recover in any civil action if his or her damages arise out of the commission or attempted commission of a felony and are a proximate result of the crime committed or attempted to be committed.⁵⁴

B. Addressing Litigation Abuse

In addition to restoring balance to tort law principles, the legislature addressed areas where West Virginia had become known for procedural gamesmanship and unwarranted litigation. Recently enacted laws reduce the ability of attorneys to forum shop for courts perceived as liability-friendly and respond to excesses in asbestos, consumer, and workers’ compensation litigation.

⁵⁰ *Id.* at 635.

⁵¹ *Id.* at 636 (emphasis added).

⁵² In dissent, Justice Menis Ketchum bluntly wrote that “criminals should not be allowed to use our judicial system to profit from their criminal activity. . . . The majority’s ruling permitting criminal plaintiffs to maintain these lawsuits ignores common sense and will encourage other criminals to file similar lawsuits.” *Id.* at 635.

⁵³ S.B. 7, 2016 Leg., Reg. Sess. (W. Va. 2016) (amending W. VA. CODE ANN. § 55-7-13d(c) (West 2018)). Other states have similarly codified a wrongful conduct rule. *See, e.g.*, ALASKA STAT. ANN. § 09.65.210 (West 2018); CAL. CIV. CODE § 3333.3 (West 2018); FLA. STAT. ANN. § 776.085 (West 2018); LA. STAT. ANN. § 9:2800.10 (2018); OHIO REV. CODE ANN. § 2307.60 (West 2018); OR. REV. STAT. ANN. § 31.180 (West 2018); TEX. CIV. PRAC. & REM. CODE ANN. § 86.002(a) (West 2018).

⁵⁴ *See* W. VA. CODE ANN. § 55-7-13d(c)(1) (West 2018).

1. Stopping Litigation Tourism Through Venue Reform

For many years, West Virginia legislators tried to curb what has become known as “litigation tourism.”⁵⁵ In 2018, they may have succeeded.

There is a long history of plaintiffs’ lawyers from around the nation packing their bags and filing lawsuits in West Virginia on behalf of clients who never lived or worked in the Mountain State.⁵⁶ As former Supreme Court of Appeals Justice Richard Neely candidly explained 30 years ago:

As long as I am allowed to redistribute wealth from out-of-state companies to in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else’s money away, but so is my job security, because the in-state plaintiffs, their families, and their friends will re-elect me.

. . . [I]t should be obvious that the in-state local plaintiff, his witnesses, and his friends, can all vote for the judge, while the out-of-state defendant can’t even be relied upon to send a campaign contribution.⁵⁷

When court procedures, judges, juries, or the substantive law of liability and damages are viewed as more favorable to plaintiffs in West Virginia than their home state, plaintiffs logically file lawsuits in West Virginia.⁵⁸

Past attempts to address this practice had limited success. In 2003, the legislature responded by amending the state’s venue statute. The law, which was signed by Governor Bob Wise (D), barred nonresident plaintiffs from bringing suit in West Virginia “unless all or a substantial part of the acts or omissions

⁵⁵ See Tony Mauro, *Anticipation Builds for Huge SCOTUS Ruling on Forum-Shopping*, NAT’L L.J. (June 14, 2017, 2:20 PM), <https://www.law.com/sites/almstaff/2017/06/14/anticipation-builds-for-huge-scotus-ruling-on-forum-shopping/> (reporting tort scholar Victor Schwartz coined the phrase “litigation tourism” to describe the problem of attorneys who file claims “in plaintiff-friendly venues that have little or no connection to the defendant corporation or the injuries at issue”).

⁵⁶ See Schwartz, Joyce & Silverman, *supra* note 1, at 769 (discussing the onslaught of asbestos claims brought in West Virginia courts by nonresidents in the 1990s).

⁵⁷ RICHARD NEELY, *THE PRODUCT LIABILITY MESS: HOW BUSINESS CAN BE RESCUED FROM THE POLITICS OF STATE COURTS* 4, 62 (1988); see also Schwartz, Joyce & Silverman, *supra* note 1, at 764–65 (further examining Neely’s book).

⁵⁸ Worsening the situation, in 2003, the Supreme Court of Appeals limited the ability of courts to dismiss cases with little or no connection to the state, finding that the “doctrine of *forum non conveniens* is a drastic remedy, which should be used with caution and restraint.” *Abbott v. Owens-Corning Fiberglass Corp.*, 444 S.E.2d 285, 292 (W. Va. 1994), *superseded by statute*, W. VA. CODE ANN. § 56-1-1a (West 2018).

giving rise to the claim occurred in this state.”⁵⁹ The legislature also protected nonresidents by allowing them to bring claims in West Virginia courts if they are unable to obtain jurisdiction against the defendant in a state or federal court where the action arose, unless barred by the applicable statute of limitations.⁶⁰

That law was short lived, as the Supreme Court of Appeals invalidated it on eyebrow-raising grounds just three years after it took effect. That case, *Morris v. Crown Equipment Corp.*,⁶¹ involved a worker who was injured in Virginia while operating a forklift that had been sold and used in Virginia, and where all witnesses and evidence presumably were in Virginia.⁶² He sued the company that designed and made the forklift, which was an Ohio corporation, in the Kanawha Circuit Court.⁶³ The plaintiff also named a West Virginia company that distributed and serviced the forklift as a defendant, giving the lawsuit a local tie.⁶⁴

Applying the 2003 venue law, the trial court dismissed the lawsuit because a substantial part of the acts at issue did not occur in West Virginia.⁶⁵ The Supreme Court of Appeals reversed, holding that the Privileges and Immunities Clause of the U.S. Constitution prevents West Virginia from barring lawsuits by a nonresident against a West Virginia defendant, even when the acts occurred elsewhere.⁶⁶ In a fractured opinion, the court held that once venue is proper as to the nonresident’s claims against a West Virginia defendant, venue is also proper for nonresident defendants.⁶⁷

This decision is in tension with longstanding U.S. Supreme Court precedent that recognized “[t]here are manifest reasons for preferring residents in access to often over-crowded Courts, both in convenience and in the fact that broadly speaking it is they who pay for maintaining the Courts concerned.”⁶⁸ While many state venue laws make distinctions between residents and nonresidents,⁶⁹ this practice, the Supreme Court of Appeals found, was impermissible as a matter of federal constitutional law in West Virginia. The

⁵⁹ S.B. 213, 2003 Leg., Reg. Sess. (W. Va. 2003) (codified at W. VA. CODE ANN. § 56-1-1(c) (West 2003)), *invalidated by* *Morris v. Crown Equip. Corp.*, 633 S.E.2d 292 (W. Va. 2006).

⁶⁰ *Id.*

⁶¹ 633 S.E.2d 292 (W. Va. 2006).

⁶² *See id.* at 294.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *See id.* at 306.

⁶⁶ *See id.* at 298–301.

⁶⁷ *See id.* at 301. Two justices on the five-member court issued separate concurring opinions. One justice dissented.

⁶⁸ *Douglas v. New York, N.H. & H. R.R.*, 279 U.S. 377, 387 (1929) (upholding New York statute providing that a foreign corporation or nonresident could only sue a foreign corporation in New York if the defendant foreign corporation conducted business in New York).

⁶⁹ *See* Schwartz, Joyce & Silverman, *supra* note 1, at 770 (citing state statutes).

ruling also conflicted with the common law doctrine of *forum non conveniens* that has, from its inception, considered the residency of the parties among other factors in deciding whether a case should be heard elsewhere.⁷⁰ The U.S. Supreme Court, however, denied certiorari.⁷¹

As a result, lawyers were again able to bring product liability and other lawsuits in West Virginia courts without any showing of acts or omissions in the state, so long as each plaintiff alleged a colorable claim against one West Virginia defendant. The legislature, hamstrung by the ruling, removed the provision precluding claims by nonresidents when the claim had no substantial connection to the state a decade ago and instead codified the state's existing doctrine of *forum non conveniens*.⁷² While this factor-based approach can reduce forum shopping when properly applied,⁷³ it leaves significant discretion with trial court judges whose historical reluctance to apply the doctrine to dismiss cases with little or no connection to the state is the very reason venue reforms were pursued in the first place.

The legislature again amended the venue statute in 2018.⁷⁴ Like the 2003 law, the 2018 provision provides that "a nonresident of the state may not bring an action in a court of this state unless all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state."⁷⁵ It also similarly provides an exception in situations where a nonresident's claim cannot proceed where the action arose because of the plaintiff's inability to obtain jurisdiction over the defendant there, unless the action is time-barred there.⁷⁶ In addition, the law provides that in cases in which there are multiple plaintiffs, "each plaintiff must independently establish proper venue."⁷⁷ This provision prevents lawyers from circumventing the venue law by naming one West Virginia resident as a plaintiff and joining scores of people who do not live in West Virginia and whose claims have no connection to the state. The legislation, which was signed into law by Governor Jim Justice (R), applies to all civil actions filed on or after July 1, 2018.

⁷⁰ See *id.* at 770–71 (citing longstanding U.S. Supreme Court jurisprudence allowing courts to favor the claims of residents over nonresidents).

⁷¹ *Crown Equip. Corp. v. Morris*, 594 U.S.1096, 1096 (2006).

⁷² See H.B. 2956, 2007 Leg., Reg. Sess. (W. Va. 2007) (codified as amended at W. VA. CODE ANN. § 56-1-1a (West 2018)).

⁷³ See, e.g., *State ex rel. J.C. v. Mazzone*, 772 S.E.2d 336, 349–50 (W. Va. 2015) (upholding dismissal of 20 nonresident Zoloff plaintiffs under the *forum non conveniens* statute's eight-factor approach).

⁷⁴ H.B. 4013, 2018 Leg., Comm. Subst., Reg. Sess. (W. Va. 2018) (amending W. VA. CODE ANN. § 56-1-1 (West 2018)).

⁷⁵ *Id.* (codified at W. VA. CODE ANN. § 56-1-1(c) (West 2018)).

⁷⁶ *Id.*

⁷⁷ *Id.*

So what changed in the past 15 years to make a law once viewed as unconstitutional by the highest court of West Virginia now constitutional? The answer is the U.S. Supreme Court has indicated—three times since *Morris v. Crown Equipment Corp.*—that not only are restrictions on nonresident claims that have no connection to a state permissible, they are constitutionally mandated.⁷⁸ These decisions have tightened the requirements for courts to exercise personal jurisdiction over nonresidents. Read together, they instruct that a court may not hear a claim against a business unless (1) the claim has a substantial connection to the state, providing specific jurisdiction over the claim; or (2) the company is incorporated or has a principle place of business in that state, allowing general jurisdiction over that defendant.⁷⁹

First, in *Goodyear Dunlop Tires Operations, S.A. v. Brown*,⁸⁰ the Court held that a North Carolina state court could not exercise jurisdiction over foreign subsidiaries of a U.S. tire maker.⁸¹ That case involved a bus accident in France and tires that were made and sold abroad, providing no basis for specific jurisdiction. The subsidiaries had no place of business, employees, or bank accounts in North Carolina; did not design, manufacture, or advertise their products in North Carolina; did not solicit business in North Carolina or themselves sell or ship tires to North Carolina customers.⁸² Although a small percentage of their tires were distributed through the “stream of commerce” in North Carolina by others, the Court held this limited connection did not establish the type of “continuous and systematic” contacts needed to empower the state court to hear claims unrelated to the companies’ contacts with North Carolina.⁸³

The next shoe to fall was *Daimler AG v. Bauman*,⁸⁴ which basically limited the forums in which a corporation is subject to general jurisdiction to where that company is “essentially at home”—where it is incorporated or has its principal place of business.⁸⁵ There, a German corporation was sued in federal court in California by Argentinian plaintiffs for human rights violations allegedly perpetrated by the company’s Argentinian subsidiary in Argentina.⁸⁶ Building on *Goodyear*, the U.S. Supreme Court reemphasized that “only a limited set of affiliations with a forum will render a defendant amenable to all-purpose

⁷⁸ See generally *Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 137 S. Ct. 1773 (2017); *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011).

⁷⁹ See *Bristol-Myers Squibb*, 137 S. Ct. at 1779–81.

⁸⁰ 564 U.S. 915 (2011).

⁸¹ *Id.* at 918–19.

⁸² *Id.* at 921–22.

⁸³ *Id.*

⁸⁴ 571 U.S. 117 (2014).

⁸⁵ See *id.* at 128, 137–38.

⁸⁶ See *id.* at 122–23.

jurisdiction[.]”⁸⁷ Subjecting the company to a lawsuit in California for conduct “having nothing to do with anything” that occurred there, the Court held, would be an “exorbitant exercise[] of all-purpose jurisdiction” and violate due process.⁸⁸

The Court’s 2017 ruling in *Bristol-Myers Squibb Co. v. Superior Court of California*⁸⁹ was the capstone that should put to rest debate regarding the validity of West Virginia’s venue law.⁹⁰ *Bristol-Myers Squibb* held that state courts may not decide cases that lack a specific connection to the state unless the defendant is incorporated or has its principal place of business in that state.⁹¹ In an 8-1 decision, the Court reversed a California Supreme Court ruling that had allowed its trial courts to hear a lawsuit brought by more than 600 individuals from 33 different states seeking compensation for injuries associated with the drug Plavix.⁹² The state high court had reasoned that the manufacturer’s marketing and promotion of the drug throughout the United States, including in California, established sufficient “minimum contacts” to allow the state court to exercise jurisdiction over all of the claims, including those of nonresidents.⁹³ The U.S. Supreme Court found that “[w]hat is needed—and what is missing here—is a connection between the forum and the specific claims at issue.”⁹⁴ The Court also recognized that “[t]he mere fact that *other* plaintiffs were prescribed, obtained, and ingested [the product] in California—and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents’ claims.”⁹⁵

While these decisions were issued in the context of personal jurisdiction, rather than venue, they indicate that it is perfectly appropriate (if not constitutionally mandated) to consider whether a nonresident’s claim has a substantial connection to the state in which it is filed. West Virginia’s 2018 venue reform is consistent with these cases and should withstand legal scrutiny. As the near unanimous decision in *Bristol-Myers Squibb* shows, it is now firmly established that a state can and must curb the filing of lawsuits against

⁸⁷ *Id.* at 137.

⁸⁸ *Id.* at 139.

⁸⁹ 137 S. Ct. 1773 (2017).

⁹⁰ Just a few months prior to the decision, legislation virtually identical to the 2003 venue law was introduced, but not considered amidst speculation as to whether the legislation could withstand legal scrutiny. *See* S.B. 451, 2017 Leg., Reg. Sess. (W. Va. 2017). The *Bristol-Myers Squibb* decision put that speculation to rest and cleared the path, so to speak, for passage of the venue statute in 2018.

⁹¹ *See Bristol-Myers Squibb*, 137 S. Ct. at 1780.

⁹² *See id.* at 1777.

⁹³ *See id.* at 1778–79.

⁹⁴ *Id.* at 1781.

⁹⁵ *Id.*

nonresidents that lack a substantial connection to the state and that each plaintiff must establish this connection.

2. Providing Medical Criteria for Asbestos Claims and Transparency Between the Tort and Trust Systems

Beginning in the mid-1990s, courts, including those in West Virginia, became “deluged with asbestos lawsuits.”⁹⁶ Lawyers sponsored X-ray screenings to amass large numbers of claims, including many by individuals who had no impairment.⁹⁷ One of the nation’s most prolific “B-readers”—a radiologist that reviews x-rays for signs of asbestosis—was West Virginia doctor Ray A. Harron.⁹⁸ He reviewed “as many as 150 X-rays a day, or one every few minutes, and produced medical reports for \$125 each,” according to a New York Times exposé.⁹⁹ In 2012, a federal jury found two lawyers and Dr. Harron liable for violating the Racketeer Influenced and Corrupt Practices Act (RICO) by fraudulently filing asbestos claims.¹⁰⁰ Similar troubling practices occurred in litigation alleging workers had developed silicosis, as 10,000 such lawsuits suddenly flooded courts in the early 2000s.¹⁰¹ A federal judge found, “[T]hese diagnoses were driven by neither health nor justice: they were manufactured for money.”¹⁰² The filing of cases on behalf of unimpaired claimants not only

⁹⁶ State *ex rel.* Allman v. MacQueen, 551 S.E.2d 369, 371–72, 374 (W. Va. 2001) (quoting *The Fairness in Asbestos Compensation Act: Hearing on H.R. 1283 Before the H. Comm. on the Judiciary*, 106th Cong. 185–215 (July 1, 1999) (statement of William N. Eskridge, Professor, Yale Law School)).

⁹⁷ See Lester Brickman, *On the Theory Class’s Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality?*, 31 PEPP. L. REV. 33, 68 (2003).

⁹⁸ See Jonathan D. Glater, *Reading X-Rays in Asbestos Suits Enriched Doctor*, N.Y. TIMES (Nov. 29, 2005), <https://www.nytimes.com/2005/11/29/business/reading-xrays-in-asbestos-suits-enriched-doctor.html>.

⁹⁹ See *id.*; see also *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 583, 596–97 (S.D. Tex. 2005) (discussing Dr. Harron’s unreliable practices); Mark A. Behrens, *Asbestos Litigation Screening Challenges: An Update*, 26 T.M. COOLEY L. REV. 721, 722–24 (2009) (discussing mass screening practice generally).

¹⁰⁰ See Amaris Elliott-Engel, *Two Pittsburgh Asbestos Lawyers Liable in Fraud Cases*, PITT. POST-GAZETTE (Dec. 31, 2012, 12:00 AM), <http://www.post-gazette.com/business/legal/2012/12/31/Two-Pittsburgh-asbestos-lawyers-liable-in-fraud-cases/stories/201212310181>; Daniel Fisher, *Law Firm Hit With \$429,000 Verdict Over Faked Asbestos Suits*, FORBES (Dec. 21, 2012, 12:19 PM), <https://www.forbes.com/sites/danielfisher/2012/12/21/law-firm-hit-with-429000-verdict-over-faked-asbestos-suits>. The lawyers ultimately agreed to pay the full \$7.3 million in damages and attorneys’ fees and withdrew their appeal. See Emily Field, *CSX, Asbestos Attys End 4th Circ. RICO Fight With \$7.3M Deal*, LAW360 (Nov. 6, 2014), <https://www.law360.com/articles/594159/csx-asbestos-attys-end-4th-circ-rico-fight-with-7-3m-deal>.

¹⁰¹ See Susan Warren, *Silicosis Suits Rise Like Dust*, WALL ST. J. (Sept. 4, 2003, 12:01 AM), <https://www.wsj.com/articles/SB106262836985280100>.

¹⁰² *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 635.

unjustly imposes potentially bankrupting liability on businesses, it also depletes resources for people who are sick or who may develop illnesses in the future.¹⁰³

The West Virginia legislature responded by adopting medical criteria based on guidelines developed by the American Medical Association for determining impairment in cases alleging injuries stemming from exposure to asbestos or silica. The 2015 law, known as the Asbestos and Silica Claims Priorities Act, prioritizes judicial consideration of claims of individuals who can demonstrate actual physical impairment, requires medical documentation to support a claim, and preserves the rights of individuals who have been exposed to asbestos or to silica, but who have no present physical impairment, to bring an action in the future.¹⁰⁴

This approach finds support in Shared State Legislation adopted by the Council of State Governments,¹⁰⁵ in resolutions adopted by the National Association of Insurance Commissioners and the National Conference of Insurance Legislators supporting the enactment of objective medical criteria to fairly treat asbestos claimants who have not yet manifested symptoms;¹⁰⁶ and in an American Bar Association resolution supporting the enactment of federal asbestos medical criteria legislation to advance only those cases of individuals with demonstrated physical impairment.¹⁰⁷ Similar laws are in place in nine other states.¹⁰⁸ Courts in other jurisdictions that host significant asbestos litigation have adopted comparable procedures.¹⁰⁹

¹⁰³ See Mark A. Behrens, *What's New in Asbestos Litigation?*, 28 REV. LITIG. 501, 505 (2009).

¹⁰⁴ S.B. 411, 2015 Leg., Reg. Sess. (W. Va. 2015) (codified at W. VA. CODE ANN. §§ 55-7F-1 to -11 (West 2018)).

¹⁰⁵ COUNCIL OF STATE GOV'TS, 2006 SUGGESTED STATE LEGISLATION: ASBESTOS TORT REFORM (2006), <https://www.csg.org/sslfiles/dockets/26cycle/2006vol/2006ssldrafts/asbestostortreform2006ssl.pdf> (sharing Ohio law).

¹⁰⁶ See NAT'L CONFERENCE OF INS. LEGISLATORS, RESOLUTION REGARDING THE NEED FOR EFFECTIVE ASBESTOS REFORM (2003), <http://ncoil.org/wp-content/uploads/2016/04/AsbestosResolution.doc>; *Alliance Praises NAIC Adoption of Strong Asbestos Resolution*, INS. J. (May 15, 2003), <http://www.insurancejournal.com/news/national/2003/05/15/28978.htm>.

¹⁰⁷ ABA COMM'N ON ASBESTOS LITIG., REPORT TO THE HOUSE OF DELEGATES (Feb. 2003), http://www.americanbar.org/content/dam/aba/migrated/leadership/full_report.authcheckdam.pdf (adopting the ABA Standard for Non-Malignant Asbestos-Related Disease Claims).

¹⁰⁸ See FLA. STAT. ANN. § 774.204 (West 2018); GA. CODE ANN. § 51-14-1 (West 2018); IOWA CODE § 686B.1 (West 2018); KAN. STAT. ANN. § 60-4901 (West 2018); OHIO REV. CODE ANN. § 2307.91 (West 2018); OKLA. STAT. ANN. tit. 76, §§ 90-94 (West 2018); S.C. CODE ANN. § 44-135-10 (2018); TENN. CODE ANN. § 50-6-209 (West 2018); TEX. CIV. PRAC. & REM. CODE ANN. §§ 90.001-90.003 (West 2018).

¹⁰⁹ Examples of such jurisdictions include Boston, New York City, Chicago, and Baltimore City. See *In re Asbestos Cases* (Cook County Cir. Ct., Ill. Mar. 26, 1991); *In re Mass. State Ct. Asbestos Pers. Injury Litig.* (Middlesex Super. Ct., Mass. amended Sept. 22, 1994); *In re Asbestos Pers. Injury & Wrongful Death Asbestos Cases*, No. 92344501, 1992 WL 12019620 (Md. Cir. Ct. Dec. 9, 1992); *In re N.Y.C. Asbestos Litig.*, No. 40000/88, 2002 WL 32151568 (N.Y. Sup. Ct. Dec. 19, 2002).

The same legislation addressed another form of widespread abuse in asbestos litigation. In litigation, plaintiffs' attorneys allege that their clients' injuries stem from exposure to asbestos from products of solvent companies. Plaintiffs' attorneys also file claims on behalf of the same individuals with trusts established by companies that are bankrupt as a result of asbestos-related liability. These trust claims sometimes contradict deposition testimony in the civil suit by asserting the plaintiff's exposure stemmed from sources other than those disclosed in the litigation.¹¹⁰ A federal judge has found that the tort system is "infected by the manipulation of exposure evidence by plaintiffs and their lawyers," which has the "effect of unfairly inflating the recoveries."¹¹¹

In response, West Virginia adopted a law that provides transparency between asbestos litigation and claims for compensation filed with asbestos trusts.¹¹² The new law requires a plaintiff to provide a sworn statement identifying all trust claims that the plaintiff has filed or potentially could be filed no later than 120 days before trial.¹¹³ A plaintiff must also make available to all parties all trust claims materials.¹¹⁴ If a plaintiff has not made these disclosures, a court may not schedule the case for trial.¹¹⁵ The court may also stay asbestos litigation if the plaintiff has a potential asbestos trust claim until it is filed.¹¹⁶ In addition, the law addresses the practice of "double dipping," in which a plaintiff is compensated twice for the same injury through a lawsuit and trust claims, by entitling defendants to a setoff or credit in the amount of the valuation established by the trust.¹¹⁷ West Virginia is among a dozen states that have enacted trust

¹¹⁰ See U.S. CHAMBER INST. FOR LEGAL REFORM, DISCONNECTS AND DOUBLE-DIPPING: THE CASE FOR ASBESTOS BANKRUPTCY TRUST TRANSPARENCY IN VIRGINIA 8–10 (2016), https://instituteforlegalreform.com/uploads/sites/1/DisconnectsDoubleDipPaper_WebReady.pdf (documenting several examples).

¹¹¹ *In re Garlock Sealing Techs., LLC*, 504 B.R. 71, 82, 86 (Bankr. W.D.N.C. 2014).

¹¹² S.B. 411, 2015 Leg., Reg. Sess. (W. Va. 2015) (codified at W. VA. CODE ANN. §§ 55-7F-1 to -11 (West 2018)).

¹¹³ W. VA. CODE ANN. § 55-7F-4(a) (West 2018).

¹¹⁴ *Id.* § 55-7F-4(b).

¹¹⁵ *Id.* § 55-7F-4(d), -6(a).

¹¹⁶ *Id.* § 55-7F-6(b).

¹¹⁷ *Id.* § 55-7F-9.

transparency laws,¹¹⁸ in addition to individual courts that have addressed such practices through discovery rulings and case management orders.¹¹⁹

3. Addressing Excessive Litigation Under the West Virginia Consumer Credit and Protection Act

The West Virginia Consumer Credit and Protection Act (WVCCPA) prohibits a debt collector from using “unfair or unconscionable means to collect or attempt to collect any claim.”¹²⁰ In recent years, this provision spurred “gotcha lawsuits” in which some claims attempted to turn a business’s reasonable attempt to collect an outstanding bill for \$25 into a \$75,000 claim.¹²¹ These types of lawsuits allege that a collection attempt violates a technical requirement of the law and seeks steep statutory fines for every bill mailed or follow up call or letter.

Twice since 2015, the legislature amended the WVCCPA to reduce the potential for abuse. First, the legislature clarified that certain practices are permissible under the law, such as sending consumers regular account statements and notices, and cannot constitute a prohibited communication seeking payment of a debt.¹²² That legislation also provided that plaintiffs cannot recover more than \$1,000 per violation.¹²³ The legislature revisited the WVCCPA in 2017 to require that, before filing a lawsuit, consumers give 45 days’ notice to a creditor or debt collector, providing the business with an opportunity to correct the situation.¹²⁴ If the consumer accepts the offer, then the business must address the

¹¹⁸ See ARIZ. REV. STAT. ANN. § 12-782 (2018); IOWA CODE ANN. § 686A.1 (West 2018); N.D. CENT. CODE ANN. § 32-46.1-01 (West 2018); OHIO REV. CODE ANN. § 2307.951 (West 2018); OKLA. STAT. tit. 76, §§ 81–89 (West 2018); MISS. CODE ANN. § 11-67-1 (West 2018); S.D. CODIFIED LAWS § 22-66 (2018); TENN. CODE ANN. § 29-34-601 (West 2018); TEX. CIV. PRAC. & REM. CODE ANN. § 90.051 (West 2018); UTAH CODE ANN. 1953 § 78B-6-2001 (West 2018); WIS. STAT. ANN. § 802.025 (West 2018).

¹¹⁹ See William P. Shelley et. al, *The Need for Further Transparency Between the Tort System and Section 524(g) Asbestos Trusts, 2014 Update—Judicial and Legislative Developments and Other Changes in the Landscape Since 2008*, 23 WIDENER L.J. 675, 702–09 (2014).

¹²⁰ W. VA. CODE ANN. § 46A-2-128 (West 2018).

¹²¹ See, e.g., Susan Baek, *Frivolous Lawsuit Alert*, 111 W. VA. MED. J. 41–42 (May/June 2015) (describing one such suit brought against a physician), <http://cdn.coverstand.com/30875/254650/1032a71d895a1565ad6087d19a8047a7e2afdd6d.15.pdf>.

¹²² S.B. 542, 2015 Leg., Reg. Sess. (W. Va. 2015) (codified at W. VA. CODE ANN. § 46A-2-128(e) (West 2018)).

¹²³ W. VA. CODE ANN. § 46A-5-101 (West 2018). Prior law allowed statutory damages between \$100 and \$1,000 subject to the discretion of the trial judge. See W. VA. CODE ANN. § 46A-5-101(1) (West 2015). This amount was subject to an inflation adjustment, however, allowing for damages as high as \$4,800 per violation. See *Lanham v. Nationstar Mortg., LLC*, 169 F. Supp. 3d 658, 661 n.2 (S.D. W. Va. 2016).

¹²⁴ S.B. 563, 2017 Leg., Reg. Sess. (W. Va. 2017) (codified at W. VA. CODE ANN. § 46A-5-108(a) (West 2018)).

issue within 20 days and litigation is avoided.¹²⁵ If no offer is made, then the consumer may file a claim.¹²⁶ If an offer is made during that 45-day period but is rejected by the consumer, that consumer can recover attorney's fees if he or she prevails at trial and is awarded more than the offer.¹²⁷

The legislature also amended WVCCPA provisions that generally prohibit unfair and deceptive business practices.¹²⁸ The 2015 law responds to a Supreme Court of Appeals ruling that effectively eliminated a requirement that those who bring consumer protection claims show an "ascertainable loss."¹²⁹ Instead, the court allowed claims to merely assert that consumers purchased a product or service that was "different" or "inferior" from what they expected without the need to show any actual damages.¹³⁰ The statute now explicitly provides that when a consumer files a WVCCPA claim seeking damages, he or she must show an "actual out-of-pocket loss" caused by the alleged violation.¹³¹ That modest change may help West Virginia avoid becoming a magnet for no-injury consumer class actions.¹³²

4. Preserving the Workers' Compensation Act

The workers' compensation system benefits workers by providing quick, no-fault compensation for work-related injuries, is supported by employers because it limits their liability exposure, and helps both parties by avoiding costly and time-consuming litigation. There is a history, however, of the Supreme Court of Appeals interpreting the Workers' Compensation Act to allow employees to bring tort claims against employers.¹³³

Since its 1913 adoption, West Virginia's Workers' Compensation Act has allowed workers to bring a claim against their employers for a work-related injury outside the no-fault system if he or she can show an employer acted with "deliberate intention . . . to produce the injury or death."¹³⁴ As this language suggests, it was meant as a narrow exception.¹³⁵ The court began diluting the

¹²⁵ W. VA. CODE ANN. § 46A-5-108(d) (West 2018).

¹²⁶ *Id.* § 46A-5-108(a).

¹²⁷ *Id.* § 46A-5-108(f).

¹²⁸ S.B. 315, 2015 Leg., Reg. Sess. (W. Va. 2015) (amending W. VA. CODE ANN. § 46A-6-106(b) (West 2018)).

¹²⁹ *See In re W. Va. Rezulin Litig.*, 585 S.E.2d 52, 76 (W. Va. 2003).

¹³⁰ *Id.*

¹³¹ W. VA. CODE ANN. § 46A-6-106(b) (West 2018).

¹³² *See generally* Victor E. Schwartz & Cary Silverman, *The Rise of "Empty Suit" Litigation: Where Should Tort Law Draw the Line?*, 80 BROOK. L. REV. 599, 628-73 (2015).

¹³³ *See* Schwartz, Joyce, & Silverman, *supra* note 1, at 782-85.

¹³⁴ W. VA. CODE ANN. § 23-4-2(c) (West 2018).

¹³⁵ *See* Jami Suver, *A Brief History of Deliberate Intent Actions in West Virginia*, 21 No. 2 W. VA. EMP. L. LETTER 5 (Aug. 2015).

deliberate intent standard in *Mandolidis v. Elkins Industries, Inc.*,¹³⁶ when it found that while the workers' compensation act removed injuries resulting from negligence from the tort system, lawsuits alleging an employer acted recklessly fell within this exception.¹³⁷ The legislature then responded by providing a more specific standard in 1986, only for the court to dilute it again in 1990 and 2006,¹³⁸ and, most recently, in 2013.¹³⁹

In the latest case, *McComas v. ACF Industries*, the court ruled that an employer is subject to liability for worker injuries outside the workers' compensation system even when it had no actual knowledge of a workplace hazard if a plaintiff alleges that the employer would have learned of the hazard had it routinely conducted industry-required safety inspections.¹⁴⁰ As Justice Loughry recognized in his dissent, this ruling was "yet another step toward . . . rendering our 'deliberate intent' statute a meaningless codification of simple workplace negligence standards."¹⁴¹ The majority created a tort action based on what an employer should have discovered through an inspection, rather than actual knowledge of a specific dangerous condition, as the statute had required.¹⁴²

The legislature responded in 2015 by overturning *McComas*.¹⁴³ Among other workers' compensation reforms, the new law defines "deliberate intent" as encompassing situations in which an employer "consciously, subjectively and deliberately formed intention to produce the specific result of injury or death to an employee."¹⁴⁴ The legislature also allowed claims outside the workers' compensation system when there is evidence that an employer had actual knowledge of a specific unsafe working condition that presented a high degree of risk and a strong probability of serious injury or death, but failed to address it.¹⁴⁵ In addition, under the new law, a plaintiff can show an employer had "actual knowledge" through evidence, such as an *intentional* failure to conduct a mandated safety inspection or knowledge of "prior accidents, near misses, safety

¹³⁶ 246 S.E.2d 907 (W. Va. 1978).

¹³⁷ *See id.* at 914.

¹³⁸ *See* *Ryan v. Clonch Indus. Inc.*, 639 S.E.2d 756, 763 (W. Va. 2006) (finding failure to conduct a safety inspection that would have revealed a need for personal protective equipment permitted a tort claim); *Mayles v. Shoney's, Inc.*, 405 S.E.2d 15, 23 (W. Va. 1990) (finding the legislature's 1986 amendment "in an apparent effort to narrow the parameters of civil liability for employers, has indeed broadened the concept").

¹³⁹ *McComas v. ACF Indus., LLC*, 750 S.E.2d 235 (W. Va. 2013).

¹⁴⁰ *See id.* at 243.

¹⁴¹ *Id.* at 245 (Loughry, J., dissenting, joined by Benjamin, C.J.).

¹⁴² *See id.*

¹⁴³ H.B. 2011, 2015 Leg., Reg. Sess. (W. Va. 2015) (codified at W. VA. CODE ANN. § 23-4-2 (West 2018)).

¹⁴⁴ W. VA. CODE ANN. § 23-4-2(d)(2)(A) (West 2018).

¹⁴⁵ *See id.* § 23-4-2(d)(2)(B).

complaints or citations from regulatory agencies.”¹⁴⁶ The new law explicitly prohibits claims outside the workers’ compensation system based on what an employer allegedly “should have known.”¹⁴⁷

C. More Reasonably Determining Damages

In addition to adopting mainstream tort law principles and reining in litigation abuse, the West Virginia legislature enacted four proposals that address inflated or excessive damage awards. These changes should reduce the potential for “jackpot justice,” make the state’s liability system more predictable, and facilitate settlement of disputes.

1. Advancing Proportionality in Punishment

A new West Virginia law more closely ties punishment imposed through a punitive damage award to the actual harm caused by a defendant’s misconduct. Before 2015, unlike most other states, West Virginia did not require “clear and convincing” evidence of misconduct to support a punitive damage award.¹⁴⁸ Instead, courts applied the lower preponderance of the evidence standard used for ordinary civil liability.¹⁴⁹ West Virginia also allowed limitless punitive damage awards, subject only to review for excessiveness under constitutional principles of due process. This combination had resulted in multimillion dollar verdicts in cases involving ordinary negligence, not malicious wrongdoing.¹⁵⁰

Legislation enacted in 2015 fundamentally changes the way punitive damages are decided in West Virginia.¹⁵¹ It requires clear and convincing evidence of “actual malice toward the plaintiff or a conscious, reckless and outrageous indifference to the health, safety and welfare of others” to support

¹⁴⁶ *Id.* § 23-4-2(d)(2)(B)(I), (III).

¹⁴⁷ *Id.* § 23-4-2(d)(2)(B)(II).

¹⁴⁸ See *Coleman v. Sopher*, 499 S.E.2d 592, 606 n.21 (W. Va. 1997). By 2000, 29 states and the District of Columbia had adopted the clear and convincing evidence standard for punitive damage awards. See Victor E. Schwartz et al., *Reining in Punitive Damages “Run Wild”*: *Proposals for Reform by Courts and Legislatures*, 65 BROOK. L. REV. 1003, 1013 (1999) [hereinafter *Reining in Punitive Damages*] (citing statutes and court decisions). Additional states have followed. See, e.g., ARK. CODE ANN. § 16-55-207 (West 2018) (enacted 2003); TENN. CODE ANN. § 29-39-104(a)(1) (West 2018) (enacted 2011).

¹⁴⁹ *Goodwin v. Thomas*, 403 S.E.2d 13, 16 (W. Va. 1991).

¹⁵⁰ See, e.g., *Manor Care, Inc. v. Douglas*, 763 S.E.2d 73, 94 (W. Va. 2014) (Benjamin, J., concurring in part and dissenting in part) (reducing \$80 million punitive damages award against nursing home to \$32 million, an amount seven times the amount of compensatory damages, in a case in which the jury found no more than simple negligence).

¹⁵¹ S.B. 421, 2015 Leg., Reg. Sess. (W. Va. 2015) (codified at W. VA. CODE ANN. § 55-7-29 (West 2018)).

such an award.¹⁵² This standard reflects the quasi-criminal nature of punitive damages and falls between the preponderance of the evidence standard of proof used to establish liability in an ordinary civil case and the “beyond a reasonable doubt” standard applied in criminal cases.¹⁵³

In addition, the new law allows a defendant to request that the jury determine liability for compensatory damages before considering punitive damages.¹⁵⁴ Bifurcation of the trial in this manner reduces the risk that plaintiffs’ attorneys will inflame the jury by tarnishing the reputation of a defendant or emphasizing its financial resources before deciding whether a defendant is responsible for a plaintiff’s injury.

Finally, the new law provides proportionality between the harm resulting from misconduct and the punishment. Punitive damages can be as high as four times the amount of compensatory damages or \$500,000, whichever is greater.¹⁵⁵ This law places West Virginia in the mainstream, as most states have adopted similar safeguards.¹⁵⁶ It is also consistent with historic precedent for punishing misconduct and the U.S. Supreme Court’s cautionary instruction that punitive damage awards that are four times the amount of compensatory damages are “close to the line” of a due process violation.¹⁵⁷

Courts nationwide have overwhelmingly found that statutory limits on punitive damages are constitutional, as setting appropriate levels of punishment

¹⁵² W. VA. CODE ANN. § 55-7-29(a) (West 2018).

¹⁵³ *See Reining in Punitive Damages*, *supra* note 148, at 1013.

¹⁵⁴ W. VA. CODE ANN. § 55-7-29(b) (West 2018).

¹⁵⁵ *Id.* § 55-7-29(c).

¹⁵⁶ About half of the states that permit punitive damages have enacted statutory limits. *See, e.g.*, ALA. CODE § 6-11-21 (2018); ALASKA STAT. ANN. § 9.17.020(f)–(h) (West 2018); COLO. REV. STAT. ANN. § 13-21-102(1)(a) (West 2018); CONN. GEN. STAT. ANN. § 52-240b (West 2018) (product liability only); FLA. STAT. ANN. § 768.73 (West 2018); GA. CODE ANN. § 51-12-5.1(f)–(g) (West 2018); IDAHO CODE ANN. § 6-1604 (West 2018); IND. CODE ANN. § 34-51-3-4 (West 2018); KAN. STAT. ANN. § 60-3702 (West 2018); ME. REV. STAT. ANN. tit. 18-A § 2-804(b) (2018) (repeal effective 2019) (wrongful death cases only); MISS. CODE ANN. § 11-1-65 (West 2018); MO. ANN. STAT. § 510.265 (West 2018); NEV. REV. STAT. ANN. § 42.005 (West 2018); N.J. STAT. ANN. § 2A:15-5.14 (West 2018); N.C. GEN. STAT. § 1D-25 (West 2018); N.D. CENT. CODE § 32.03.2-11 (2018); OHIO REV. CODE ANN. § 2315.21 (West 2018); OKLA. STAT. ANN. tit. 23, § 9.1 (West 2018); S.C. CODE ANN. § 15-32-530 (2018); TENN. CODE ANN. § 29-39-104 (West 2018); TEX. CIV. PRAC. & REM. CODE ANN. § 41.008 (West 2018); VA. CODE ANN. § 8.01-38.1 (West 2018); WIS. STAT. ANN. § 895.043(6) (West 2018). In addition, Louisiana, Massachusetts, Michigan, Nebraska, New Hampshire, and Washington generally do not authorize punitive damage awards. *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 495 (2008).

¹⁵⁷ *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 581 (1996) (observing that imposing double, triple, or quadruple damages for wrongs has historic precedent dating back 700 years to English statutes); *see also State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (indicating “few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process” and that “[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee”).

is firmly a legislative policy judgment.¹⁵⁸ Plaintiffs have no “right” to punitive damages, which do not serve a compensatory purpose. In 2017, the Supreme Court of Appeals ruled because “[a] plaintiff has no right, much less a vested right, to an award of punitive damages prior to trial” the punitive damage limit applies to pending claims.¹⁵⁹ That finding, along with West Virginia’s longstanding precedent upholding limits on noneconomic damages,¹⁶⁰ strongly supports the legislature’s constitutional authority to place reasonable constraints on punitive damage awards.

2. Curbing “Phantom Damages”

Anyone who has read a medical bill knows that the “list prices” initially indicated as the cost of medical treatment are not the amounts paid by a patient or insurer. Standard rates for the same medical service can vary drastically among healthcare providers.¹⁶¹ Healthcare providers routinely accept payment that is substantially lower than the billed amount based on negotiated rates with managed care plans or payment schedules set by Medicare rules.¹⁶² Likewise, uninsured patients rarely pay list prices, as healthcare providers have established indigent care programs that provide subsidies or discounts to low-income patients and write off an increasing amount of bills.¹⁶³ In a 2014 decision,

¹⁵⁸ Nearly every federal and state court considering the constitutionality of statutory punitive damage limits in conjunction with the right to trial by jury has found that placing bounds on such punishment is constitutional. *See, e.g., Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1051 (Alaska 2002); *Smith v. Printup*, 866 P.2d 985, 994 (Kan. 1993); *Rhyne v. K-Mart Corp.*, 594 S.E.2d 1, 12–14 (N.C. 2004); *Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 476 (Ohio 2007); *Seminole Pipeline Co. v. Broad Leaf Partners, Inc.*, 979 S.W.2d 730, 758 (Tex. Ct. App. 1998); *Pulliam v. Coastal Emergency Servs. of Richmond Inc.*, 509 S.E.2d 307 (Va. 1999). Courts have also recognized that statutory limits do not violate the separation of powers. *See, e.g., Evans*, 56 P.3d at 1055–56; *Arbino*, 880 N.E.2d at 490; *Pulliam*, 509 S.E.2d at 319. Outliers include *Arkansas and Missouri*. *See Bayer CropScience LP v. Schafer*, 385 S.W.3d 822 (Ark. 2011) (invalidating punitive damage limit pursuant to a unique provision of the Arkansas Constitution barring limits on recovery outside the employment context); *Lewellen v. Franklin*, 441 S.W.3d 136 (Mo. 2014) (invalidating punitive damage limit based on interpretation of the Missouri Constitution’s right to a jury trial).

¹⁵⁹ *Martinez v. Asplundh Tree Experts*, 803 S.E.2d 582, 589 (W. Va. 2017).

¹⁶⁰ *See infra* note 198 and accompanying text.

¹⁶¹ *See Wilson Andrews et al., Disparity in Medical Billing*, WASH. POST (May 8, 2013), <http://www.washingtonpost.com/wp-srv/special/national/actual-cost-of-medical-care> (reporting that “even on the same street, hospitals can vary by upwards of 300% in price for the same service”).

¹⁶² *See Fee Schedule—General Information*, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://www.cms.gov/feeschedulegeninfo/> (last visited Sept. 5, 2018).

¹⁶³ Researchers found that, in 2001, patients at California hospitals with private insurance paid 41% of charges, patients with Medicare and Medicaid paid 35% and 30% of billed rates, respectively, and uninsured patients paid 39% of billed charges. Glenn A. Melnick & Katya Fonkych, *Hospital Pricing and the Uninsured: Do the Uninsured Pay Higher Prices?*, 27 HEALTH

however, the Supreme Court of Appeals put these practical considerations aside and prevented juries from learning that the amounts plaintiffs' lawyers seek as compensation for their client's medical expenses are wildly inflated.

In *Kenney v. Liston*,¹⁶⁴ the court held that jurors may only consider evidence of the amount initially billed for a plaintiff's medical care, even if the amount that the healthcare provider accepted as full payment for that treatment was substantially less.¹⁶⁵ There, the plaintiff sued a drunk driver for injuries resulting from an accident. The plaintiff introduced, and the jury awarded, the full amount of his bills for past medical expenses, \$74,061, even though a portion of those invoiced amounts were discounted or written off by healthcare providers and not paid by the plaintiff or his health insurer.¹⁶⁶ The Court regarded the amount of the medical bills as indicative of the reasonable value of medical services and interpreted the collateral source rule as prohibiting introduction of evidence of the amounts actually paid in full satisfaction of those medical bills.¹⁶⁷ This approach contrasts with states such as California, Oklahoma, North Carolina, and Texas, which do not allow plaintiffs to recover "phantom damages"—amounts that exist only on paper that no one ever paid or will pay.¹⁶⁸

In 2015, the legislature overturned *Kenney* with respect to medical professional liability claims. The new law limits a verdict for past medical expenses to "the total amount . . . paid by or on behalf of the plaintiff" and any incurred unpaid amounts that "the plaintiff or another person on behalf of the plaintiff is obligated to pay."¹⁶⁹ This law ensures that plaintiffs receive compensation for their actual medical expenses (even if paid by an insurer) while reducing the potential that West Virginia courts will award damages that reflect healthcare billing practices, not real costs.

Since the provision eliminating "phantom damages" was included in a comprehensive medical liability reform bill and codified within West Virginia's Medical Professional Liability Act (MPLA), the applicability of the reforms may not extend beyond that context. An argument can be made, however, that the

AFF. 116, 118 (2008). The study found that, over time, the ratios declined for all payers in part due to the rapid increase in billed charges. *See id.* In 2005, uninsured patients as a group continued to pay less than those with private insurance, but a higher percentage of charges, on average, than patients with Medicare or Medicaid coverage. *See id.* at 119.

¹⁶⁴ 760 S.E.2d 434 (W. Va. 2014).

¹⁶⁵ *See id.* at 445–46.

¹⁶⁶ *See id.*

¹⁶⁷ *See id.* at 446.

¹⁶⁸ *See* OKLA. STAT. ANN. tit. 12, § 3009.1 (West 2018) (enacted 2011); N.C. GEN. STAT. ANN. 8C-1, 414 (West 2018) (enacted 2011); TEX. CIV. PRAC. & REM. CODE § 41.0105 (West 2018) (enacted 2003); *Howell v. Hamilton Meats & Provisions, Inc.*, 257 P.3d 1130, 1133 (Cal. 2011); *see also* *Haygood v. De Escabedo*, 356 S.W.3d 390 (Tex. 2011) (interpreting Texas statute).

¹⁶⁹ S.B. 6, 2015 Leg., Reg. Sess. (W. Va. 2015) (codified at W. VA. CODE ANN. § 55-7B-9d (West 2018)).

provision extends to all claims and, if it does not, it should.¹⁷⁰ Observers, including West Virginia trial court judges, recognize the 2015 reform was adopted in “direct response” to the *Kenney* decision.¹⁷¹ *Kenney* was a motor vehicle accident case, not a medical malpractice lawsuit. While the new law advances the medical liability concerns that the bill addresses by eliminating phantom damages in such suits, the provision responded to a broader concern and should be applied in any personal injury action seeking recovery of medical expenses.¹⁷²

3. Restoring a Duty to Mitigate Damages in Employment Litigation

Until recently, damage awards in West Virginia employment cases exceeded amounts awarded under federal law and the law of surrounding states. This situation resulted from a series of court decisions, beginning with *Mason County Board of Education v. State Superintendent of Schools*¹⁷³ in 1982, finding that plaintiffs pursuing employment-related lawsuits have no duty to mitigate

¹⁷⁰ In stark contrast to virtually every other section of the MPLA, which govern elements of proof, the admissibility of expert testimony, several liability, limits on noneconomic damages, and other matters, there is nothing in the text of the statute eliminating “phantom damages” that explicitly limits its application to medical liability actions. *Cf.* W. VA. CODE ANN. §§ 55-7B-3(a) (“The following are necessary elements of proof that an injury or death resulted from the failure of a health care provider to follow the accepted standard of care . . .”), 55-7B-4(a) (“A cause of action for injury to a person alleging medical professional liability against a health care provider . . . arises as of the date of injury . . .”), 55-7B-5(a) (“In any medical professional liability action against a health care provider . . .”), 55-7B-6(a) (“[N]o person may file a medical professional liability action against any health care provider . . .”), 55-7B-6A(a) (“Within thirty days of the filing of an answer by a defendant in a medical professional liability action . . .”), 55-7B-6B(a) (“In each professional liability action filed against a health care provider, the court shall . . .”), 55-7B-7(a) (“The applicable standard of care and a defendant’s failure to meet the standard of care, if at issue, shall be established in medical professional liability cases by the plaintiff by testimony of one or more knowledgeable, competent expert witnesses . . .”), 55-7B-8(a) (“In any professional liability action brought against a health care provider . . .”), 55-7B-9(a) (“In the trial of a medical professional liability action under this article involving multiple defendants . . .”), 55-7B-9B (“An action may not be maintained against a health care provider pursuant to this article by or on behalf of a third-party nonpatient for rendering or failing to render health care services to a patient . . .”), 55-7B-9C(a) (“In any action brought under this article for injury to or death of a patient as a result of health care services or assistance rendered in good faith and necessitated by an emergency condition . . .”) (West 2018).

¹⁷¹ The Hon. Judge Joseph K. Reeder & Matthew G. Chapman, *2015 West Virginia Legislation Update: Part I*, 118 W. VA. L. REV. ONLINE 23 (2015), <https://wvlawreview.wvu.edu/west-virginia-law-review-online/2015/09/29/2015-west-virginia-legislation-update-part-i>.

¹⁷² In fact, legislation introduced in 2016 would have explicitly overruled *Kenney* and applied to any action to recover damages for health care services or treatment resulting from injury or death. *See* S.B. 296, 2016 Leg., Reg. Sess. (W. Va. 2016).

¹⁷³ 295 S.E.2d 719 (W. Va. 1982).

their damages by seeking new employment between the time of discharge and trial if the former employer acted with “malice” in terminating the individual.¹⁷⁴

The practical result of these decisions was that even when a plaintiff found comparable employment after termination, that person could seek damages for front pay for the remainder of his or her working life. This approach could lead to millions of dollars in damages for the loss of a career’s worth of lost income,¹⁷⁵ even when a plaintiff quickly secures a new job. It also gave plaintiffs license to not earnestly seek employment.¹⁷⁶ In addition, juries could award punitive damages on top of front and back pay awards that already exceeded actual damages,¹⁷⁷ double-punishing employers that were found to have wrongfully terminated employees.¹⁷⁸

The legislature brought West Virginia employment law into the mainstream in 2015 by enacting legislation that compensates those who are subjected to an unlawful employment action, while ensuring that the award does not far exceed the goal of making a wronged employee whole.¹⁷⁹ The new law abolishes the “malice” exception and recognizes that all plaintiffs have an affirmative duty to mitigate past and future lost wages.¹⁸⁰ It also affirms the trial judge’s responsibility to determine whether reinstatement or front pay is a plaintiff’s appropriate remedy, and tasks the trial court judge with determining the amount of front pay, if any, to be awarded.¹⁸¹ In 2017, the Supreme Court of Appeals itself recognized that West Virginia had “adopted a concept of unmitigated front and back pay unrecognized by any other state,” found that the

¹⁷⁴ Mason Cty. Bd. of Educ. v. State Superintendent of Sch., 295 S.E.2d 719 (W. Va. 1982); see also *Burke-Parsons-Bowlby Corp. v. Rice*, 736 S.E.2d 338 (W. Va. 2012); *W. Va. Am. Water Co. v. Nagy*, No. 101229, 2011 WL 8583425 (W. Va. June 15, 2011) (memorandum decision); *Peters v. Rivers Edge Mining, Inc.*, 680 S.E.2d 791, 815 (W. Va. 2009).

¹⁷⁵ See, e.g., *Rice*, 736 S.E.2d at 343 (affirming jury award of unmitigated front pay totaling \$1,991,332, in addition to \$142,659 in back pay, but found punitive damages unwarranted on claim brought by employee who alleged age discrimination when his position was eliminated following company acquisition).

¹⁷⁶ See Amber Marie Moore, Note, *Can Damages Be Too Damaging? Examining Mason County and Its Progeny*, 115 W. VA. L. REV. 807, 822–23 (2012).

¹⁷⁷ See, e.g., *Nagy*, 2011 WL 8583425, at *2 (affirming award that included \$200,450 in back pay; \$900,000 in front pay; \$150,000 for humiliation, embarrassment, or loss of personal dignity; \$150,000 for emotional distress; and \$350,000 in punitive damages).

¹⁷⁸ See *Rice*, 736 S.E.2d at 349–51 (Benjamin, J., dissenting) (finding “damages awarded in excess of that which compensates a plaintiff for actual loss based upon a finding that the defendant engaged in malicious conduct toward the plaintiff are, by their very nature, punitive” and should be subject to constitutional review as such).

¹⁷⁹ S.B. 344, 2015 Leg., Reg. Sess. (W. Va. 2015) (codified at W. VA. CODE ANN. §§ 55-7E-1 (West 2018)).

¹⁸⁰ W. VA. CODE ANN. § 55-7E-3(a) (West 2018).

¹⁸¹ *Id.* § 55-7E-3(b).

legislature had abrogated *Mason County* and its progeny, and applied the new law to pending claims.¹⁸²

4. Adopting a More Reasonable Judgment Interest Rate

The purpose of judgment interest is to “compensate the successful plaintiff for being deprived of compensation for the loss from the time between the ascertainment of the damage and the payment by the defendant.”¹⁸³ Until 2017, however, West Virginia imposed an interest rate on judgments that significantly exceeded inflation. Under that law, which had not been altered in ten years, courts awarded compound interest at a rate of three points above the Fifth Federal Reserve discount rate.¹⁸⁴ That law also provided that the judgment interest rate could not be less than 7% or exceed 11% per year.¹⁸⁵ That year, the Administrative Office of the Supreme Court of Appeals set the interest rate at the minimum 7% level.¹⁸⁶ Meanwhile, the Fifth Federal Reserve District’s discount rate was 1.75%,¹⁸⁷ and a plaintiff would have received less than 1% interest if the money owed had been in a money market account. Rather than serving a compensatory purpose, the interest rate on judgments punished those who defended themselves in court.

The legislature adjusted interest rates on court judgments in 2017 to more closely reflect market rates.¹⁸⁸ The new law sets the judgment interest rate at two points above the discount rate and uses simple, rather than compound, interest.¹⁸⁹ In addition, the new law reduces the minimum interest rate from 7%

¹⁸² See *Martinez v. Asplundh Tree Expert Co.*, 803 S.E.2d 582, 587 (W. Va. 2017). Notably, Justice Loughry acknowledged that

[t]he Legislature . . . commendably sought to eradicate West Virginia’s outlier status regarding unmitigated back and front pay in employment claims and thereby eliminate an unjustifiable windfall to plaintiffs. The duty of an injured plaintiff to mitigate damages is a long-standing and universally recognized principle that [*Mason County*] obliterated, thereby creating a blight on our state’s wrongful discharge laws.

See *id.* at 590 (Loughry, J., concurring).

¹⁸³ *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990) (quoting *Poleto v. Consol. Rail Corp.*, 826 F.2d 1270, 1280 (3d Cir. 1987)).

¹⁸⁴ W. VA. CODE ANN. § 56-6-31 (West 2018).

¹⁸⁵ *Id.*

¹⁸⁶ See SUPREME COURT OF APPEALS OF W. VA., ADMIN. ORDER RE: DETERMINATION AND DISSEMINATION OF THE RATE OF INTEREST ON JUDGMENTS AND DECREASE FOR THE YEAR 2017 (2017), <http://www.courtswv.gov/legal-community/pdfs/interest2017.pdf>.

¹⁸⁷ See *id.*

¹⁸⁸ H.B. 2678, 2017 Leg., Reg. Sess. (W. Va. 2017) (amending W. VA. CODE ANN. § 56-6-31 (West 2018)).

¹⁸⁹ *Id.*

to 4% and the maximum rate from 11% to 9%.¹⁹⁰ The change led to a decrease in the judgment interest rate from 7% to 4.5% in 2018.¹⁹¹

D. Additional Progress

The West Virginia Legislature adopted four additional civil justice reforms that have contributed to improving the state's legal climate. The first updates and modernizes the state's arbitration laws, providing an efficient and cost-effective way of resolving disputes without litigation. That law adopts a process that closely tracks federal law and is consistent with states that follow uniform arbitration rules.¹⁹² The second discourages forum shopping specific to product liability claims by clarifying that when a nonresident files a lawsuit, West Virginia courts apply the law of the state where the injury occurred.¹⁹³ The third modified the state's Wage Payment and Collection Act to allow employers more flexibility with respect to the required timing of payment of wages to employees and separated employees, thereby reducing technical and punitive violations under the Act which often resulted from West Virginia's unique payment requirements.¹⁹⁴

The fourth overhauls West Virginia's MPLA. In response to Supreme Court of Appeals decisions that had limited the MPLA's application,¹⁹⁵ and the

¹⁹⁰ *Id.*

¹⁹¹ See SUPREME COURT OF APPEALS OF W. VA., ADMIN. ORDER RE: DETERMINATION AND DISSEMINATION OF THE RATE OF INTEREST ON JUDGMENTS AND DECREASE FOR THE YEAR 2018 (2018), <http://www.courtswv.gov/legal-community/pdfs/interest2018.pdf>.

¹⁹² S.B. 37, 2015 Leg., Reg. Sess. (W. Va. 2015).

¹⁹³ H.B. 2726, 2015 Leg., Reg. Sess. (W. Va. 2015) (codified at W. VA. CODE ANN. § 55-8-16 (West 2018)). This legislation expanded the scope of a law enacted in 2011 applicable only to failure to warn claims brought against pharmaceutical manufacturers, which was particularly necessary given the Supreme Court of Appeals of West Virginia's rejection of the learned intermediary doctrine. The Legislature also adopted a similar law, specifically, in 2011. See W. VA. CODE ANN. § 55-8-16(a) (West 2018).

¹⁹⁴ Because the Wage Payment Collection Act previously required employee wages be paid at least every two weeks (rather than twice monthly) and that separated employees be paid their wages fully within four business days, multi-state employers often had to employ a third-party administrator to separately process payroll for West Virginia's unique pay requirements. Class action lawsuits for technical violations of the Act were frequent and costly, as the statute also provided for liquidated damages of three times any amount paid in an untimely fashion. See S.B. 12, 2015 Leg., Reg. Sess. (W. Va. 2015) (amending W. VA. CODE ANN. §§ 21-5-1 and 21-5-4 (West 2018)); S.B. 318, 2015 Leg., Reg. Sess. (W. Va. 2015) (amending W. VA. CODE ANN. § 21-5-3 (West 2018)).

¹⁹⁵ See *Manor Care, Inc. v. Douglas*, 763 S.E.2d 73, 87-91 (W. Va. 2014) (finding claim alleging nursing home was understaffed did not qualify as a "medical professional liability action"); *Phillips v. Larry's Drive-In Pharmacy, Inc.*, 647 S.E.2d 920, 929 (W. Va. 2007) (finding pharmacy is not a "health care facility" or a "health care provider"); *Boggs v. Camden-Clark Mem'l Hosp. Corp.*, 609 S.E.2d 917, 919 (W. Va. 2004) (finding the Medical Professional Liability

litigation that followed,¹⁹⁶ the legislature made a series of changes to ensure that the law's safeguards apply to all claims related to medical services. The legislature broadened the definitions of "health care," "health care facility," and "health care provider"¹⁹⁷ and amended the definition of "medical professional liability" to eliminate any distinction between medical negligence and other negligence claims against a healthcare provider.¹⁹⁸ The new law also provides that expert testimony on the standard of care in a medical malpractice lawsuit must be grounded in scientifically valid peer-reviewed studies if available.¹⁹⁹ In addition, it caps inflation adjustments under the state's existing limit on noneconomic damages in medical malpractice cases. The limits were set at \$250,000 in personal injury cases and \$500,000 in cases involving catastrophic injuries or death in 2004,²⁰⁰ but climbed to approximately \$330,000 and \$642,000, respectively. The new law does not allow the limits to exceed 150% of the statutory amounts (\$375,000 and \$750,000 respectively) without further legislative action.²⁰¹ The Supreme Court of Appeals has repeatedly recognized the legislature's authority to set and adjust a limit on subjective noneconomic damages as a means of providing reasonable recovery to plaintiffs while stabilizing medical liability insurance rates.²⁰²

III. A TRANSPARENT AND COMPETITIVE PROCESS FOR STATE RETENTION OF OUTSIDE COUNSEL

For two decades, West Virginia's enforcement of state law through private attorneys whose compensation was tied to damages or fines cast a shadow

Act "does not apply to other claims that may be contemporaneous to or related to the alleged act of medical professional liability").

¹⁹⁶ See Hoppy Kercheval, *Lawmakers Fixing Nursing Home Loophole in Medical Malpractice Law*, METRONews (Feb. 24, 2015), <http://www.wvmetronews.com/2015/02/24/lawmakers-fixing-nursing-home-loophole-in-medical-malpractice-law/> (recognizing West Virginia became among a few states considered "ground zero" for litigation against nursing homes due to multi-million dollar verdicts that the West Virginia Supreme Court of Appeals found outside the scope of the MPLA).

¹⁹⁷ S.B. 6, 2015 Leg., Reg. Sess. (W. Va. 2015) (amending W. VA. CODE ANN. § 55-7B-2(e)-(g), (i) (West 2018)).

¹⁹⁸ *Id.* (amending W. VA. CODE ANN. § 55-7B-2(i) (West 2018) to include "claims that may be contemporaneous to or related to the alleged tort or breach of contract or otherwise provided, all in the context of rendering health care services" within definition of "medical professional liability").

¹⁹⁹ S.B. 6, 2015 Leg., Reg. Sess. (W. Va. 2015) (codified at W. VA. CODE ANN. § 55-7B-7 (West 2018)).

²⁰⁰ W. VA. CODE ANN. § 55-7B-8(a)-(b) (West 2018).

²⁰¹ S.B. 6, 2015 Leg., Reg. Sess. (W. Va. 2015) (amending W. VA. CODE ANN. § 55-7B-8(c) (West 2018)).

²⁰² See *MacDonald v. City Hosp., Inc.*, 715 S.E.2d 405, 414 (W. Va. 2011); *Verba v. Ghaphery*, 552 S.E.2d 406, 410 (W. Va. 2001); *Robinson v. Charleston Area Med. Ctr., Inc.*, 414 S.E.2d 877, 887-88 (W. Va. 1991).

over the state's litigation climate. Businesses were concerned that they would be targeted by deputized contingency-fee lawyers who stood to financially gain by using the state's broad powers to impose heavy penalties. Attorney General Darrell McGraw (1993–2013) became known for retaining private attorneys as “special assistant attorneys general.”²⁰³ These lawyers, handpicked by the Attorney General for no-bid contracts, were often campaign contributors or had close political or personal ties to the Attorney General.²⁰⁴

After distributing a significant portion of state settlements to cover the fees of outside counsel, what money remained was deposited in the Office of the Attorney General's Consumer Protection Fund rather than the state's General Revenue Fund.²⁰⁵ While some of the settlement money funded legitimate consumer protection activities of the Office or may have provided restitution to consumers, large sums were unilaterally distributed to organizations and pet projects reflecting the Attorney General's personal preferences that often had little or no connection to the litigation.²⁰⁶ Significant amounts of money also went toward “public education,” which some viewed as self-promotion for the attorney general, during reelection years.²⁰⁷ Attorney General McGraw's

²⁰³ See Eric Lipton, *Lawyers Create Big Paydays by Coaxing Attorneys General to Sue*, N.Y. TIMES (Dec. 18, 2014), <https://www.nytimes.com/2014/12/19/us/politics/lawyers-create-big-paydays-by-coaxing-attorneys-general-to-sue.html> (reporting that McGraw collected more than \$2 billion worth of settlements in partnership with contingency-fee lawyers during his tenure as West Virginia's attorney general).

²⁰⁴ See James R. Copland, *Trial Lawyers Inc.: Attorneys General—A Report on the Alliance Between State AGs and the Plaintiffs' Bar 2011*, MANHATTAN INST. (Oct. 25, 2011), <https://www.manhattan-institute.org/html/trial-lawyers-inc-attorneys-general-report-alliance-between-state-ags-and-plaintiffs-bar-2011>.

²⁰⁵ See *id.*

²⁰⁶ For example, after paying private lawyers a \$3 million fee, McGraw distributed a \$10 million settlement with Purdue Pharma that resolved allegations that the company misrepresented the potential for addiction to OxyContin to help establish a pharmacy school at the University of Charleston, fund a nursing program run by the wife of the State Senate President, pay for a 12,000-foot fitness training center for a West Virginia State Police Academy center, fund Salvation Army Boys and Girls Clubs, and fund other programs. The state agencies in whose name McGraw sued received virtually none of the settlement. See Cary Silverman & Jonathan L. Wilson, *State Attorney General Enforcement of Unfair or Deceptive Acts and Practices Laws: Emerging Concerns and Solutions*, 65 KAN. L. REV. 209, 255 (2016).

²⁰⁷ See Richie Heath, *McGraw Owes West Virginians an Explanation*, W. VA. REC. (Aug. 23, 2012), <https://wvrecord.com/stories/510603351-their-view-mcgraw-owes-west-virginians-an-explanation> (documenting the surge of Attorney General's Office television advertising expenditures during an election year and the Office's spending of tens of thousands of dollars of state funds on trinkets bearing McGraw's name); see also Josh Hafenbrack, *McGraw Spending Grows, GOP Critics Allege Political Motive for Advertising*, CHARLESTON DAILY MAIL, Mar. 9, 2004, at 1A (detailing nearly \$900,000 in advertising and public relations spending by the Attorney General's Office while both Attorney General McGraw and his brother, then-Supreme Court Justice Warren McGraw, were both up for reelection).

practices were roundly criticized by lawmakers,²⁰⁸ the media,²⁰⁹ and think tanks,²¹⁰ and even resulted in the federal government withholding state Medicaid funds.²¹¹

These practices began to change in 2013 after Patrick Morrissey narrowly defeated McGraw on a reform platform that included altering how the state hires outside counsel.²¹² At the same time the then-new Attorney General was developing contracting safeguards for future retention of outside counsel, the Supreme Court of Appeals considered legal challenges to Attorney General McGraw's previous use of outside counsel by pharmaceutical and financial services companies who were the target of such outside counsel-driven state enforcement actions.²¹³

Ultimately, the Supreme Court rejected the challenges to the legality of the use of outside counsel by the Attorney General's Office, but acknowledged that certain parameters must be in place. In *State ex rel. Discover Financial Services, Inc. v. Nibert*, the court found that while state law only specifically authorized the Attorney General to hire and pay "assistant attorneys general" through legislative appropriations,²¹⁴ the Attorney General had broad and inherent common law authority to retain "special assistant attorneys general" and compensate them through contingency-fee arrangements.²¹⁵ In ruling as it did,

²⁰⁸ See, e.g., Hoppy Kercheval, Editorial, *Legislators Are Going After Darrell McGraw, Why Should He Not Be Bidding out Lucrative Contracts?*, CHARLESTON DAILY MAIL, Feb. 24, 2006, at 4A; Alison Knezevich, *AG Should Clear Settlements with Lawmakers, Delegate Says*, CHARLESTON GAZETTE, Feb. 3, 2010, at 1C.

²⁰⁹ See, e.g., Editorial, *McGraw's Handling of OxyContin Settlement Raises Lots of Questions*, DOMINION POST (Morgantown), Aug. 31, 2007; Editorial, *The State Should Curb McGraw*, CHARLESTON DAILY MAIL, Jan. 26, 2007, at 4A; Walt Williams, *The \$10 Million Question*, STATE J. (W. Va.), Oct. 10, 2008, at 1.

²¹⁰ See, e.g., HANS BADER, COMPETITIVE ENTER. INST., *THE NATION'S WORST STATE ATTORNEYS GENERAL 16–19* (2010); JAMES R. COPLAND, TRIAL LAWYERS INC.: ATTORNEYS GENERAL: A REPORT ON THE ALLIANCE BETWEEN STATE AGS AND THE PLAINTIFFS' BAR 2011 7–8, 19 (2011), <https://www.manhattan-institute.org/pdf/TLI-ag.pdf>.

²¹¹ See *W. Va. Dep't of Health & Human Res. v. Sebelius*, 649 F.3d 217, 224–25 (4th Cir. 2011) (finding the U.S. Department of Health and Human Services properly withheld from West Virginia's Department of Health and Human Resources \$3.2 million in Medicaid funds, reflecting amounts from two West Virginia settlements that McGraw's office paid out to private lawyers and outside organizations while not reimbursing Medicaid).

²¹² See Eric Eyre, *New AG to Overhaul Operations*, CHARLESTON GAZETTE, Nov. 8, 2012, at 1A.

²¹³ See, e.g., *State ex rel. Discover Fin. Servs., Inc. v. Nibert*, 744 S.E.2d 625 (W. Va. 2013).

²¹⁴ See *id.* at 647–50 (examining the language and history of W. VA. CODE ANN. § 5-3-3 (West 2018)).

²¹⁵ See *id.* at 641–47 (emphasis added).

the Supreme Court overruled *Manchin v. Browning*,²¹⁶ which had previously found that the Attorney General does not possess common law powers.²¹⁷

The Court also responded to concern that lawyers representing the state on a contingency-fee basis have a conflict of interest because such arrangements reward them for pursuing the highest monetary penalties, rather than injunctive or other relief that may better serve justice and the public interest.²¹⁸ Specifically, the Court found contingency-fee arrangements permissible when (1) the Attorney General monitors the litigation; (2) the Attorney General has not completely abrogated authority to outside counsel and retains “ultimate control over litigation strategy and tactics;” and (3) the trial court approves the amount of attorneys’ fees to be awarded.²¹⁹ The Court also summarily rejected concerns that deputizing private attorneys to enforce state law on a contingency-fee basis violates due process.²²⁰

The Court’s ruling solidifying the Attorney General’s inherent authority to hire outside counsel made the adoption of policies and procedures guarding against the appearance of impropriety and protecting the integrity of state law enforcement and the public purse even more imperative. Soon after this decision, Attorney General Morrissey finalized an office outside counsel policy that formally incorporated the safeguards set forth in *Nibert* and made the process of hiring and compensating outside counsel more competitive and transparent.²²¹ The shift was greeted as “welcome news.”²²² Within one year, the new policy had saved the state nearly \$4 million.²²³ In conjunction with these outside counsel reforms, Attorney General Morrissey also began the process of

²¹⁶ 296 S.E.2d 909 (W. Va. 1982).

²¹⁷ *State ex rel. Discover Fin. Servs., Inc. v. Nibert*, 744 S.E.2d 625 (W. Va. 2013) (overruling *Manchin v. Browning*, 296 S.E.2d 909, 915 (W. Va. 1982)). While the Court recognized that the Legislature had previously authorized the hiring of “special assistant attorneys general” in 1937, but subsequently revoked that authority in 1953, it found that since the statute did not expressly prohibit such hiring, the Attorney General could do so through his common law powers. *See id.* at 648–50.

²¹⁸ *See id.* at 637–38.

²¹⁹ *See id.* at 638–39.

²²⁰ *See id.* at 630 n.20.

²²¹ *See* OFFICE OF THE W. VA. ATTORNEY GEN., POLICY NO. WVAGO-004, OUTSIDE COUNSEL POLICY (2013).

²²² Editorial, *Morrissey’s New Rules Are an Improvement: Greater Transparency in Hiring Outside Counsel Is Welcome News*, CHARLESTON DAILY MAIL, Aug. 2, 2013, at 4A; *see also* David Beard, *A.G. Sets Policy on Hiring Outside Counsel*, DOMINION POST (Morgantown), July 31, 2013 (reporting support of the new policy from the U.S. Chamber Institute Legal Reform and American Tort Reform Association).

²²³ *See* Chris Dickerson, *AG’s Outside Counsel Policy Has Saved State Nearly \$4M*, W. VA. REC. (June 23, 2014), <https://wvrecord.com/stories/510587325-ag-s-outside-counsel-policy-has-saved-state-nearly-4m>.

transferring surplus money from the office's Consumer Protection Fund to the General Revenue Fund.²²⁴

The Legislature codified most aspects of Attorney General Morrissey's outside counsel policy in 2016 to ensure that basic good government practices continue into future administrations.²²⁵ Under this new law, before entering into an agreement to hire outside counsel, the Attorney General must find that the use of outside counsel would be "both cost-effective and in the public interest," by considering a number of factors, including whether government attorneys can sufficiently handle the matter.²²⁶ Upon making this finding, the Attorney General must issue a request for proposals for private attorneys to represent the state unless there is an emergency situation.²²⁷ Selection must be based on experience, capacity to represent the state, and value—not personal relationships.²²⁸ Consistent with *Nibert*, the Attorney General must maintain supervision over the private attorneys and only the state may settle a lawsuit involving outside counsel.²²⁹ Attorneys' fees are subject to a sliding scale that helps avoid windfall payments to lawyers at taxpayer expense.²³⁰ The law does not permit fees to be awarded based on civil penalties or fines.²³¹ Finally, the law ensures transparency by requiring the Attorney General to post on the Office's website written findings of need to hire outside counsel, requests for proposals, and payments to outside counsel.²³²

²²⁴ See *West Virginia AG Transfers \$10M for Anti-Drug Efforts*, W. VA. PUB. BROADCASTING (Apr. 26, 2016), <http://www.wvpublic.org/post/west-virginia-ag-transfers-10m-anti-drug-efforts#stream/0> (reporting Attorney General Morrissey had made five transfers totaling \$33.5 million from the Consumer Protection Fund to the General Fund). Legislation that would have capped the balance of the Consumer Protection Fund at \$7 million (requiring periodic transfer to the General Revenue Fund of any amounts above that level), allowed use of those funds by the Office of the Attorney General "for the direct and indirect administrative, investigative, compliance, enforcement, or litigation costs and services incurred for consumer protection purposes," and required legislative appropriation for any other uses of such funds, passed the legislature but was vetoed in 2018. H.B. 4009, 2018 Leg., Reg. Sess. (W. Va. 2018).

²²⁵ See H.B. 4007, 2016 Leg., Reg. Sess. (W. Va. 2016) (codified at W. VA. CODE ANN. § 5-3-3a (West 2018)). In doing so, the Legislature has expressly abrogated the Attorney General's common law authority to appoint special assistant attorneys general pursuant to the *Nibert* decision.

²²⁶ W. VA. CODE ANN. § 5-3-3a(b) (West 2018).

²²⁷ *Id.* § 5-3-3a(c).

²²⁸ See *id.* § 5-3-3a(e).

²²⁹ See *id.* § 5-3-3a(g).

²³⁰ See *id.* § 5-3-3a(h).

²³¹ See *id.*

²³² *Id.* § 5-3-3a(d), (j).

Today, the state continues to retain outside counsel as needed.²³³ The Office of the Attorney General has made written determinations authorizing the appointment of special assistant attorneys general to assist with representation of a wide range of state agencies, universities, as well as the Attorney General's Office itself where there is a need for special expertise or assistance with litigation or compliance issues.²³⁴ Unlike in the past, these decisions are made in the open, provide all attorneys with the ability to compete to provide legal service for the state, and better serve taxpayers by protecting public funds.

IV. WEST VIRGINIA'S NEXT STEPS

West Virginia has made impressive strides over three short legislative sessions to tackle many of the reasons why the state's liability system had developed a poor reputation. And the Mountain State's transformation has not gone unnoticed.

In October 2015, then-Senate President Bill Cole and then-House Speaker Tim Armstead were honored by the U.S. Chamber Institute for Legal Reform (ILR) with the State Legislative Achievement Award in recognition of their efforts to reform West Virginia's legal system.²³⁵ Later that year, the American Tort Reform Foundation removed West Virginia from its list of "Judicial Hellholes" for the first time since the list's inception.²³⁶ West Virginia also rose five places between 2015 and 2017 in ILR's survey of corporate executives and counsel on state legal climates.²³⁷ As a result, then-West Virginia Secretary of Commerce Woody Thrasher noted that state lawmakers "have made it easier to recruit new companies to West Virginia."²³⁸

²³³ The number of RFPs for outside counsel issued by the Office of the Attorney General has varied significantly from year-to-year based on the need for legal counsel: 14 (2014), 20 (2015), 6 (2016), 7 (2017) and 13 (2018 through October 10). See *Requests for Proposals & Written Determinations*, OFF. W. VA. ATT'Y GEN., <https://ago.wv.gov/outsidecounsel/Pages/RFP.aspx> (last visited Oct. 10, 2018) (compilation on file with author).

²³⁴ See *id.*

²³⁵ See Cole, *Armstead Honored for W.Va. Legal Reform*, BLUEFIELD DAILY TELEGRAPH (Oct. 27, 2015), http://www.bdonline.com/news/cole-armstead-honored-for-w-va-legal-reform/article_e6a9795e-7cc5-11e5-999e-637138db4a97.html.

²³⁶ See AM. TORT REFORM FOUND., JUDICIAL HELLHOLES 2017–2018, at 55 (2017) (removing West Virginia from its list of "Judicial Hellholes" due to enactment of legal reform and moving the state to the group's "Watch List"); see also Jeff Jenkins, *Praise and Criticism for New Judicial Climate Ranking*, METRONews (Dec. 17, 2015), <http://wvmetronews.com/2015/12/17/praise-and-criticism-for-new-judicial-climate-ranking/> (reporting on West Virginia's removal from the "Judicial Hellhole" list after enactment of more than a dozen civil justice reform measures).

²³⁷ See U.S. CHAMBER INST. FOR LEGAL REFORM, 2017 LAWSUIT CLIMATE SURVEY: RANKING THE STATES 92 (2017).

²³⁸ See Woody Thrasher, *Despite Gains, More Needed to Aid Economy*, HERALD-DISPATCH (Oct. 22, 2017), http://www.herald-dispatch.com/opinion/woody-thrasher-despite-gains-more-needed-to-aid-economy/article_18f2f17f-7100-558e-8f10-9e522208b625.html.

However, more work remains to be done. The Legislature should continue to build upon this progress by addressing five problem areas that call for improvement.

A. Establishing an Intermediate Appellate Court

First and foremost, West Virginia should address a situation that has long cried out for change: the state's lack of an intermediate appellate court. Meaningful appellate review is a critical component of a fair justice system. When trial courts improperly admit prejudicial or unreliable evidence, allow novel theories of liability that are unsupported by law, place barriers on the ability to mount a defense, or sustain excessive verdicts, litigants depend on appellate review to correct the error. Full appellate review also helpfully establishes precedent that instructs trial courts on how to properly apply the law and avoid errors in the future.²³⁹

West Virginia falls short of this standard. Its single appellate court, the West Virginia Supreme Court of Appeals, is left to address every appeal that arrives from the state's 55 circuit courts, composed of about 70 judges, as well as decide appeals from other state courts, consider court rules, and administer the judicial branch. Most state judicial systems provide significantly more access to meaningful appellate review. Unlike West Virginia, 41 states have at least one intermediate appellate court, most of which provide for an appeal of civil cases as a matter of right.²⁴⁰

Until recently, review of civil cases in the Supreme Court of Appeals was wholly discretionary, often leaving parties with no appeal at all. In fact, between 1999 and 2008, the Court declined to hear 69% of civil appeals—including cases involving verdicts of \$220 million and \$400 million—and 84% of criminal appeals.²⁴¹ On several occasions, the U.S. Supreme Court was asked

²³⁹ See, e.g., Andrew Graham & Cole DeLancey, *2012 Survey on Oil & Gas: West Virginia*, 18 TEX. WESLEYAN L. REV. 675, 679–80 (2012) (observing that development of West Virginia law is “seriously impeded” by the state’s lack of an intermediate appellate court, which results in “incongruent and redundant development of the case law”).

²⁴⁰ See NAT’L CTR. FOR STATE COURTS, COURT STATISTICS PROJECT, STATE COURT STRUCTURE CHARTS, http://www.courtstatistics.org/Other-Pages/State_Court_Structure_Charts.aspx (last visited Aug. 27, 2018).

²⁴¹ Cassandra Burke Robertson, *The Right to Appeal*, 91 N.C. L. REV. 1219, 1235 (2013). Concerns with the lack of appellate review also arise in the criminal context. See, e.g., Linnsey Evick, *A Door Closed: The Right to Full Appellate Review of Sentences of Life Imprisonment Without Parole in West Virginia*, 112 W. VA. L. REV. 241, 249–50 (2009) (finding that “of the eleven states with no intermediate appellate court, West Virginia is now the only state that does not provide mandatory full review of its harshest criminal sentence, life imprisonment without parole”).

to intervene, but denied certiorari.²⁴² Now, as discussed below, parties are entitled to a limited, insufficient form of review.²⁴³

In 2009, then-Governor Joe Manchin created an Independent Commission on Judicial Reform, chaired by retired U.S. Supreme Court Justice Sandra Day O'Connor.²⁴⁴ The Commission was created to address troubling trends, including “the erosion of the public’s confidence in the State’s judicial system,” and “the voluminous caseload before the West Virginia Supreme Court of Appeals.”²⁴⁵ The Commission found that while the number of cases heard by West Virginia’s high court remained stable, the number of appeals had doubled. The Commission concluded that “[b]y virtually any measure, the Supreme Court of Appeals is one of the busiest state appellate courts in the entire country.”²⁴⁶ The Commission recognized that while many other states initially had a single appellate court, as caseloads grew post-1950, the number of states with intermediate appellate courts tripled.²⁴⁷ By 2000, Chief Justice Elliott Maynard declared, “You don’t have to be a mathematician to figure out that West Virginia needs an intermediate appellate court.”²⁴⁸ Accordingly, the Commission recommended creation of an intermediate court of appeals that would “ease the burden on the Supreme Court of Appeals, free the high court to continue hearing a discretionary docket focused on important or novel legal issues and expand the core functions of our appellate judicial system.”²⁴⁹

The Supreme Court of Appeals, however, opted to marginally expand its own appellate review of cases, rather than advocate for creating an intermediate appellate court.²⁵⁰ When overhauling its appellate rules in 2011, the Court provided for mandatory review of all trial court decisions.²⁵¹ The new rules do not provide for full, traditional appellate review. Rather, the Court adopted an abridged form of review under which it drafts a “concise statement” of its

²⁴² Robertson, *supra* note 241, at 1235 n.73 (citing cases).

²⁴³ ROY PERRY, CASELOAD CHARACTERISTICS: UNDERSTANDING THE WORKLOAD OF THE WEST VIRGINIA SUPREME COURT (Dec. 2015), <http://www.courtswv.gov/supreme-court/clerk/pdf/CaseloadCharacteristics-2015.pdf> (“Before 2011, all appeals were discretionary; they were reviewed, but about three-fourths were refused with no explanation and no decision on the merits.”).

²⁴⁴ See *State ex rel. Loughry v. Tennant*, 732 S.E.2d 507, 510 (W. Va. 2012).

²⁴⁵ *Id.*

²⁴⁶ W. VA. INDEP. COMM’N ON JUDICIAL REFORM, FINAL REPORT 8 (2009) [hereinafter JUDICIAL REFORM FINAL REP.].

²⁴⁷ *Id.* at 31.

²⁴⁸ Elliott E. Maynard, *West Virginia Needs an Intermediate Appellate Court*, W. VA. LAW., July 2000, at 8; see also Chief Justice Elliott E. Maynard, *State of the Judiciary Address* (May 12, 2000), W. VA. LAW., June 2000, at 8 (calling for establishment of an intermediate appellate court).

²⁴⁹ JUDICIAL REFORM FINAL REP., *supra* note 246, at 8.

²⁵⁰ See PERRY, *supra* note 243, at 2.

²⁵¹ *Id.*

reasoning.²⁵² These memorandum decisions usually affirm the trial court. They are unsigned, unpublished, and, while citable, have low precedential value.²⁵³ In fact, the Court recently overturned a series of memorandum decisions, explaining that its abbreviated decisions had not fully, thoroughly, and thoughtfully considered the issues,²⁵⁴ calling into doubt the value of these rulings as a source of law.²⁵⁵

In addition, while the new rule curbs the issue of parties having *no* right to appeal, it does not address the Commission's concern regarding the workload the Court faces. Between 2006 and 2010, under the old rules, the Court refused 12,050 petitions for appeal, from 2011 to 2015; under the new rules, zero petitions were refused.²⁵⁶ As the already-busy Court takes on substantially more appeals, parties rarely get the benefit of a full appeal because the court overwhelmingly issues short memoranda as opposed to fully considered and explained decisions.²⁵⁷ In 2015, only 11.5% of the court's 949 merits decisions were signed opinions, and in 2016, 13.4% of the 861 merit-based decisions were signed opinions.²⁵⁸ Many attorneys, organizations, and other observers agree that this half step is inadequate.²⁵⁹

Meanwhile, other states continue to move forward in providing more meaningful appellate review. As the Commission's report observed, in the decade preceding its 2009 report, three states with smaller caseloads than West Virginia (Mississippi, Nebraska, and Utah) had established intermediate

²⁵² See W. VA. R. APP. P. 21.

²⁵³ State v. McKinley, 764 S.E.2d 303, 313 (W. Va. 2014).

²⁵⁴ Hammons v. W. Va. Office of Ins. Comm'r, 775 S.E.2d 458, 475 (W. Va. 2015); see also State v. Deel, 788 S.E.2d 741, 748–49 (W. Va. 2016) (finding analysis of ex post facto principles in two memorandum decisions issued in 2012 and 2015 “erroneous” and “incorrect”).

²⁵⁵ More recently, the Court has attempted to “reassure the legal community and the public that ‘there is no question that memorandum decisions are pronouncements on the merits that fully comply with the constitutional requirements to address every point fairly arising upon the record and to state the reasons for a decision concisely in writing.’” *In re Involuntary Hospitalization of T.O.*, 796 S.E.2d 564, 572 (W. Va. 2017) (quoting *McKinley*, 764 S.E.2d at 311; see also *SWVA, Inc. v. Birch*, 787 S.E.2d 664, 668 (W. Va. 2016) (citing a series of memorandum decisions issued in workers’ compensation context and finding “the doctrine of stare decisis supports our decision in this case”).

²⁵⁶ See PERRY, *supra* note 243, at 1–2.

²⁵⁷ See W. VA. SUPREME COURT CLERK’S OFFICE, SUPREME COURT OF APPEALS OF WEST VIRGINIA QUICK REFERENCE FACTS (2017) [hereinafter QUICK REFERENCE FACTS], <http://www.courtsww.gov/supreme-court/clerk/statistics/15-16QuickFacts.pdf>; see also W. VA. JUDICIAL COMP. COMM’N, FINAL REPORT (Dec. 2017) (citing the West Virginia Supreme Court of Appeals’ number one ranking in the nation in incoming cases per 100,000 people and an increased workload resulting from the new appellate rules as justification for a pay raise proposal for justices).

²⁵⁸ See QUICK REFERENCE FACTS, *supra* note 257.

²⁵⁹ See Stephanie Zwerner, Note, *Better for Business, Better for Justice: Why West Virginia Needs an Intermediate Appellate Court*, 117 W. VA. L. REV. 429, 438 (2014).

appellate courts.²⁶⁰ Since that time, voters in Nevada, one of the few states aside from West Virginia that did not have an intermediate appellate court, approved a constitutional amendment creating a court of appeals.²⁶¹ As the Nevada judiciary recognized, the new court, which began hearing cases in 2015, reduces the burden on the state's high court, "allowing the Supreme Court to spend more time on the cases that merit published decisions."²⁶²

Legislation to establish an intermediate appellate court (IAC) that provides all litigants with full appellate review has been repeatedly introduced, but has fallen short of enactment.²⁶³ The latest proposal, the West Virginia Appellate Review Reorganization Act of 2018, would have divided the IAC into two panels, each with three judges, serving a Northern District and Southern District.²⁶⁴ The Governor would nominate judges to fill these positions, subject to Senate confirmation, to serve staggered ten-year terms.²⁶⁵ The bill would have provided parties with an appeal of a wide range of final judgments to the IAC as a matter of right.²⁶⁶ The legislation would have required that the IAC provide each appeal "full and meaningful review, and an opportunity to be heard" as well as a written decision on the merits.²⁶⁷ The Senate passed the legislation by a 23–11 vote on February 15, 2018,²⁶⁸ but the measure stalled in the House.²⁶⁹

Why did the IAC proposal fall short? Although most West Virginians support establishing an intermediate appellate court,²⁷⁰ some members of the

²⁶⁰ JUDICIAL REFORM FINAL REP., *supra* note 246, at 31.

²⁶¹ *Court of Appeals, NEVADA COURTS*, https://nvcourts.gov/Supreme/Court_Information/Court_of_Appeals/ (last visited Aug. 27, 2018).

²⁶² *Id.*

²⁶³ See Brad McElhinny, *Intermediate Court of Appeals Gets Another Legislative Review*, METRONews (Jan. 28, 2018), <http://wvmetronews.com/2018/01/28/intermediate-court-of-appeals-gets-another-legislative-review/> (reporting that proposals for an intermediate appellate court were considered in 1999, 2003, 2010, 2011, 2012, 2013, and 2014).

²⁶⁴ S.B. 341, 2018 Leg., Reg. Sess. (W. Va. 2018).

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.* (passed 23–11 on Feb. 15, 2018).

²⁶⁹ A two-week teacher strike near the close of the 2018 session that brought the legislature to a near standstill contributed to the IAC bill's failure to further advance. See Jess Bidgood, *West Virginia Raises Teachers' Pay to End Statewide Strike*, N.Y. TIMES (Mar. 6, 2018), <https://www.nytimes.com/2018/03/06/us/west-virginia-teachers-strike-deal.html>.

²⁷⁰ David Yates, *Poll Shows WV Voters Believe Lawsuits Hurting Job Creation*, WASH. EXAMINER (Mar. 20, 2014), <https://www.washingtonexaminer.com/poll-shows-wv-voters-believe-lawsuits-hurting-job-creation>.

Supreme Court of Appeals²⁷¹ and the plaintiffs' bar²⁷² actively opposed the proposal. Opponents say West Virginia's appellate caseload does not warrant an appellate court and, given the Supreme Court of Appeals' review of every case to some degree, additional review is unnecessary.²⁷³ The plaintiffs' bar also asserts that additional appellate review would result in "unnecessary delays."²⁷⁴ Such "delays," however, are a byproduct of ensuring that parties receive justice.

The main sticking point, however, is the cost of the new court for the state. Estimates of that cost widely vary. In 2017, the plaintiffs' bar asserted that an IAC would cost the state \$30 million to \$40 million annually.²⁷⁵ The following year, the Supreme Court of Appeals published a fiscal note anticipating that a fully functioning IAC would cost \$11.7 million to implement and then about \$10.3 million per year thereafter.²⁷⁶ While this is a significantly lower sum than suggested by the plaintiffs' bar, it still suggests the Court's predisposition against establishing the new court. Legislative leaders view that estimate as wildly inflated, calling it "comical" that operating a six-member court would cost more than running the entire State Senate, which costs less than \$8 million.²⁷⁷ In contrast, the Senate Finance Committee predicts that the new court would cost about \$3 million per year.²⁷⁸ Since the West Virginia Constitution has uniquely given the Supreme Court of Appeals sole authority to set the judiciary's

²⁷¹ See, e.g., Ry Rivard, *Supreme Court Justice Says State Doesn't Need to Add Appeals Court*, CHARLESTON GAZETTE-MAIL (Jan. 9, 2012), https://www.wvgazette.com/news/politics/supreme-court-justice-says-state-doesnt-need-to-add-appeals/article_d00f152b-5d15-5290-a83e-2cde8fa37d16.html (reporting then-Chief Justice Menis Ketchum's position that an IAC would be a "waste of money"); The Hon. Margaret L. Workman, *Intermediate Appeals Court: We Don't Need It and We Can't Afford It*, W. VA. LAW., Apr.–June 2011, <http://www.courts.wv.gov/public-resources/press/cj-column/Workman-Apr-June-2011.html>.

²⁷² See Linda Harris, *Intermediate Court Concept Drawing Criticism, Praise in West Virginia*, STATE J. (Feb. 25, 2018), https://www.wvnews.com/statejournal/law/intermediate-court-concept-drawing-criticism-praise-in-west-virginia/article_c690b1b5-5c3d-5b0b-9149-554bebab4457.html; Carrie Hodousek, *Trial Lawyers Group Opposes Bill to Create Intermediate Court in W. Va.*, METRONews (Feb. 17, 2017), <http://wvmetronews.com/2017/02/17/trial-lawyers-group-opposes-bill-to-create-intermediate-court-in-w-va/>.

²⁷³ Harris, *supra* note 272 (reporting position of Beth White, executive director of the West Virginia Association for Justice).

²⁷⁴ *Id.* (quoting West Virginia Association President-elect Stephen New).

²⁷⁵ Hodousek, *supra* note 272 (quoting Ms. White).

²⁷⁶ W. VA. SUPREME COURT OF APPEALS, CBD NO. 1958, FISCAL NOTE TO THE DRAFT COMMITTEE SUBSTITUTE S.B. 341 (2018); see also Brad McElhinny, *Supreme Court Estimates Cost of Intermediate Court at \$11.7 Million*, METRONews (Feb. 6, 2018), <http://wvmetronews.com/2018/02/06/supreme-court-estimates-cost-of-intermediate-court-at-11-7-million/>.

²⁷⁷ Jeff Jenkins, *Carmichael Calls Intermediate Court Fiscal Note "Comical,"* METRONews (Feb. 7, 2018), <http://wvmetronews.com/2018/02/07/carmichael-calls-intermediate-court-fiscal-note-comical/> (quoting Senate President Mitch Carmichael).

²⁷⁸ Harris, *supra* note 272.

budget,²⁷⁹ the Court's estimate matters most.²⁸⁰ In 2018, opponents pitted the Court's estimate of the cost of the IAC against other state priorities, such as increasing teacher salaries and addressing the state's opioid crisis.²⁸¹

As proponents have observed, "West Virginia's entire judicial system is a mere three percent of the state's budget."²⁸² Adding an additional level of appellate review would not have a significant effect on taxpayer funds. Advocates for an IAC also recognize that "[t]he benefit to the state's legal system and attractiveness to businesses would far justify the additional cost."²⁸³

Meanwhile, the Court has itself come under fire for wasteful spending.²⁸⁴ Public confidence in the Court may be at an all-time low following the adoption of impeachment articles by the House of Delegates against all four sitting justices stemming from this spending and other allegations of misconduct.²⁸⁵ With the

²⁷⁹ See W. VA. CONST. art. VI, § 51(5) (prohibiting the legislature from decreasing a budget item relating to the judiciary); see also Hoppy Kercheval, *State Supreme Court Getting Close Scrutiny by the Legislature*, METRONews (Feb. 9, 2018), <http://wvmetronews.com/2018/02/09/260875/>.

²⁸⁰ In the 2018 legislative session, the State Senate and House of Delegates overwhelmingly passed a resolution proposing a constitutional amendment that would give the legislature control of the judiciary's budget, with certain safeguards. See S.J.R. 3, 2018 Leg., Reg. Sess. (W. Va. 2018). West Virginians approved the amendment in November 2018, which may pave the way for the legislature to fund an IAC within the judiciary's existing budget. See Brad McElhinny, *Amendment is Approved for Lawmakers to Have More Judicial Budget Oversight*, METRONews (Nov. 6, 2018), <http://wvmetronews.com/2018/11/06/amendment-is-approved-for-lawmakers-to-have-more-judicial-budget-oversight/>.

²⁸¹ Jeff Jenkins, *Need, Cost of Intermediate Court Questioned Before Senate Passes Bill*, METRONews (Feb. 15, 2018), <http://wvmetronews.com/2018/02/15/need-cost-of-intermediate-court-questioned-before-senate-passes-bill/> (quoting West Virginia Association for Justice statement released on the day of the Senate vote).

²⁸² *West Virginia Needs an Intermediate Court of Appeals*, CHARLESTON GAZETTE-MAIL (Jan. 5, 2015), https://www.wvgazette.com/opinion/editorial-west-virginia-needs-an-intermediate-court-of-appeals/article_f23ca834-f540-54e1-aafe-0c92462636ff.html.

²⁸³ Zwerner, *supra* note 259, at 468.

²⁸⁴ Hoppy Kercheval, *State Supreme Court Spends Big on Office Furniture*, METRONews (Nov. 15, 2017), <http://wvmetronews.com/2017/11/15/state-supreme-court-spends-big-on-office-furniture/> (reporting spending \$3.7 million to renovate court offices with \$32,000 on a single couch, \$1,700 for throw pillows, and \$7,500 for a floor medallion outlining the counties of the state in the Chief Justice's office).

²⁸⁵ Justice Menis Ketchum retired from the Court prior to pleading guilty to a federal wire fraud count relating to his personal use of a state-owned vehicle. See *All of West Virginia's Supreme Court Justices Impeached Over Spending*, ASSOC. PRESS (Aug. 14, 2018, 5:02 AM), <https://www.nbcnews.com/news/us-news/all-west-virginia-s-supreme-court-justices-impeached-over-spending-n900461>; Brad McElhinny, *Impeachment Day 8: Delegates Vote on Articles Impeaching All WV Justices*, METRONews (Aug. 7, 2018), <http://wvmetronews.com/2018/08/07/impeachment-day-8-case-continues-on-supreme-court/>; Lacie Pierson, *WV House Judiciary Introduces Articles of Impeachment Against All Supreme Court Justices*, CHARLESTON GAZETTE-MAIL (Aug. 7, 2018), <https://wvpress.org/breaking-news/wv-house-judiciary-introduces-articles-of-impeachment-against-all-supreme-court-justices/>.

recent resignation of Justice Allen H. Loughry II, three new justices will be sitting on the Court by year's end.²⁸⁶ Consequently, this may be precisely the time to build further accountability into the judicial system and preserve access to appellate review by establishing an IAC.

B. *Abandoning West Virginia's Outlier Medical Monitoring Law*

West Virginia should place needed, common sense constraints on the ability of people who are not injured but allege exposure to a toxic substance to recover damages for medical monitoring.

Everyone is exposed to small amounts of potentially harmful substances in their daily lives. Allowing claims based purely on exposure can lead to highly speculative lawsuits on behalf of many people who will never develop an injury. In some cases, medical monitoring cannot prevent an illness and there may be no benefit to early detection. There is also no certainty that plaintiffs, if given cash awards, will use the money for medical testing. For these reasons, most courts have rejected medical monitoring claims brought on behalf of people without a present physical injury or placed significant constraints on such claims.

In 1997, the U.S. Supreme Court rejected a claim for medical monitoring under a federal tort law substitute for workers' compensation in the railroad industry. The Court rejected the claim as "beyond the bounds of currently 'evolving common law.'"²⁸⁷ The Court was concerned that "tens of millions of individuals" might qualify for some form of substance-exposure-related medical monitoring.²⁸⁸ Courts would be flooded with questionable cases, defendants would face uncertain liability, and those who actually develop an injury would

²⁸⁶ West Virginia voters recently selected former Congressman Evan Jenkins and former House Speaker Tim Armstead to fill the two court vacancies created by the retirements of Justices Menis Ketchum and Robin Davis. See Caity Coyne, *Armstead, Jenkins Win Supreme Court Races*, CHARLESTON GAZETTE-MAIL (Nov. 6, 2018), https://www.wvgazette.com/election_2018/armstead-jenkins-win-supreme-court-races/article_f369ac31-b86c-541f-845a-17937a4ae3c6.html. With the West Virginia Senate rejecting the single Article of Impeachment against Justice Beth Walker and five temporary justices to the West Virginia Supreme Court blocking the impeachment trial against Chief Justice Margaret Workman, Justice Loughry's resignation created a final vacancy to be filled by Governor Jim Justice until the May 2020 election. See Phil Kabler, *Walker Receives Public Reprimand, Keeps Seat on Supreme Court*, CHARLESTON GAZETTE-MAIL (Oct. 2, 2018), https://www.wvgazette.com/news/cops_and_courts/walker-receives-public-reprimand-keeps-seat-on-supreme-court/article_2d023c84-1ce1-5010-8d77-96a4f45d7f3b.html; see also Jeff Morris, *Supreme Court Will Not Reconsider Ruling that Blocked Impeachment Trials for Justices*, WCHS (Nov. 21, 2018), <https://wchstv.com/news/local/supreme-court-will-not-reconsider-ruling-that-blocked-impeachment-trials-for-justices>; Jeff Jenkins, *Loughry Resigns from Supreme Court*, METRONews (Nov. 10, 2018, 7:13 PM), <http://wvmetronews.com/2018/11/10/loughry-resigns-from-supreme-court/>.

²⁸⁷ *Metro-North Commuter R.R. Corp. v. Buckley*, 521 U.S. 424, 440 (1997).

²⁸⁸ *Id.* at 442.

have less chance of recovery after the depletion of resources for medical testing, the U.S. Supreme Court found.²⁸⁹

While other states followed this path,²⁹⁰ West Virginia took a different route. In a highly criticized case in 1999, the West Virginia Supreme Court of Appeals allowed cash awards for medical monitoring without a present physical injury.²⁹¹ It permitted such claims even if the amount of exposure to a toxic substance is insufficient to cause injury and regardless of whether there is a medical benefit to early detection of a disease.²⁹² Rather, the court allowed a lump sum recovery “based on the subjective desires of a plaintiff for information.”²⁹³ A dissenting justice cautioned:

[T]he practical effect of this decision is to make almost every West Virginian a potential plaintiff in a medical monitoring cause of action. Those who work in heavy industries such as coal, oil, gas, timber, steel, and chemicals as well as those who work in older office buildings, or handle ink in newspaper offices, or launder the linens in hotels have, no doubt, come into contact with hazardous substances. Now all of these people may be able to collect money as victorious plaintiffs without any showing of injury at all.²⁹⁴

Indeed, that is what occurred. In 2011, DuPont settled a lawsuit over concerns regarding a zinc smelter plant in Harrison County, West Virginia, setting aside \$4 million for medical monitoring and providing \$400 payments for those who completed a claim form. According to the claims administrator, 4,000 people signed up for the initial round of the medical monitoring program, but

²⁸⁹ *Id.*

²⁹⁰ A flurry of state supreme courts followed the U.S. Supreme Court’s reasoning in rapid succession. *See* Hinton v. Monsanto Co., 813 So. 2d 827 (Ala. 2001); Wood v. Wyeth-Ayerst Labs., 82 S.W.3d 849 (Ky. 2002); Henry v. Dow Chem. Co., 701 N.W.2d 684 (Mich. 2005); Paz v. Brush Engineered Materials, Inc., 949 So. 2d 1 (Miss. 2007); Badillo v. Am. Brands, Inc., 16 P.3d 435 (Nev. 2000); Lowe v. Philip Morris USA, Inc., 183 P.3d 181 (Or. 2008). When New York’s highest court rejected medical monitoring claims in 2013, it recognized that “[t]he requirement that a plaintiff sustain physical harm before being able to recover in tort is a fundamental principle of our state’s tort system” and that a new cause of action has “the potential for vast uncircumscribed liability.” *Caronia v. Philip Morris USA, Inc.*, 5 N.E.3d 11, 14, 17 (N.Y. 2013). While the high courts of Maryland and Massachusetts permitted medical monitoring claims during this period, they tightly circumscribed the conditions for bringing an action and, unlike West Virginia, did not allow cash awards. *See* Donovan v. Philip Morris USA, Inc., 914 N.E.2d 891, 902 (Mass. 2009); Exxon Mobil Corp. v. Albright, 71 A.3d 30 (Md. 2013); *see also* Exxon Mobil Corp. v. Ford, 71 A.3d 105 (Md. 2013).

²⁹¹ *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 426–30 (W. Va. 1999).

²⁹² *Id.* at 433–34.

²⁹³ *Id.*

²⁹⁴ *Id.* at 435 (Maynard, J., dissenting).

only half went through with the testing.²⁹⁵ Another 2,000 people just took the cash.²⁹⁶ As the *Charleston Daily Mail* observed, “Who would turn down a quick \$400?”²⁹⁷

To its credit, the Supreme Court of Appeals drew the line at punitive damages, ruling that a medical monitoring claim in which the plaintiffs have alleged only a future risk of harm, not a present harm, is insufficient to impose such punishment.²⁹⁸ Even with this constraint, West Virginia’s medical monitoring law remains an outlier. The only state to take a similar approach is Missouri.²⁹⁹

The Legislature should bring West Virginia’s medical monitoring law in line with other states. At minimum, the law should require placement of recovery in an action seeking future medical monitoring costs into a court-supervised fund, rather than paying out cash.³⁰⁰ This fund would reimburse the medical expenses of plaintiffs until the court finds that the medical surveillance, screening tests, or monitoring procedures are no longer required. In addition, legislation should require a plaintiff to show some present injury or diagnosis before payment of future medical monitoring expenses or establish strict standards to qualify. Claims should be allowed only when an individual shows he or she was significantly exposed to a proven hazardous substance due to a defendant’s conduct, has a substantially higher risk of contracting a latent disease than the general public as a result of that exposure, and that early detection of that disease is possible and beneficial. The West Virginia Senate unanimously

²⁹⁵ See Matt Harvey, *Spelter Smelter Settlement Winding Down in Harrison County*, EXPONENT TELEGRAM (Jan. 18, 2016), https://www.wvnews.com/theet/news/local/spelter-smelter-settlement-winding-down-in-harrison-county/article_7cc5989f-4869-5ac4-87fa-ea1309651d8a.html.

²⁹⁶ See *id.*

²⁹⁷ See Editorial, *Who Would Turn Down a Quick \$400?*, CHARLESTON DAILY MAIL, Sept. 14, 2011, at 4A.

²⁹⁸ See *Perrine v. E.I. du Pont de Nemours & Co.*, 694 S.E.2d 815, 933–34 (W. Va. 2010). Nevertheless, the court in that case sustained a \$117.7 million punitive damage award, reasoning that 60% of jury’s \$196.2 million punitive damage award stemmed from property damage claims and the remaining 40% was associated with medical monitoring claims. See *id.* at 931–32.

²⁹⁹ See *Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712, 716 (Mo. 2007); see also Mark A. Behrens & Christopher E. Appel, *Medical Monitoring in Missouri After Meyer ex rel. Coplin v. Fluor Corp.: Sound Policy Should Be Restored to a Vague and Unsound Directive*, 27 ST. LOUIS U. PUB. L. REV. 135 (2007). The Vermont Legislature passed a bill authorizing broad recovery for medical monitoring in 2018, but was vetoed by Governor Phil Scott. See S. 197, 2017–18 Leg., Reg. Sess., (Vt. 2018). Governor Scott expressed concern that the “level of liability and uncertainty this legislation creates for employers could prove catastrophic” for the state’s economy and that the bill would “sacrifice provable and scientific evidence in favor of claims that are speculative, conceptual, abstract, and subject to very low levels of proof.” See Gov. Philip B. Scott, Veto Message, S. 197, May 23, 2018.

³⁰⁰ For other important safeguards, see generally Victor E. Schwartz et al., *Medical Monitoring: The Right Way and the Wrong Way*, 70 MO. L. REV. 349 (2005).

passed legislation along these lines in March 2017,³⁰¹ but the House did not act on the bill before the Legislature adjourned.

C. Providing Jurors with Full Information to Decide Auto Accident Cases

One of the first questions people ask after learning of a car accident is, “were they wearing their seatbelts?” Certainly, this question also comes into the minds of jurors deliberating an automobile accident case. Yet, West Virginia law limits the ability of jurors to have this question answered. The Legislature should amend West Virginia law to provide that use or nonuse of a seatbelt by any driver or passenger is admissible in any civil action as evidence of comparative negligence or failure to mitigate damages.³⁰²

Historically, states did not allow juries to hear evidence of seatbelt use for two understandable reasons. First, when states followed the rule of contributory negligence, any degree of fault on the part of the plaintiff fully barred recovery. West Virginia, however, abandoned the contributory negligence defense and replaced it with comparative fault in 1979.³⁰³ Since that time, a plaintiff’s contribution to an injury only reduces recovery in proportion to his or her degree of fault.

Second, states did not initially have laws mandating seatbelt use and, when they enacted such laws, scientific research had not fully established how critical seatbelts are to safety. Society had also not fully embraced seatbelt use. That remained the case in 1993, when West Virginia first required drivers, front-seat passengers, and children to wear seatbelts.³⁰⁴

As part of that law, West Virginia adopted a unique procedure for considering seatbelt use in litigation. The law allows a trial court judge to consider seatbelt nonuse outside the view of the jury to determine whether an injured party’s failure to wear a seatbelt caused his or her injuries.³⁰⁵ If the judge finds that the failure to wear a seatbelt was a proximate cause of the injuries, the jury learns of the nonuse, but may reduce recovery *by no more than five percent*.³⁰⁶ If the injured party stipulates that his or her failure to wear a seatbelt contributed to the injury, the court forgoes a hearing and automatically withholds five percent of any future damages award.³⁰⁷ In such cases, the jury never hears evidence of the seatbelt nonuse. That law may have been ahead of its time

³⁰¹ S.B. 236, 2017 Leg., Reg. Sess. (W. Va. 2017) (passed 33–0 on Mar. 7, 2017).

³⁰² Legislation along these lines was introduced, but did not advance, in 2017 and 2018. See S.B. 606, 2018 Leg., Reg. Sess. (W. Va. 2018); H.B. 4367, 2018 Leg., Reg. Sess. (W. Va. 2018); H.B. 2581, 2017 Leg., Reg. Sess. (W. Va. 2017).

³⁰³ *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879 (W. Va. 1979).

³⁰⁴ H.B. 2098, 1993 Leg., Reg. Sess. (W. Va. 1993).

³⁰⁵ W. VA. CODE ANN. § 17C-15-49(d) (West 2018).

³⁰⁶ *Id.*

³⁰⁷ *Id.*

25 years ago, but it is now obsolete as it fails to recognize several major shifts that have occurred.

A wealth of research now conclusively establishes that buckling up reduces injuries and saves lives. According to the National Highway Traffic Safety Administration, wearing seatbelts prevents over 14,000 deaths each year.³⁰⁸ In 2016, about 48% of people killed in crashes were not wearing seatbelts.³⁰⁹ The public fully understands and accepts the importance of wearing seatbelts. For example, before West Virginia participated in a “Click It or Ticket” campaign in 2001, less than half of West Virginians used seatbelts.³¹⁰ After that campaign, seatbelt use jumped to 71.6%.³¹¹ In 2013, 82.2% of West Virginians were wearing seatbelts.³¹²

Until that year, seatbelt use remained a “secondary offense” in West Virginia, meaning that police officers could not stop someone solely for not wearing a seatbelt, but could enforce the seatbelt law only in combination with another offense, such as speeding.³¹³ After nine years of legislative consideration, the legislature made failure to wear a seatbelt a primary traffic offense in 2013.³¹⁴ Now, law enforcement officers may pull over any vehicle in which the driver, any front seat passenger, or any passenger under 18 years of age in the backseat are unbuckled and fine them.³¹⁵ The change was expected to boost seatbelt use in West Virginia.³¹⁶ In 2016, an observational survey conducted by the Governor’s Highway Safety Program estimated the state’s seatbelt usage rate had climbed to 86.8%.³¹⁷

Given today’s understanding of the importance of seatbelt use, adoption of comparative fault, and the evolution of how seatbelt laws are enforced, there is no justification for hiding evidence from juries as to whether drivers and

³⁰⁸ *Seat Belts*, NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., <https://www.nhtsa.gov/risky-driving/seat-belts> (last visited Aug. 20, 2018).

³⁰⁹ *Id.*

³¹⁰ *Highway Safety Performance Plan FY 2010*, W. VA. DIV. MOTOR VEHICLES & W. VA. DEP’T TRANSP. 2, <https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/wvfy10hsp.pdf> (last visited Aug. 27, 2018) (indicating 49.5% seatbelt usage rate in 2001).

³¹¹ *Id.* at 14.

³¹² W. VA. 2013 GOVERNOR’S HIGHWAY SAFETY PROGRAM, ANN. REP. 1 (2013), transportation.wv.gov/DMV/DMVFormSearch/WVGHSP-2013-Annual-Report-wf.pdf.

³¹³ See H.B. 2108, 2013 Leg., Reg. Sess. (W. Va. 2013).

³¹⁴ See Malak Khader, *Legislature Passes Primary Offense Seatbelt Law*, 24 WRAP-UP, no. 7 (Apr. 13, 2013), www.wvlegislature.gov/wrapup/pdfs/Vol.XXIV_issue7.pdf.

³¹⁵ W. VA. CODE ANN. § 17C-15-49(a), (c) (West 2018).

³¹⁶ W. VA. DIV. OF MOTOR VEHICLES, ANN. REP. 1 (2016), https://transportation.wv.gov/DMV/DMVFormSearch/DMV_Annual_Report_2016.pdf.

³¹⁷ *Observational Survey of Safety Belt Use*, W. VA. DIV. OF MOTOR VEHICLES & W. VA. DEP’T OF TRANSP. 1, https://transportation.wv.gov/DMV/DMVFormSearch/GHSP_FY16_SEAT-BELT-SUVEY.pdf (last visited Aug. 27, 2018).

passengers were wearing seatbelts or allowing no more than a five percent reduction in damages. In one state that recently abandoned a prohibition on seatbelt evidence, a unanimous supreme court referred to the exclusionary rule as “an anachronism,” a “vestige of a bygone legal system,” and an “oddity in light of modern societal norms.”³¹⁸ Keeping this law in place blindfolds the jury from fairly considering irresponsible (and illegal) behavior, as it would in any other personal injury case.³¹⁹

D. Eliminating Predatory Lawsuit Lending

West Virginia should subject lawsuit lending to the same types of safeguards governing other businesses that provide consumer loans or credit.

An industry has emerged in which companies offer immediate cash to consumers who are plaintiffs in personal injury claims. These “cash advances” must be paid back to the lender with interest and fees out of the plaintiff’s settlement or judgment. The loans often come with exorbitant interest rates and large fees.³²⁰ *The Wall Street Journal* has called these arrangements “the legal equivalent of the payday loan.”³²¹ Plaintiffs’ lawyers observe that if the litigation does not quickly settle, the accumulated interest on a lawsuit loan is likely to leave their clients with little, if any, recovery.³²² Those that represent business interests express concern that lawsuit lending may prolong litigation and inflate settlement values.³²³ *The New York Times* recently exposed how these loans have served as a “funding machine” for mass tort litigation where, without adequate explanation to clients, they have been used to entice women to remove pelvic

³¹⁸ See *Nabors Well Servs., Ltd., v. Romero*, 456 S.W.3d 553, 555 (Tex. 2015).

³¹⁹ See *id.* at 566 (“The result [of the exclusionary rule] is certainly an oddity: the unbelted plaintiff is likely to be punished with a criminal citation carrying a monetary fine from the police officer investigating the accident, but in the civil courtroom his illegal conduct will be rewarded by monetary compensation.”).

³²⁰ Ashby Jones, *Loan & Order: States Object to ‘Payday’ Lawsuit Lending*, WALL ST. J. (Apr. 28, 2013), <https://www.wsj.com/articles/SB10001424127887324743704578446903171978648>; see also Binyamin Appelbaum, *Lawsuit Loans Add New Risk for the Injured*, N.Y. TIMES (Jan. 16, 2011), <https://www.nytimes.com/2011/01/17/business/17lawsuit.html> (finding “the rates charged by lawsuit lenders often exceed 100 % a year”).

³²¹ Jones, *supra* note 320.

³²² *Id.* (citing comments of Anthony Leone, who serves as president of the Rhode Island Association for Justice); see also Appelbaum, *supra* note 320 (quoting Robert J. Genis, a personal injury lawyer, as referring to lawsuit lending as “legal loan sharking” and indicating that he warns clients against such borrowing).

³²³ Jones, *supra* note 320 (quoting Harold Kim, Executive Vice President of the U.S. Chamber of Commerce Institute of Legal Reform).

mesh devices not because surgery was medically necessary, but because the removal of the device would improve the chance of a settlement.³²⁴

Plaintiffs who lose their cases are not obligated to repay the loan. This distinction allows lawsuit lenders to call the process “non-recourse” funding in which they provide a cash advance,³²⁵ not a loan subject to safeguards applicable to other lenders. While payday lending is effectively illegal in West Virginia because such arrangements are subject to strong usury laws that prohibit excessive interest rates,³²⁶ lawsuit lending circumvents these laws.

Several states have protected consumers by enacting legislation that governs lawsuit lending, such as Oklahoma (2013), Tennessee (2014), Arkansas (2015), and Indiana (2016).³²⁷ West Virginia should take similar action.³²⁸ The law might require lenders to register with the state and post a surety bond, allow consumers to cancel a lawsuit lending contract within five days, and set a maximum interest rate and fee limits consistent with West Virginia’s usury law.³²⁹ In addition, the law should guard against conflicts of interest by ensuring that lenders do not attempt to influence a consumer’s case. For example, the law

³²⁴ See Matthew Goldstein & Jessica Silver-Greenberg, *How Profiteers Lure Women Into Often-Unneeded Surgery*, N.Y. TIMES (Apr. 14, 2018), <https://www.nytimes.com/2018/04/14/business/vaginal-mesh-surgery-lawsuits-financing.html>. Most of the pelvic mesh cases—over 100,000 claims—were transferred to federal multidistrict litigation in West Virginia. See *MDL Statistics Report – Distribution of Pending MDL Dockets by District*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG. 6 (Aug. 15, 2018), www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_B_District-August-15-2018.pdf.

³²⁵ See, e.g., *West Virginia Lawsuit Funding*, ALLIANCE CLAIM FUNDING, LLC, <http://www.allianceclaimfunding.com/west-virginia-lawsuit-funding> (last visited Aug. 20, 2018); *West Virginia Lawsuit Loans*, TRIMARK LEGAL FUNDING CO., <https://tflc.com/state-west-virginia/> (last visited Aug. 20, 2018); see also *West Virginia Lawsuit Funding*, CASH FOR LAWSUITS, <https://cashforlawsuits.com/lawsuit-advance-funding-case-types/west-virginia-lawsuit-funding/> (last visited Aug. 20, 2018) (describing its service as “non-recourse advances”).

³²⁶ West Virginia law sets maximum rates for consumer loans ranging from 31% APR (loan of \$2,000 or less), 27% APR (loan between \$2,000 and \$10,000), and 18% APR (loan of over \$10,000). See W. VA. CODE ANN. § 46A-4-107(1)-(3) (West 2018).

³²⁷ See S.B. 882, 90th Gen. Assemb., Reg. Sess. (Ark. 2015) (codified at ARK. CODE ANN. § 4-57-109 (West 2018)); H.B. 1127, 2016 Reg. Sess. (Ind. 2016) (codified at IND. CODE ANN. § 24-4.5-1-101.1 (West 2018)); S.B. 1360, 2014 Reg. Sess. (Tenn. 2014) (codified at TENN. CODE ANN. §§ 47-16-101 et seq. (West 2018)); H.B. 84, 2016 Reg. Sess. (Vt. 2016) (codified at VT. STAT. ANN. tit. 8, §§ 2251 to 2260 (West 2018)).

³²⁸ By way of comparison, the state Senate engaged in lengthy and heated debate this past session on legislation that would have increased the amount of money high-risk consumers could borrow on already regulated high-interest loans. See Rusty Marks, *Senate Approves Consumer Loan Bill in Party-Line Vote*, WVNEWS (Feb. 19, 2018), https://www.wvnews.com/news/wvnews/senate-approves-consumer-loan-bill-in-party-line-vote/article_d318451b-1253-525b-9bbc-47adcbb519cd.html.

³²⁹ See generally General Thurbert Baker, *Paying to Play: Inside the Ethics and Implications of Third-Party Litigation Financing*, 23 WIDENER L.J. 229, 241 (2013) (highlighting cases of predatory lawsuit lending and concluding “lenders should—at the very least—be subject to state usury, truth-in-lending, and other consumer protection laws”).

might prohibit lawsuit lenders from accepting referral fees or other payments from law firms or from referring consumers to particular lawyers, law firms, or medical providers.

E. Preventing Patient Harm from Misleading Lawsuit Advertising

West Virginia should prohibit misleading practices in lawsuit advertising that scare patients into stopping their prescribed medications and discourage people from seeking medical treatment.

The number of advertisements for legal services on television has tripled over the past decade, with the largest portion targeting prescription drugs and medical devices.³³⁰ The internet is also inundated with websites, videos, and advertisements on social media that seek plaintiffs for mass tort suits.³³¹ These advertisements are often presented as “medical alerts,” suggest an affiliation with the FDA, and warn that taking a drug can result in dire consequences, such as death, even when the chance of such complications are remote, understood by doctors, and explained to their patients.³³²

There is mounting evidence that misleading lawsuit advertising leads people to stop taking their medications or seeking treatment. According to the FDA, doctors have submitted at least 61 reports of patients stopping their prescribed anticoagulant after viewing a lawsuit ad, resulting in six deaths and a wide range of other adverse events, the most frequent of which was a stroke.³³³ In testimony before Congress, doctors shared first-hand accounts of how misleading lawsuit ads have harmed their patients and hindered their ability to provide medical care.³³⁴

³³⁰ See CARY SILVERMAN, U.S. CHAMBER INST. FOR LEGAL REFORM, *BAD FOR YOUR HEALTH: LAWSUIT ADVERTISING IMPLICATIONS AND SOLUTIONS* 6 (2017).

³³¹ See *id.* at 14–18.

³³² See *id.* at 10–13; see also Elizabeth Tippet, *Medical Advice from Lawyers: A Content Analysis of Advertising for Drug Injury Lawsuits*, 41 *AM. J. L. & MED.* 7 (2015); Daniel M. Schaffzin, *Warning: Lawyer Advertising May Be Hazardous to Your Health! A Call to Fairly Balance Solicitation of Clients in Pharmaceutical Litigation*, 8 *CHARLESTON L. REV.* 319 (2013).

³³³ See Letter from Anna K. Abram, Deputy Commissioner for Policy, Planning, Legislation, and Analysis, U.S. Food and Drug Admin. to The Hon. Andy Harris, M.D., U.S. House of Representatives (undated 2017).

³³⁴ See *Examining Ethical Responsibilities Regarding Attorney Advertising Before the Subcomm. on the Constitution, H. Comm. on the Judiciary*, 115th Cong. 8–10 (2017) (statement of Ilana Kutinsky, Director of Atrial Fibrillation Services, William Beaumont Hospital, Troy, Michigan); *Examining Ethical Responsibilities Regarding Attorney Advertising Before the Subcomm. on the Constitution, H. Comm. on the Judiciary*, 115th Cong. 10–12 (2017) (testimony of Shawn H. Fleming, MD, Novant Health Vascular Specialists); see also *Examining Ethical Responsibilities Regarding Attorney Advertising Before the Subcomm. on the Constitution, H. Comm. on the Judiciary*, (2017) (statement of Dr. W. Frank Peacock, MD, FACEP, FACC, Professor, Emergency Medicine, Associate Chair and Research Director, Baylor College of Medicine, Houston, Texas) (submitted statement, on file with author).

In addition, several studies and surveys show the troubling impact these misleading ads have on patients. CDC-affiliated researchers have found that videos on YouTube, most of which were lawsuit ads, convey scientifically unsupported claims about the risk of taking anti-depressants and other drugs during pregnancy.³³⁵ A team of experts in female pelvic health found that women who seek treatment often inaccurately believe mesh devices have been recalled due to lawsuit ads.³³⁶ A recent survey of patients confirms that lawsuit ads scare people away from medications treating conditions ranging from diabetes to depression.³³⁷ A study also demonstrated that consumers shown two actual television commercials soliciting lawsuits targeting the reflux drug Reglan—one that purported to be a public service warning and another that clearly disclosed its purpose as a lawsuit advertisement—found that those who viewed the ad presented as a health alert were less likely to fill a new prescription or refill an existing prescription.³³⁸ Earlier, psychologists reported that patients stopped taking medications to treat mental health conditions after viewing a lawsuit ad, resulting in relapses, hospitalizations, and suicide attempts.³³⁹

The American Medical Association has recognized these types of “fearmongering” television commercials pose a threat to public health.³⁴⁰ Organizations representing seniors have expressed similar concerns.³⁴¹

Nevertheless, there is virtually no oversight of lawsuit advertising—from the FDA, the Federal Trade Commission (FTC), or state bars. While West Virginia Rule of Professional Conduct 7.1 prohibits a lawyer from making “a false or misleading communication,”³⁴² this rule is insufficient to address attorney advertising that presents misleading information about the safety of drugs or medical devices. The rule applies only to misrepresentations “about the lawyer or the lawyer’s services.”³⁴³ It prohibits statements that create unjustified expectations about the results that can be achieved, make unsubstantiated

³³⁵ See Craig Hansen et al., *Assessment of YouTube Videos as Source of Information on Medication Use in Pregnancy*, 25 PHARMACOEPIDEMOLOGY & DRUG SAFETY 35, 39 (2015).

³³⁶ See Christopher F. Tenggardjaja et al., *Evaluation of Patients’ Perceptions of Mesh Usage in Female Pelvic Medicine and Reconstructive Surgery*, 85 UROLOGY 326, 327 (2015).

³³⁷ See SILVERMAN, *supra* note 329, at 20–22 (presenting results of a May 2017 poll of patients commissioned by the U.S. Chamber Institute for Legal Reform).

³³⁸ See Jesse King & Elizabeth Tippett, *Drug Injury Advertising*, YALE J. OF HEALTH POL’Y L. & ETHICS (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3220066.

³³⁹ See Press Release, National Council for Community Behavioral Healthcare, *New Survey Shows Product Liability Litigation May Jeopardize Treatment Outcomes for People with Severe Mental Illness* (June 13, 2007).

³⁴⁰ See AM. MED. ASS’N, Resolution 208 (A-16) (received Apr. 25, 2016) (on file with author).

³⁴¹ See, e.g., Leah Miller, *Don’t Confuse Lawsuit Ads that Look Like Public Service Announcements*, AARP S.D. (Mar. 21, 2018), <https://states.aarp.org/dont-confuse-lawsuit-ads-that-look-like-public-service-announcements/>.

³⁴² W. VA. RULES OF PROF’L CONDUCT r. 7.1.

³⁴³ *Id.*

comparisons of the lawyer's services or fees with the services or fees of other lawyers,³⁴⁴ or inform viewers that there will be "no recovery-no fee" without indicating that the client is responsible for payment of the costs and expenses of litigation.³⁴⁵ Rule 7.1 does not extend to public health concerns resulting from misleading or inaccurate information about a product or medical treatment option conveyed in lawsuit ads. In addition, the West Virginia State Bar, Office of Disciplinary Counsel, and Lawyer Disciplinary Board have no authority over non-attorney entities that sponsor many of the commercials and websites. Finally, disciplinary action is typically triggered by complaints filed by a client who feels misled or by another attorney (alleging a competitor's deceptive advertising places him or her at a disadvantage).³⁴⁶ A doctor or patient who is not involved in the legal system is highly unlikely to file a bar complaint.³⁴⁷

It appears that the last time the Lawyer Disciplinary Board considered guidelines for attorney advertising on the internet was in 1998, when websites, news groups, "chat rooms," and e-mail spam first proliferated,³⁴⁸ well before the era of mass tort lead generation, YouTube, and social media. In 2006, the West Virginia Bar's Lawyer Advertising Commission considered a number of recommendations with respect to lawyer advertising,³⁴⁹ but the 19-member commission ultimately only recommended clarifying what constituted a "false and misleading" advertisement.³⁵⁰

West Virginia should take additional steps to prohibit common misleading practices in lawsuit advertising. For example, the legislation should prohibit presenting a lawsuit advertisement as a "medical alert," "health alert," "consumer alert," or "public service announcement." Those who advertise legal services should not be permitted to display the logo of a federal or state government agency in a manner, suggesting affiliation with or the sponsorship of that agency. Advertisements, whether on the internet, television, or print media, should not contain the word "recall" when referring to a product that has *not* been recalled by a government agency or through an agreement between a manufacturer and government agency. All lawsuit advertisements should

³⁴⁴ See *id.* cmt. 3.

³⁴⁵ See Lawyer Disciplinary Bd., State of W. Va., L.E.I. 96-01 (1998) ("No Recovery-No Fee" Lawyer Advertisements Must Disclose Client Responsibility for Litigation Costs and Expenses in the Same Advertisement).

³⁴⁶ See Tippett, *supra* note 331, at 40–41 (citing Fred C. Zacharias, *What Lawyers Do When Nobody's Watching: Legal Advertising as a Case Study of the Impact of Underenforced Professional Rules*, 87 IOWA L. REV. 971, 1002 (2002)).

³⁴⁷ See *id.* at 41 (observing that "non-client consumers . . . may not be motivated to complain, or may not identify state bars as an avenue for complaints").

³⁴⁸ See Lawyer Disciplinary Bd., State of W. Va., L.E.I. 98-03 (1998) (Attorney Advertising on the Internet).

³⁴⁹ See Tom Searls, *Bar to Work on Reforming Lawyers' Advertising*, CHARLESTON GAZETTE, Mar. 15, 2006.

³⁵⁰ See *Legal Group Won't Ban Boastful Ads*, CHARLESTON DAILY MAIL, July 19, 2016.

identify its sponsor and whether that attorney, law firm, or other entity will represent clients, or refer those who respond to others. In addition, lawsuit ads targeting FDA-approved prescription drugs should warn patients that they should not stop taking a prescribed medication without first consulting with their doctor. Violations of these requirements should be subject to the same remedies as other deceptive business practices under the West Virginia Consumer Credit and Protection Act.

The legislation should also empower the Attorney General to respond when a law firm or lead generation company obtains, uses, or discloses private health information for the purpose of soliciting patients to bring lawsuits. While entities such as health maintenance organizations and insurers are subject to state laws prohibiting them from disclosing private health information,³⁵¹ these laws do not reach attorneys, law firms, and lead generation companies, and firms they may contract with to conduct cold calls soliciting people to bring lawsuits.

Finally, the legislation should make clear that it does not affect the authority of the West Virginia State Bar, Office of Disciplinary Counsel, Lawyer Disciplinary Board, or the courts to enforce ethics rules and take disciplinary action against attorneys when warranted.

This approach is fully consistent with the First Amendment and how misleading advertising is addressed outside the legal marketplace. The U.S. Supreme Court ruled in *Bates v. State Bar of Arizona*³⁵² that while a blanket ban on attorney advertising is impermissible, “[a]dvertising that is false, deceptive, or misleading of course is subject to restraint.”³⁵³ Subsequent Supreme Court decisions have upheld restrictions on attorney advertising that unduly influence injured people³⁵⁴ or misled the public.³⁵⁵ The Court has found that “for commercial speech to come within the First Amendment, it at least must concern lawful activity and not be misleading.”³⁵⁶ Even where attorney solicitation practices are not misleading, the Court has found that narrowly tailored

³⁵¹ See W. VA. CODE ANN. § 33-25A-26 (West 2018) (health maintenance organizations); W. VA. CODE ST. R. § 114-57-15 (West 2018) (insurers).

³⁵² 433 U.S. 350 (1977).

³⁵³ See *id.* at 383.

³⁵⁴ See *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 464–65 (1978) (upholding restriction on soliciting patients at hospitals or accident sites); see also *Lawyer Disciplinary Bd. v. Allen*, 479 S.E.2d 317, 329 (W. Va. 1996) (holding West Virginia rule prohibiting lawyers from directly soliciting injured people with whom they do not have a family or prior professional relationship by phone materially advances a substantial government interest and that such activity is not protected as the constitutional exercise of commercial speech).

³⁵⁵ *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 650 (1985) (upholding discipline when attorney ad for med. device litigation said “no recovery, no fee” when client would be required to pay litigation expenses).

³⁵⁶ See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980).

restrictions are permissible where there is a substantial interest in protecting the public.³⁵⁷

In fact, the FTC has found these types of practices deceptive when used in other industries, cautioned businesses from using them, and taken enforcement action.³⁵⁸ The West Virginia Consumer Credit and Protection Act already generally prohibits “unfair or deceptive acts or practices.”³⁵⁹ Legislation can identify specific misleading lawsuits advertising practices that fall within this prohibition. Such a law would address the substantial governmental interest in ensuring that patients do not view advertisements intended to generate lawsuits as providing medical advice, leading patients to forgo prescribed medications or treatment options. Narrowly tailored legislation can directly advance this interest, while protecting truthful commercial speech.

V. CONCLUSION

The legislature should seize the momentum built over the past three years to continue its achievements by addressing outstanding problem areas and establishing the state as a leader in proactively tackling concerns. Some of the suggested reforms, such as establishing an intermediate appellate court, replacing West Virginia’s outlier medical monitoring law with a more mainstream approach, and allowing juries to consider seatbelt use, are long overdue. Other proposals, such as by addressing predatory lawsuit lending and protecting the public from misleading lawsuit advertising, present an opportunity for West Virginia to lead.

Meanwhile, plaintiffs’ attorneys will continue to push liability law at the edges. While the West Virginia Supreme Court of Appeals has accepted invitations to expand liability in the past, it has recently shown sensitivity to the

³⁵⁷ See *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 626–29 (1995) (upholding Florida Bar rule that prohibited lawyers from sending direct mail to victims and their relatives within 30 days of an accident or disaster).

³⁵⁸ See, e.g., FTC, ENFORCEMENT POLICY STATEMENT ON DECEPTIVELY FORMATTED ADVERTISEMENTS, 4–6, 15–16 (2015) (recognizing that infomercials that mimic news reports can be deceptive and requiring clear notice that it is a “PAID ADVERTISEMENT,” citing cases taking action when ads are presented a public service announcements or suggesting a government affiliation, and actions challenging deceptive websites that purport to be an objective resource for scientific information, but are selling a product). The FTC has also required advertisements that make health or safety claims to be supported by “competent and reliable scientific evidence.” See, e.g., *POM Wonderful LLC*, 155 F.T.C. 56, 193 (2013), *aff’d in part*, 777 F.3d 478, 504–05 (D.C. Cir. 2015); *In re Telebrands Corp.*, 140 F.T.C. 278, 347 (2005), *aff’d*, 457 F.3d 354 (4th Cir. 2006); *In re Novartis Corp.*, 127 F.T.C. 580, 725 (1999), *aff’d*, 223 F.3d 783 (D.C. Cir. 2000).

³⁵⁹ W. VA. CODE ANN. § 46A-6-104 (West 2018). This prohibition expressly includes practices that cause confusion as to the approval or certification of the goods or services, mislead consumers regarding the affiliation or connection to another, disparage goods by false or misleading representation of fact, or any other conduct that similarly creates a likelihood of confusion or of misunderstanding. See W. VA. CODE ANN. § 46A-6-102(7) (West 2018).

potential consequences of doing so. For example, in *McNair v. Johnson & Johnson*, the court adhered to the core principle that businesses are responsible only for products they make or sell, not those made or sold by others.³⁶⁰ It “decline[d] to deviate from our traditional products liability law to extend the duty of brand [prescription drug] manufacturers to those allegedly injured by a competitor’s product,” joining the vast majority of courts.³⁶¹ The court found that the alternative would increase the price of new drugs, stifle research and development of beneficial products, and have negative health consequences for society.³⁶² In addition, the court observed that imposing new obligations through tort law on an already heavily-regulated industry can “interfere in the delicate calculus” set by policymakers.³⁶³ The decision rejected deep-pocket liability.³⁶⁴

McNair may indicate that the state’s high court is less prone to adopting novel theories of liability. As liability expansions occur and new abusive litigation practices emerge,³⁶⁵ however, the legislature should continue to maintain balance. Perceptions of the fairness of West Virginia’s legal system will not change overnight, but businesses are already taking notice of the state’s progress.

³⁶⁰ See *McNair v. Johnson & Johnson*, No. 17-0519, 2018 W. Va. LEXIS 344, at *22 (W. Va. May 11, 2018).

³⁶¹ *Id.*

³⁶² *Id.* at *31–32 (citing Victor E. Schwartz et al., *Warning: Shifting Liability to Manufacturers of Brand-Name Medicines When the Harm Was Allegedly Caused by Generic Drugs Has Severe Side Effects*, 81 *FORDHAM L. REV.* 1835, 1842 (2013)).

³⁶³ *Id.* at *33.

³⁶⁴ See *id.* at *33–34.

³⁶⁵ While some states enacted comprehensive tort reform laws years ago, they continue to respond to liability expansions and abusive litigation practices as they emerge. See, e.g., Michael S. Hull et al., *House Bill 4 and Proposition 12: An Analysis with Legislative History, Part One*, 36 *TEX. TECH L. REV.* 1 (2005); H.B. 1774 (Tex. 2017) (responding to abusive weather-related insurance litigation practices).