



U.S. CHAMBER
Institute for Legal Reform

West Virginia's Climb

*Lawsuit Climate Progress in the
Mountain State and the Path Ahead*

.....
JANUARY 2018



U.S. CHAMBER
Institute for Legal Reform

An Affiliate of the U.S. Chamber of Commerce

© U.S. Chamber Institute for Legal Reform, January 2018. All rights reserved.

This publication, or part thereof, may not be reproduced in any form without the written permission of the U.S. Chamber Institute for Legal Reform. Forward requests for permission to reprint to: Reprint Permission Office, U.S. Chamber Institute for Legal Reform, 1615 H Street, N.W., Washington, D.C. 20062-2000 (202.463.5724).

Table of Contents

Executive Summary	1
West Virginia’s Hard-Won Progress	3
Improving the State’s Liability Laws and Addressing Lawsuit Abuse.....	3
<i>Fairly Allocating Fault</i>	3
<i>Stopping Jackpot Judgments</i>	5
<i>Addressing Abuse in Asbestos Litigation</i>	6
<i>Bringing Rationality to Consumer Protection Litigation</i>	7
Moving From Pay-to-Play Hiring to a Transparent Process for Retaining Outside Counsel.....	8
Responding to Liability-Expanding Court Decisions.....	9
<i>Adopting The Learned Intermediary Doctrine</i>	9
<i>Eliminating “Phantom Damages”</i>	10
<i>Precluding Liability for “Open And Obvious” Hazards</i>	11
<i>Preserving the Workers’ Compensation Act</i>	11
<i>Recognizing a Duty to Mitigate Damages in Employment Litigation</i>	12
Other Notable Reforms	13
The Path Forward	15
Establishing an Intermediate Appellate Court.....	15
Abandoning West Virginia’s Outlier Medical Monitoring Law.....	18
Allowing Jurors to Learn Whether a Plaintiff Wore a Seatbelt	19
Stopping Litigation Tourism by Passing Venue Reform.....	21
Ensuring that Class Actions Don’t Just Benefit Lawyers.....	23
Protecting Consumers from Predatory Lawsuit Lending	25
Preventing Patient Harm from Misleading Lawsuit Advertising.....	26
Conclusion	29

Prepared for the U.S. Chamber Institute for Legal Reform by

Cary Silverman, Shook, Hardy & Bacon L.L.P.

Executive Summary

West Virginia has begun shedding its reputation for having one of the worst civil justice systems in the nation. The Mountain State's lawsuit climate ranked dead last or second to last in surveys of senior business executives and attorneys conducted eleven times over the past fifteen years—until 2017.¹ This report explores the beginning of the state's encouraging transformation and highlights areas where it may continue this progress.

For years, significant departures from core principles of tort law put West Virginia outside the mainstream. The West Virginia Supreme Court of Appeals, the state's only appellate court, repeatedly issued rulings that expanded liability and led to more lawsuits. West Virginia was the sole state in the country to impose a duty on pharmaceutical manufacturers to not only adequately educate doctors on the benefits and risks of medications, but to directly communicate warnings to patients. The court subjected homeowners and businesses to liability for hazards that were open and obvious, created loopholes for employees to sue employers for work-related injuries outside the workers' compensation system, and allowed inflated awards for medical expenses.

State courts were flooded with asbestos claims, many of which were generated by

highly questionable practices and filed on behalf of people who had no impairment. West Virginia's previous attorney general was known for deputizing private personal injury lawyers to enforce state law, paying them based on the amount of damages imposed rather than seeking solutions that best served the public. The threat of unlimited punitive damage awards loomed with no right to appeal.

West Virginia has addressed these concerns and more over the past three years.

First, the legislature enacted laws that altered fundamental aspects of the state's tort law and addressed lawsuit abuse concerns. Now, West Virginia law more fairly bases liability on responsibility, ensures that punitive damage awards are tied to actual harm, and reduces the potential for abuse in asbestos and consumer litigation.

Next, the legislature adopted a good government reform that continues to allow the state's attorney general to hire outside counsel when needed, but provides transparency that avoids pay-to-play hiring, oversight that protects the public interest, and other safeguards that protect taxpayer funds.

Then, the legislature restored stability by responding to a bevy of liability-expanding court rulings. The state's high court, while still a concern, has recently shown more balance.

Finally, the legislature updated the state's arbitration laws, reduced an excessive judgment interest rate to one that reflects market rates, and adopted product and medical liability reforms.

These changes are having an impact on the state's lawsuit climate. Between 2015 and 2017, West Virginia jumped five spots to #45 in the U.S. Chamber Institute for Legal Reform's *Lawsuit Climate Survey*. As West Virginia Secretary of Commerce Woody Thrasher observed, "While advancing five spots may seem insignificant, it is this kind of incremental progress that shows the business community we are starting to get our act together in the Mountain State."² *The Intelligencer* applauded legislators, Governor Jim Justice, and former Governor Earl Ray Tomblin for a "very good start" in "making West Virginia courts less intimidating places for businesses."³

To continue this progress, this report recommends several key reforms for the legislature to consider:

- Establish an intermediate appellate court so that all litigants are guaranteed full and fair appellate review.

- Abandon West Virginia's outlier medical monitoring law, which currently allows individuals who allege exposure to a toxic substance, but have no actual injury, to recover cash awards.
- Adopt a stronger venue law to curb the ability of attorneys to bring lawsuits in West Virginia courts on behalf of people who do not live or work in West Virginia and were injured elsewhere.
- Remove the blindfold placed on jurors who are not allowed to learn that plaintiffs in auto accident cases were not wearing their seatbelts.
- Ensure that the class action system benefits the public, not just lawyers, by stemming no-injury litigation and basing attorneys' fees on the benefit actually received by class members, among other reforms.
- Protect people from predatory lawsuit lending by subjecting such practices to similar safeguards as other consumer loans.
- End common misleading practices used in lawsuit advertisements that scare people away from seeking treatment or lead them to stop taking their prescribed medication.

West Virginia is proving that with the right leadership, positive change will happen—2018 offers additional opportunity for movement in the right direction.

West Virginia's Hard-Won Progress

Over three short years, West Virginia has transformed itself from a litigation outlier to an inspiring example of change. With the support of its governor, the legislature brought West Virginia's liability laws into the mainstream, adopting commonsense reforms ranging from curbing joint and several liability to product liability reform. With the help of a new attorney general, the legislature adopted good government legislation ending pay-to-play hiring of private contingency-fee lawyers to enforce state law. It also restored balance to West Virginia tort law by responding to court decisions that had endorsed novel theories of liability, eliminated longstanding defenses, and allowed inflated damage awards.

Improving the State's Liability Laws and Addressing Lawsuit Abuse

FAIRLY ALLOCATING FAULT

Under prior West Virginia law, individuals and businesses whose actions played a minor role in causing a person's injury were on the hook for the full amount of that person's damages, including the portion attributed to the wrongful conduct of others. What is known as joint and several liability encourages plaintiffs' lawyers to target businesses they consider to have "deep pockets," while settling with or not pursuing those who bear the greatest responsibility for the plaintiff's injury.

“ Now, individuals and businesses sued in West Virginia typically pay damages in proportion to their level of responsibility for an injury. ”

Before 2005, each defendant was “jointly and severally liable” for a plaintiff’s injury.⁴ That year, the legislature took a step forward by limiting joint liability against parties minimally at fault (less than 30%), but the law still left many defendants subject to liability in excess of their responsibility.⁵

In 2015, the legislature replaced this antiquated and unfair rule. Now, individuals and businesses sued in West Virginia typically pay damages in proportion to their level of responsibility for an injury. This is known as “several” or “fair share” liability. In making this change, West Virginia joined 19 states that have fully replaced joint liability with fair share liability or sharply limited joint liability to narrow situations.⁶

Under the new West Virginia law, if a party cannot collect the judgment from responsible parties at that time, 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. A defendant that is equally or less at fault than the plaintiff, however, is not subject to reallocation. The legislature also maintained certain situations where joint liability continues to apply, such as to defendants found to have engaged in conspiracy, driven under the influence of alcohol or drugs, engaged in criminal conduct, or illegally disposed of hazardous waste.⁷

In the same bill, the legislature recognized that a plaintiff who is primarily responsible for his or her own injury may not recover damages.⁸ Under this law, when a plaintiff’s fault is less than the combined fault of all other persons, recovery is reduced in proportion to the plaintiff’s

“ [W]hen West Virginia 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.”

degree of fault. This system, which promotes personal responsibility, is known as “modified comparative fault.” It had been applied by West Virginia courts for over three decades.⁹ It is the modern rule, adopted with some variation in more than three-quarters of the states.

The new law clarifies that when West Virginia 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. 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, have legal immunity, 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 joint defendants who are thus required to bear a greater proportion of the plaintiff’s loss than is attributable to their fault.”¹⁰

West Virginia courts have recognized that juries may consider the fault of nonparties where evidence indicates shared responsibility, but the ability and process for doing so was uncertain.¹¹ The new law provides clarity through adopting a procedure for a defendant to give fair notice to a plaintiff that it plans to assert that a nonparty is wholly or partially at fault for the plaintiff's injuries.¹² The West Virginia law is similar to many other states' laws.¹³

STOPPING JACKPOT JUDGMENTS

The legislature also took action to ensure that the state's civil justice system is not viewed as a litigation lottery in which some plaintiffs may hit the jackpot. Before 2015, West Virginia law invited unrestrained punitive damage awards. Unlike most other states, West Virginia did not require "clear and convincing" evidence of misconduct to support a punitive damage award.¹⁴ Instead, its courts applied a lower preponderance of the evidence standard that is used for ordinary civil liability.¹⁵ The state also allowed limitless punitive damage awards, subject only to review for excessiveness under constitutional principles of due process. This combination resulted in multimillion-dollar verdicts in cases involving ordinary negligence, not malicious wrongdoing.¹⁶

The legislature has fundamentally changed the way punitive damages are decided in West Virginia. In 2015, it required 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 an award of punitive damages.

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

Finally, the new law puts an end to jackpot judgments by ensuring that the punishment imposed through punitive damages is proportional to a defendant's conduct.¹⁷ Punitive damages can be as high as four times the amount of compensatory damages or \$500,000, whichever is greater.

This law places West Virginia in the mainstream, joining the majority of states that have adopted similar safeguards.¹⁸

“ [T]he new law puts an end to jackpot judgments by ensuring that the punishment imposed through punitive damages is proportional to a defendant's conduct. ”

ADDRESSING ABUSE IN ASBESTOS LITIGATION

Over the years, West Virginia courts have been “deluged with asbestos lawsuits.”¹⁹ Lawyers sponsored x-ray screenings to amass large numbers of claims, including many by individuals who had no impairment.

One of the nation’s most prolific “B-readers”—a radiologist that reviews x-rays for signs of asbestosis—was West Virginia doctor Ray Harron. 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.²⁰ 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.²¹ Similar troubling practices occurred in litigation alleging workers had developed silicosis, as 10,000 such lawsuits suddenly flooded courts in the early 2000s.²² A federal judge found, “[T]hese diagnoses were driven by neither health nor justice: they were manufactured for money.”²³

The filing of such baseless cases not only unjustly imposes potentially bankrupting liability on businesses, it depletes resources for people who are sick or who may develop illnesses in the future.

In 2015, the 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 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 legal 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.²⁴

This approach finds support in Shared State Legislation adopted by the Council of State Governments; 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 that have not yet manifested symptoms; and 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. Similar laws are in place in nine other states.²⁵ Courts in many other jurisdictions have adopted such procedures.²⁶

In the same bill, the legislature addressed another form of widespread abuse in asbestos litigation. Some plaintiffs’ lawyers

“ *West Virginia adopted a law that brings transparency between asbestos litigation and claims for compensation filed with asbestos trusts.* ”

“ The legislature has twice amended the WVCCPA to reduce the potential for lawsuit abuse. ”

claim that their clients’ injuries stem from exposure to asbestos from products of solvent companies in litigation. Then, after the lawsuit ends, they file claims with trusts established by companies that are bankrupt as a result of asbestos-related liability. These trust claims often contradict testimony in the civil suit by asserting the plaintiff’s exposure stemmed from other sources. 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.”²⁷

In response, West Virginia adopted a law that brings transparency between asbestos litigation and claims for compensation filed with asbestos trusts. The new law requires a plaintiff to provide a sworn statement identifying all trust claims that the plaintiff has filed within 30 days of filing a lawsuit.

A plaintiff must also make all trust claims materials available to all parties. If a plaintiff has not made these disclosures, a court may not schedule the case for trial. The law also 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.²⁸ West Virginia is among a dozen states that have enacted similar trust transparency laws.²⁹

BRINGING RATIONALITY TO CONSUMER PROTECTION LITIGATION

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.”³⁰ There was a recent wave of WVCCPA lawsuits as some lawyers abused this law, turning a business’s reasonable attempt to collect an outstanding bill for \$25 into a \$75,000 “gotcha” lawsuit.³¹ They did so by claiming the collection attempt violated a technicality and seeking steep statutory fines for every bill mailed or follow-up call or letter.

The legislature has twice amended the WVCCPA to reduce the potential for lawsuit abuse. In 2015, the legislature clarified practices that are and are not permissible

“ The legislature revisited the WVCCPA in 2017 to require that consumers give 45 days’ notice to a creditor or debt collector before filing a lawsuit, giving the business an opportunity to make an offer to correct the situation. ”

under the law. For example, it provided that regular account statements and notices do not constitute prohibited communications. The law also provided that plaintiffs cannot recover more than \$1,000 per violation.³²

The legislature revisited the WVCCPA in 2017 to require that consumers give 45 days' notice to a creditor or debt collector before filing a lawsuit, giving the business an opportunity to make an offer to correct the situation. If the consumer accepts the offer, the business must address the issue within 20 days and litigation is avoided. If no offer is made, then the consumer may file the claim. If an offer is made during that 45-day period but is rejected by the consumer, that consumer must be awarded more than that offer at trial in order to recover attorneys' fees.³³

The legislature also amended WVCCPA provisions that generally prohibit unfair and deceptive business practices. 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."³⁴ Instead, the court allowed lawsuits that merely asserted consumers purchased a product or service that was "different" or "inferior" from what they expected, without the need to claim any actual damages.³⁵ The amendment 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.

Moving From Pay-to-Play Hiring to a Transparent Process for Retaining Outside Counsel

For two decades, the practices of West Virginia Attorney General Darrell McGraw (1993-2013) cast a shadow over the state's litigation. McGraw was known for his frequent hiring of private lawyers to bring enforcement actions on behalf of the state. The lawyers, handpicked by McGraw for no-bid contracts, were often campaign contributors or had close political or personal ties to the AG. These lawyers profited from millions of dollars in fees taken from the state's recovery.

McGraw kept what settlement money remained, placing it in his office's consumer protection fund. Some of the money in that fund was unilaterally distributed to organizations and pet projects reflecting McGraw's personal preferences that often had little or no connection to the litigation.³⁶ Other money went toward

“ In 2016, the legislature codified aspects of Attorney General Morrissey's outside counsel policy to ensure that basic good government practices continue into future administrations.”

“public education,” which some viewed as self-promotion, during reelection years.³⁷

McGraw’s practices were roundly criticized by lawmakers,³⁸ the media,³⁹ and think tanks,⁴⁰ and even resulted in the federal government withholding state Medicaid funds.⁴¹

These practices changed in 2013 when Patrick Morrissey defeated McGraw and adopted an office outside counsel policy making such hiring more competitive and transparent.⁴² The shift was greeted as “welcome news.”⁴³ Within one year, the new policy had saved the state nearly \$4 million.⁴⁴

In 2016, the legislature codified aspects of Attorney General Morrissey’s outside counsel policy to ensure that basic good government practices continue into future administrations. The new law provides that:

- Before entering into an agreement to hire outside counsel, the attorney general must find that the arrangement is both cost-effective and in the public interest, such as by considering whether government attorneys can handle the matter.
- The attorney general must issue a request for proposals for private attorneys to represent the state unless there is an emergency situation.
- The attorney general must maintain supervision over the private attorneys and only the state may settle the lawsuit.
- Attorneys’ fees are subject to a sliding scale that helps avoid windfall payments to lawyers at taxpayer expense. Fees may not be based on civil penalties or fines.

Written findings of need to hire outside counsel and payments to outside counsel must be posted and available to the public on the attorney general’s website.⁴⁵

Responding to Liability-Expanding Court Decisions

Traditionally, tort (personal injury) law develops over time through court decisions. In past years, the West Virginia Supreme Court of Appeals moved the state’s law in a markedly pro-liability direction. It allowed novel claims, eliminated traditional defenses, and permitted inflated damage awards. To restore stability, the legislature overturned several of these decisions. In recent years, the state’s high court has shown more balance, and, in 2016, voters elected Elizabeth D. Walker to the bench, rejecting the candidacy of former Attorney General Darrell McGraw and unseating an incumbent justice.⁴⁶

ADOPTING THE LEARNED INTERMEDIARY DOCTRINE

A generally accepted rule of product liability law is that manufacturers of prescription drugs and medical devices have a duty to provide adequate warnings or instructions to healthcare providers. This rule, known as the learned intermediary doctrine, recognizes that doctors are in the best position of communicating this information to patients based on each individual’s condition. For that reason, the doctrine does not require manufacturers to directly communicate information about risks to patients.

In a 3-2 decision, the West Virginia Supreme Court of Appeals became the first state high court in the nation to reject this doctrine outright. Its 2007 opinion in *State*

ex rel. Johnson & Johnson Corp. v. Karl reasoned that television advertising for prescription drugs made the doctrine “outdated,” even as physicians continue to play a vital role in a patient’s decision to take medication.⁴⁷ The decision did nothing that would result in better information for patients, but it did open the door to lawsuits against drug makers viewed as having deep pockets.

In 2016, the legislature overturned *Karl*. The new law brings West Virginia into the mainstream, joining every other state by adopting the learned intermediary doctrine. State law now 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.”⁴⁸

ELIMINATING “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. Negotiated rates, discounts, and write-offs are common and reflect the true value of

medical services. In a 2014 decision, however, the West Virginia Supreme Court of Appeals 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*, 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 for that treatment was substantially less.⁴⁹ The West Virginia decision contrasts with approaches taken in states such as California, Oklahoma, North Carolina, and Texas.⁵⁰

The legislature overturned *Kenney* in 2015. Included in a broader bill addressing medical professional liability, the new law reduces the potential for West Virginia courts to require defendants to pay expenses that exist only on paper and that no plaintiff or insurer would ever have paid. It limits a verdict for past medical expenses to “the total amount paid by or on behalf of the plaintiff” and incurred and unpaid amounts that “the plaintiff or another person on behalf of the plaintiff is obligated to pay.”⁵¹

“The new law brings West Virginia into the mainstream, joining every other state by adopting the learned intermediary doctrine.”

“The new law reduces the potential that West Virginia courts will require defendants to pay expenses that exist only on paper and that no plaintiff or insurer would ever have paid.”

PRECLUDING LIABILITY FOR “OPEN AND OBVIOUS” HAZARDS

In a 2013 decision, the Supreme Court of Appeals increased the liability of anyone who owns or leases a home, business, or other property. Departing from a century of law, it 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.”⁵²

Before this decision, West Virginia law provided that a land possessor only has a duty to correct hidden dangers, not every hole or rock that might present a hazard. The court’s decision in *Hersh v. E-T Enterprises*, 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. In his dissent, Justice Loughry wrote, “It is decisions like these that have given the state the unfortunate reputation of being a ‘judicial hellhole.’”⁵³

To the relief of West Virginia homeowners and businesses, the legislature restored a 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 occupant, and shall not be held liable for civil damages for any injuries sustained as a result of such dangers.”⁵⁴

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 long history, however, of the Supreme Court of Appeals interpreting the Workers’ Compensation Act to allow employees to bring tort claims against employers.⁵⁵

“To the relief of West Virginia homeowners and businesses, the legislature restored a longstanding constraint on premises liability.”

“The legislature brought West Virginia employment law into the mainstream in 2015 by enacting a law that appropriately 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.”

That occurred again in 2013 when the court watered down what is known as the “deliberate intent” standard. Since its 1913 adoption, West Virginia’s Workers’ Compensation Act has allowed a worker to sue an employer outside the no-fault system if he or she can show an employer acted with deliberate intent to harm an employee. As this language suggests, it was meant as a narrow exception.

In *McComas v. ACF Industries*, the court ruled that a plaintiff can show deliberate intent simply by alleging that an employer “should have known” of a workplace hazard. By taking this approach, the court rendered meaningless a standard that was understood to allow a lawsuit only when an employer had actual knowledge of a dangerous situation before an injury occurred.

The legislature responded in 2015 by overturning *McComas*. Among other workers’ compensation reforms, it defined “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,” not negligent behavior.⁵⁶ The court restored the actual knowledge requirement, allowing a claim if the employer knew of the specific

unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented.

RECOGNIZING 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, placing West Virginia outside the mainstream.

This situation resulted from a series of court decisions finding that plaintiffs pursuing employment-related lawsuits have no duty to mitigate their damages by seeking new employment between the time of discharge and trial if the former employer acted with “malice” in terminating the individual.⁵⁷

The practical result of these decisions was that even when a plaintiff found comparable employment after the 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 a career’s worth of lost income, even when a plaintiff quickly secured a new job. It also gave plaintiffs license not to earnestly seek employment. In addition, juries could award punitive damages on top of front and back pay awards that already exceeded actual

damages, punishing employers that were found to have wrongfully terminated employees.

The legislature brought West Virginia employment law into the mainstream in 2015 by enacting a law that appropriately 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. The new law recognizes that all plaintiffs have an affirmative duty to mitigate past and future lost wages. 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.⁵⁸

Other Notable Reforms

- **Arbitration.** Arbitration is an efficient and cost-effective way of resolving disputes. West Virginia's arbitration laws had not been updated in decades. In 2015, the legislature adopted a modern and effective arbitration process that closely tracks federal law and is consistent with states that follow uniform arbitration rules.⁵⁹

“ In 2017, the legislature adjusted interest rates on court judgments to more closely reflect market rates. ”

“ West Virginia joined the majority of states that have an ‘innocent seller’ law. ”

- **A more reasonable judgment interest rate.** West Virginia historically imposed an interest rate on judgments that significantly exceeded inflation. This had the effect of punishing companies that defended themselves in court rather than quickly settling lawsuits. In 2017, the legislature adjusted interest rates on court judgments to more closely reflect market rates. Prior law calculated judgment interest based on compound interest at a rate of three points above the Fifth Federal Reserve discount rate. The new law reduces that rate to two points above the discount rate and uses simple, rather than compound, interest. In addition, the new law reduces the minimum seven percent interest rate, which had been in effect continuously since 2009. Now, the statutory minimum is set at a more reasonable four percent. The new law also reduced the maximum rate from eleven percent to nine percent.⁶⁰
- **Innocent seller defense.** Until recently, businesses that sold products in West Virginia were liable to the same extent as the companies that designed, manufactured, and labeled them. A retailer, for example, could be liable if it sold a product in a closed box that it had no reason to know was defective. In 2017, West Virginia joined the majority

“ [E]xpert testimony on the standard of care in a medical malpractice lawsuit must be grounded in scientifically valid peer-reviewed studies if available. ”

of states that have an “innocent seller” law. 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. A product seller is also subject to a product liability claim if the court determines by clear and convincing evidence that the party asserting the product liability action would be unable to enforce judgment against the manufacturer.⁶¹

- **Clarifying the applicable law in product liability actions.** In order to discourage forum shopping, a law adopted in 2015 provides that when a nonresident brings a product liability claim in West Virginia, liability should be determined based on the law applicable in the state where the plaintiff’s injury occurred.⁶²
- **No duty to trespassers.** In 2015, West Virginia codified and preserved the traditional rule that a person who owns or leases property generally has no duty to protect trespassers from injuries.⁶³

- **Medical liability reform.** In 2015, West Virginia overhauled its Medical Professional Liability Act (MPLA). In response to Supreme Court of Appeals decisions that had limited the MPLA’s application,⁶⁴ the legislature broadened the definitions of “health care,” “medical professional liability,” “health care facility,” and “health care provider” to extend the law’s safeguards to all claims related to medical services.⁶⁵

In addition, the legislature provided that expert testimony on the standard of care in a medical malpractice lawsuit must be grounded in scientifically valid peer-reviewed studies if available.⁶⁶

The legislature also capped inflation adjustments under the state’s existing limit on noneconomic damages in medical malpractice cases. The limit was originally set at \$250,000 in personal injury cases and \$500,000 in cases involving catastrophic injuries or death, but has climbed to \$330,000 and \$642,000 respectively. The new law does not allow the limits to go beyond 150% of the original amounts without further legislative action.⁶⁷

The Path Forward

West Virginia has made impressive strides over three short legislative sessions to tackle many of the problems that led the state's liability system to develop a poor reputation. The legislature should continue this progress by addressing several significant problem areas that continue to call for improvement. It has an opportunity to establish West Virginia as a leader in legal reform.

Establishing 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 presenting a defense, or sustain an excessive verdict, litigants depend on appellate review to correct the error. Full appellate review also helpfully establishes precedent that instructs trial courts on how to avoid mistakes in the future. The alternative is to leave miscarriages of justice unchecked.

West Virginia falls short of this standard. It has a single appellate court, the West Virginia Supreme Court of Appeals. The court's five members are left to address every appeal that arrives from the state's 55 circuit courts composed of about 70 judges, 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.⁶⁸ As discussed below, until recently, review of civil cases in the Supreme Court of Appeals was wholly discretionary, often leaving parties with no appeal at all. Now, parties are entitled to a limited, insufficient form of review.⁶⁹

In 2009, as the reputation of West Virginia's civil justice system plunged, then-Governor Joe Manchin created an Independent Judicial Reform Commission, chaired by retired U.S. Supreme Court Justice Sandra Day O'Connor.⁷⁰ 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."⁷¹

“ The Commission concluded that ‘by virtually any measure, the Supreme Court of Appeals is one of the busiest state appellate courts in the entire country.’ ”

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 “by virtually any measure, the Supreme Court of Appeals is one of the busiest state appellate courts in the entire country.”⁷² 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.⁷³

Accordingly, the Commission recommended creating 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.”⁷⁴

The Supreme Court of Appeals rejected the Commission’s proposal to create an intermediate appellate court. Instead, it opted to marginally expand its own appellate review of cases.⁷⁵ When overhauling its appellate rules in 2011, the court provided for mandatory review of all trial court decisions.⁷⁶ The new rules, however, do not provide for full, traditional appellate reviews that issue decisions that trial courts must follow in the future. Rather, the Supreme Court of Appeals adopted an abridged form of review under which it drafts a “concise statement” of its reasoning.⁷⁷ These memorandum decisions usually affirm the trial court. They are unpublished (except on the court’s website) and do not establish binding legal precedent.

While the new rule curbs the issue of parties having no right to appeal, it does not address the Commission’s concerns for the overburdened workload the court faces.

“ [T]he Commission recommended creating 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.’ ”

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.⁷⁸ Now the already-busy court is taking on substantially more appeals, yet parties rarely get the benefit of a full appeal because the court overwhelmingly issues short memoranda as opposed to fully considered and explained decisions.⁷⁹ In 2015, only 11.5% of the court's 949 merits decisions were signed opinions, and in 2016, just over 13% of the 861 merit-based decisions were signed opinions.⁸⁰ Many attorneys, organizations, and other observers agree that this half-step is inadequate.⁸¹

While West Virginia has resisted change, other states continue to move forward in providing more meaningful appellate review. As the Commission observed, in the decade preceding its report, three states with smaller caseloads than West Virginia (Mississippi, Nebraska, and Utah) had established intermediate appellate courts.⁸² Since that time, voters in Nevada, one of the few states aside from West Virginia that did not have an intermediate appeals court, approved a constitutional amendment creating a court of appeals.⁸³

“ While West Virginia has resisted change, other states continue to move forward in providing more meaningful appellate review. ”

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.”⁸⁴

SOLUTION

The legislature should establish an intermediate appellate court that provides all litigants with full appellate review.⁸⁵ Despite the Independent Judicial Reform Commission's 2009 recommendation that West Virginia establish a court of appeals, legislation has not advanced. The most recent legislation, introduced in 2017, proposed six judges divided into two panels serving a Northern District and Southern District.⁸⁶

Although most West Virginians support establishing an intermediate appellate court, a handful of groups have actively opposed the proposal.⁸⁷ Some opponents suggest that adding an intermediate appellate court would result in a “substantial delay to litigants achieving finality in their legal disputes.”⁸⁸ Such “delays,” however, are a byproduct of ensuring that parties receive justice.

Others balk at the expense of the new court for the state. As proponents observe, however, “West Virginia's entire judicial system is a mere three percent of the state's budget.”⁸⁹ Adding an additional level of appellate review would not have a significant effect. They also recognize that “[t]he benefit to the state's legal system and attractiveness to businesses would far justify the additional cost.”⁹⁰ Meanwhile, the Supreme Court of Appeals has come under fire for wasteful spending, including \$3.7 million to renovate court offices with \$32,000 spent 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.⁹¹

In sum, bringing an intermediate appeals court to West Virginia will help ensure that parties have a greater opportunity for substantive review and allow the Supreme Court of Appeals to focus on novel issues that merit published opinions.

Abandoning West Virginia's Outlier Medical Monitoring Law

For several decades, plaintiffs' lawyers have urged courts to allow them to bring lawsuits on behalf of people who may have been exposed to a toxic substance, but have not been harmed. The problem with imposing liability in this manner is that everyone is exposed to small amounts of potentially harmful substances. Allowing such claims could 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 actually 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.

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."⁹² The Court was concerned that "tens of millions of individuals" might qualify for some form of substance-

“ In a highly criticized case in 1999, the West Virginia Supreme Court of Appeals took the unprecedented step of allowing cash awards for medical monitoring without a present physical injury. ”

exposure-related medical monitoring.⁹³ Courts would be flooded with questionable cases, defendants would face uncertain liability, and those who actually develop an injury would have less chance of recovery after depletion of resources for medical testing, the Court found.⁹⁴

While other states followed the path of the U.S. Supreme Court,⁹⁵ West Virginia took a different route. In a highly criticized case in 1999, the West Virginia Supreme Court of Appeals took the unprecedented step of allowing cash awards for medical monitoring without a present physical injury.⁹⁶ 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.⁹⁷ Rather, the court allowed a lump sum recovery "based on the subjective desires of a plaintiff for information."⁹⁸ A dissenting justice cautioned:

[The] 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, 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.⁹⁹

Indeed, that is what has occurred. In 2011, DuPont settled a lawsuit over concerns regarding a zinc smelter plant in Harrison County, 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 only half went through with the testing. Another 2,000 people just took the cash.¹⁰⁰ As the *Charleston Gazette-Mail* observed, “Who would turn down a quick \$400?”¹⁰¹

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 actual harm, is insufficient to impose such punishment.¹⁰² Even with this constraint, West Virginia’s medical monitoring law remains an outlier, as the only state to take a similar approach is Missouri.¹⁰³

SOLUTION

The legislature should bring West Virginia’s medical monitoring law into the mainstream. At minimum, such a law should require placement of recovery in an action seeking future medical monitoring costs into a court-supervised fund, rather than paying out cash.¹⁰⁴ This fund would

continue to 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. Such 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 deserves recognition for unanimously passing legislation along these lines in March 2017,¹⁰⁵ but the House did not act on the bill in the short time left before the legislature adjourned.

Allowing Jurors to Learn Whether a Plaintiff Wore a Seatbelt

Today, people naturally realize the importance of seatbelts. Often, one of the first questions people ask after hearing about a car accident is, “were they wearing their seatbelts?” Certainly, this question also comes to the minds of jurors deliberating an automobile accident case, yet West Virginia law limits the ability of jurors to have this question answered.

Historically, states did allow juries to hear such evidence 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 1979.¹⁰⁶ 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.¹⁰⁷

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. 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*. 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. In such cases, the jury never hears evidence of the seatbelt nonuse.¹⁰⁸ This law remains in place today,

though several major changes have occurred over the past 25 years.

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 about 14,000 deaths each year. In 2015, about 48 percent of people killed in crashes were not wearing seatbelts.¹⁰⁹

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. Immediately after that campaign, seatbelt use jumped to over 70%. By 2008, nearly 90% of West Virginians were wearing seatbelts.¹¹⁰

Still, for several more years, 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. It was not until 2013, after nine years of legislative consideration, that the legislature made failure to wear a seatbelt a primary traffic offense.¹¹¹ Now, police may pull over any vehicle in which the driver, any front seat passenger, or any passenger under 18 years of age in the

“ Given today’s understanding of the importance of seatbelt use, there is no justification for hiding evidence from juries as to whether drivers and passengers were wearing seatbelts or allowing no more than a five percent reduction in damages. ”

backseat are unbuckled and fine them.¹¹²

Given today's understanding of the importance of seatbelt use, there is no justification for hiding evidence from juries as to whether drivers and 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 social norms."¹¹³ Keeping this law in place blindfolds the jury from fairly considering irresponsible (and illegal) behavior, as it would in any other personal injury case.¹¹⁴

SOLUTION

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.

Stopping Litigation Tourism by Passing Venue Reform

For many years, West Virginia legislators have tried to curb what has become known as "litigation tourism." Plaintiffs' lawyers from around the nation file lawsuits in West Virginia on behalf of clients who never lived or worked in the Mountain State. Rather than logically file the lawsuit in the plaintiff's home state, they file in West Virginia because they view some state courts as applying procedures or laws that favor plaintiffs. These courts become what one once-prominent plaintiff lawyer called a "magic jurisdiction." As he described it, in these courts "it's almost impossible to get a fair trial if you're a defendant. . . . Any

“ Plaintiffs' lawyers from around the nation file lawsuits in West Virginia on behalf of clients who never lived or worked in the Mountain State. ”

lawyer fresh out of law school can walk in there and win the case, so it doesn't matter what the evidence or law is.”¹¹⁵

In 2003, the legislature amended the state's venue statute to curb the ability to bring lawsuits in West Virginia that had little or no connection to the state. The law, which was signed by then-Governor Bob Wise, barred nonresident plaintiffs from bringing suit in West Virginia "unless all or a substantial part of the acts or omissions giving rise to the claim occurred in this state.”¹¹⁶

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.*, 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. He sued the company that designed and made the forklift, which was an Ohio corporation, in West Virginia's Kanawha Circuit Court. The plaintiff also named a West Virginia company that distributed and serviced the forklift as a defendant, giving the lawsuit a local tie.

“ Recently, the litigation landscape changed, unlocking the door to more effective venue reform. ”

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. 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, despite the acts occurring in Virginia. 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.¹¹⁷

This decision seemed contrary to 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.”¹¹⁸ It 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. Since the U.S. Supreme Court denied *certiorari*, however, the decision stands.

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 can allege 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*.¹¹⁹ While this factor-based approach can be helpful when properly applied,¹²⁰ 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.

Recently, the litigation landscape changed, unlocking the door to more effective venue reform. The 2017 U.S. Supreme Court ruling in *Bristol-Myers Squibb Co. v. Superior Court of California* generally found 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.¹²¹ In an 8-1 decision, the Court reversed a California Supreme Court decision 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. 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.

While issued in the context of personal jurisdiction, rather than a venue law, the U.S. Supreme Court’s decision suggests it is perfectly appropriate (if not

constitutionally mandated) to consider whether a case has a substantial connection to the state in which it is filed. As the Supreme Court ruled in finding no jurisdiction to hear the claim, “What is needed—and what is missing here—is a connection between the forum and the specific claims at issue.”¹²² The California Supreme Court had failed to “identif[y] any adequate link between the State and the nonresidents’ claims.”¹²³ The court also found 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.”¹²⁴

SOLUTION

The *Bristol-Myers Squibb* decision reaffirms that a statute like West Virginia’s 2003 venue reform should withstand legal scrutiny. The near-unanimous decision of the U.S. Supreme Court suggests that concerns regarding abusive forum-shopping should outweigh political or policy inclinations. In light of *Bristol-Myers Squibb* and other recent U.S. Supreme Court decisions,¹²⁵ the legislature should revisit the state’s venue law to curb the filing of lawsuits in West Virginia that lack a substantial connection to the state.

Ensuring that Class Actions Don’t Just Benefit Lawyers

The class action system created more than a half-century ago has drifted far from its intended purpose. Class actions are supposed to provide compensation to class members for small, but real, losses. But, all too often, they provide only big paydays for the lawyers that generated them.

West Virginia adopted its class action procedures in 1960, including an opt-out system in which plaintiffs’ lawyers may quickly draft a complaint that sues on behalf of thousands of people whom the lawyers have never met or heard from, asserting these individuals have experienced an injury common to a client. West Virginia’s rule governing class actions has been amended just three times over the last 57 years, with the last significant changes occurring two decades ago.¹²⁶

Meanwhile, class actions have changed. In the typical case today, most class members receive absolutely nothing.¹²⁷ In the very small percentage of cases that settle on a class-wide basis, few class members file claims to receive what is often a nominal amount. Many people toss worthless class action notices alerting them to the opportunity to get a few dollars in the trash. They do not view themselves as injured

“ West Virginia’s rule governing class actions has been amended just three times over the last 57 years, with the last significant changes occurring two decades ago. Meanwhile, class actions have changed.”

“ *A dissenting justice called the no-injury case ‘a typical example of a frivolous class-action lawsuit.’* ”

and resent that lawyers are profiting from them. The businesses targeted often settle given the significant cost of defending against such claims and the risk of a jackpot judgment if a court certifies a class including thousands of people.¹²⁸

Even when West Virginia trial courts have rejected no-injury class actions, the Supreme Court of Appeals has found they must be certified. For example, in 2014, the court certified a class action on behalf of more than 3,000 patients against a hospital after it briefly and accidentally stored limited patient data in a way that it could be accessed through the internet.¹²⁹ The court did so despite recognizing that there was “no evidence of unauthorized access of [the patients’] personal and medical information, no evidence of actual identity theft, and no evidence of economic injury.”¹³⁰ The trial court judge had dismissed the claim, finding the class experienced no injury.¹³¹ A dissenting Supreme Court of Appeals justice called the no-injury case “a typical example of a frivolous class-action lawsuit.” But a majority of the court certified it.¹³²

The Supreme Court of Appeals has instructed West Virginia circuit courts: when in doubt, certify.¹³³ In some cases, the high court has handcuffed trial court

judges from considering the merits of a case—no matter how baseless or atypical the claims—before deciding whether to certify the class.¹³⁴ While the high court’s recent rulings appear more balanced,¹³⁵ there remains a need for reform.

SOLUTION

The federal courts and Congress are both considering changes to the rule governing class actions decided in federal courts,¹³⁶ which is virtually identical to West Virginia’s rule. West Virginia has an opportunity to be at the forefront of reform by adopting new safeguards for class actions heard in state courts. It should adopt procedures that help ensure that class actions serve class members, not just lawyers, by considering similar reforms that have been introduced at the federal level, such as:

- Stopping class actions that lump thousands of people with no injury with a few people who may have experienced a loss by requiring the class members to have experienced the same type and scope of injury as the named class representative.
- Combating lawyer-generated class actions by requiring lawyers to disclose the circumstances under which each class representative agreed to be included in the complaint and prohibiting class certification when a proposed class representative is a relative, or is a present or former employee, of class counsel.
- Requiring class actions to have a reliable and feasible way of identifying and distributing money to class members.
- Ensuring that lawyers do not receive fees that dwarf the benefit received by

class members by basing fee awards on a reasonable percentage of the money actually received by class members.

- Reducing pressure to settle meritless claims by having courts decide whether a class action complaint states a viable claim before highly expensive and burdensome discovery moves forward. As the West Virginia Supreme Court of Appeals recently recognized, there is “overwhelming support for resolving threshold legal issues in class actions prior to conducting class discovery and ruling on class certification both in the jurisprudence of other courts and in legal treatises.”¹³⁷ Early resolution of such questions, it found, “may avoid the expense for the parties and burdens for the court and may minimize use of the class action process for cases that are weak on the merits.”¹³⁸
- Protecting the availability of meaningful appellate review by providing parties with a right to an interlocutory (immediate) appeal of a trial court’s order certifying or denying certification of a class action.

Protecting Consumers from Predatory Lawsuit Lending

An industry has emerged in which lawsuit lenders 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 sky-high interest rates that can exceed 200 percent, leaving borrowers with little to no recovery. The *Wall Street Journal* has called these arrangements “the legal equivalent of the payday loan.”¹³⁹

“While payday lending is generally illegal in West Virginia due to the state’s strong usury laws, which prohibit excessive interest rates, lawsuit lending gets around these laws.”

Plaintiffs who lose their cases are not obligated to repay the loan. This distinction allows lawsuit lenders to call the process “non-recourse funding.” They claim it is not a loan subject to safeguards applicable to other lenders, but a cash advance. While payday lending is generally illegal in West Virginia due to the state’s strong usury laws, which prohibit excessive interest rates,¹⁴⁰ lawsuit lending gets around these laws.

Several states have protected consumers by passing laws that govern lawsuit lending, including Oklahoma (2013), Tennessee (2014), Arkansas (2015), and Indiana (2016).¹⁴¹

SOLUTION

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

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 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.

Preventing Patient Harm from Misleading Lawsuit Advertising

The number of lawsuit ads on television has tripled over the past decade, with the largest portion targeting prescription drugs and medical devices.¹⁴² Lawsuit ads are often presented as “medical alerts,” suggest an affiliation with the Food and Drug Administration (FDA), and warn that taking a drug can result in dire consequences, such as death, even when the chance of such complications is remote, understood by doctors, and explained to their patients. The American Medical Association has recognized that “fearmongering” lawsuit ads pose a threat to public health.¹⁴³ There is mounting evidence that misleading lawsuit advertising scares people away from taking their medications or seeking treatment:

- According to the FDA, doctors have submitted 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.¹⁴⁴
- Psychologists have reported that patients stopped taking medications to treat mental health conditions after viewing a lawsuit ad, resulting in relapses, hospitalizations, and suicide attempts.¹⁴⁵
- Centers for Disease Control and Prevention (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.¹⁴⁶
- 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.¹⁴⁷
- A recent survey of patients confirms that lawsuit ads scare people away from medications treating conditions ranging from diabetes to depression.¹⁴⁸
- Doctors have shared first-hand accounts of how misleading lawsuit ads have harmed their patients and hindered their ability to provide medical care.¹⁴⁹

In addition, some unscrupulous firms—often non-attorney “lead generation” companies—have violated patient privacy by obtaining and using private health information to push individuals to file lawsuits through cold calls, robocalls, and mailings.¹⁵⁰

“The American Medical Association has recognized that ‘fearmongering’ lawsuit ads pose a threat to public health.”

Despite such concerns, there is virtually no oversight of lawsuit advertising—not from the FDA, the Federal Trade Commission, or state bars. While West Virginia has a rule of professional conduct that prohibits a lawyer from making “a false or misleading communication,” 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,”¹⁵¹ such as statements about fees or expenses. It does not extend to public health concerns resulting from misleading or inaccurate information about medical treatment conveyed in lawsuit ads.

In addition, the West Virginia State Bar cannot reach non-attorney entities that sponsor many lawsuit ads and engage in the worst solicitation offenses. Finally, disciplinary action is almost exclusively triggered by complaints filed by the client of an attorney (often related to lack of communication or fee issues) or by another attorney (alleging a competitor’s deceptive advertising places him or her at a disadvantage). A doctor or patient who is not involved in the legal system is highly unlikely to file a bar complaint.

SOLUTION

West Virginia should adopt legislation that prohibits common practices in lawsuit advertising that mislead the public. For example, the legislation should prohibit:

- Presenting a lawsuit ad as a “medical alert,” “health alert,” “consumer alert,” or “public service announcement.”
- Displaying in a lawsuit ad the logo of a federal or state government agency in a manner that suggests affiliation with or the sponsorship of that agency.

“ *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.* ”

- Using the word “recall” in a lawsuit ad when referring to a product that has not been recalled by a government agency or through an agreement between a manufacturer and government agency.
- Failing to identify the sponsor of the ad and whether that attorney or law firm will represent clients or refer those who respond to the ads to others.

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 would be subject to the same remedies as other deceptive business practices under the West Virginia Consumer Credit and Protection Act.

In addition, legislation should empower the state 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. Such law is needed because West Virginia does not

have a statute that generally prohibits the disclosure of confidential health information. While entities and individuals such as HMOs, insurers, and pharmacists are subject to state laws prohibiting them from disclosing private health information, these laws do not reach attorneys, law firms, and lead generation companies.

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

Conclusion

West Virginians should be proud of the work their elected officials have done to improve the state’s civil justice system. The state is heading in the right direction. The legislature should use the momentum built over the past three years to continue its achievements by responding to problem areas and establishing West Virginia as a leader in proactively tackling concerns.

Whether a state’s litigation climate is viewed as balanced or out of the mainstream is influential in important business decisions such as where to locate, expand, or constrict business operations. West Virginia’s reputation as one of the worst places to be hauled into court in the nation developed over decades—perceptions will not change overnight. In three short years, however, West Virginia seems to have turned the corner. It should continue moving in the right direction.

“*[P]erceptions will not change overnight. In three short years, however, West Virginia seems to have turned the corner.*”

The West Virginia legislature should seize the opportunity in 2018 to continue the state’s transformation from a state with an imbalanced liability system to a shining example of a civil justice system guided by commonsense laws that treats all parties fairly.

This report suggests several steps that the legislature can take to make further progress. Some of these reforms, such as replacing the state’s outlier medical monitoring law with a more mainstream approach, allowing juries to consider seatbelt use, and implementing effective venue reform are long overdue. Other proposals present an opportunity for West Virginia to lead, such as by adopting class action reforms, addressing predatory lawsuit lending, and protecting the public from misleading lawsuit advertising. Establishing an intermediate appellate court may require a strong multi-year commitment to change.

Legal reform is not a one-time proposition. Plaintiffs' lawyers are continually pushing tort law at the edges, asserting new theories of liability. Courts sometimes accept such invitations. While states such as Texas enacted comprehensive tort reform laws years ago, they continue to

respond to liability expansions and abusive litigation practices as they emerge. West Virginia legislators appear to have adopted this mindset. They should commit themselves to protecting recent legislative achievements and maintaining a balanced civil justice system.

Endnotes

- 1 See U.S. Chamber Inst. for Legal Reform, 2017 Lawsuit Climate Survey (Sept. 2017) (conducted by Harris Poll).
- 2 Woody Trasher, Op-ed, Good News, Bad News in West Virginia's Business Climate, Exponent Telegram, Oct. 12, 2017.
- 3 Editorial, Bringing New Jobs to W.Va., The Intelligencer, Dec. 12, 2017.
- 4 *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879, 886 (W. Va. 1979).
- 5 S.B. 421 (W. Va. 2005) (formerly codified at W. Va. Code Ann. § 55-7-24(b)). West Virginia's 30% threshold imposed joint liability on more defendants than most other states taking a similar approach, including Iowa (50%), Minnesota (50%), Missouri (51%), Montana (50%), Nevada (less than plaintiff's fault), New Hampshire (50%), New Jersey (60%), New York (50%), Ohio (50%), Pennsylvania (60%), South Carolina (50%), South Dakota (50%), Texas (50%), and Wisconsin (51%).
- 6 States that have largely replaced joint liability with several liability include Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, North Dakota, Oklahoma, Tennessee, Utah, Vermont, and Wyoming.
- 7 H.B. 2002 (W. Va. 2015) (codified at W. Va. Code Ann. § 55-7-13c).
- 8 *Id.* (codified at W. Va. Code Ann. §§ 55-17-13a, 55-7-13c(c)).
- 9 See *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879 (W. Va. 1979); see also *Adkins v. Whitten*, 297 S.E.2d 881, 883 (W. Va. 1982) ("[A] plaintiff who is fifty percent or more at fault is barred from recovery.").
- 10 See W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* 475-76 (5th ed. 1984) (emphasis added).
- 11 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."); *Doe v. Wal-Mart Stores, Inc.*, 558 S.E.2d 663 (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).
- 12 S.B. 411 (W. Va. 2015) (codified at W. Va. Code Ann. § 55-7-13d).
- 13 Several states have adopted statutes that explicitly permit a jury 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. § 12-2506*; *Colo. Rev. Stat. § 13-21-111.5*; *Fla. Stat. Ann. § 768.81(3)*; *Ga. Code Ann. § 51-12-33*; *Ind. Code Ann. § 34-51-2*; *Mich. Comp. Laws §§ 600.2957, 600.6304*; *Tex. Civ. Prac. & Rem. Code Ann. §§ 33.003, 33.004*; *Utah Code Ann. § 78-27-38(4)(a)*. Other state statutes authorize allocation of fault to nonparties, but do not provide detailed procedures for doing so. See, e.g., *La. Civ. Code art. 2323(A)*; *N.M. Stat. Ann. § 41-3A-1(B)*; *N.D. Cent. Code § 32-03.2-02*. In other states, courts interpret state 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); *Hunter v. General Motors Corp.*, 729 So.2d 1264 (Miss. 1999); *Bode v. Clark Equip. Co.*, 719 P.2d 824 (Okla. 1986).

- 14 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, Mark A. Behrens & Joseph P. Mastrosimone, *Reining in Punitive Damages “Run Wild”*: Proposals for Reform By Courts and Legislatures, 65 *Brook. L. Rev.* 1003, 1013 (2000) (citing statutes and court decisions). Additional states have followed. See, e.g., Ark. Code Ann. § 16-55-207 (enacted 2003); Tenn. Code Ann. § 29-39-104(a)(1) (enacted 2011).
- 15 *Goodwin v. Thomas*, 403 S.E.2d 13, 16 (W. Va. 1991).
- 16 See, e.g., *Manor Care, Inc. v. Douglas*, 763 S.E.2d 73 (W. Va. 2014) (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 and the verdict form was described by dissenting justices as a “inscrutable mess” and “woefully inadequate.”).
- 17 S.B. 421 (2015) (codified at W. Va. Code Ann. § 55-7-29).
- 18 About half of the states that permit punitive damages have enacted statutory limits, including Alabama, Alaska, Colorado, Connecticut (product liability only), Florida, Georgia, Idaho, Indiana, Kansas, Maine (wrongful death cases only), Mississippi, Montana, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and Wisconsin. In addition, Louisiana, Massachusetts, Michigan, Nebraska, New Hampshire, and Washington, generally do not authorize punitive damage awards.
- 19 *State ex rel. Allman v. MacQueen*, 551 S.E.2d 369, 374 (W. Va. 2001).
- 20 See Jonathan D. Glater, *Reading X-Rays in Asbestos Suits Enriched Doctor*, N.Y. Times, Nov. 29, 2005; see also *In re Silica Prods. Liab. Litig.*, 398 F.Supp.2d 563, 583, 596-97 (S.D. Tex. 2005) (extensively discussing Dr. Harron’s unreliable practices in finding that thousands of silicosis diagnoses “were driven by neither health nor justice: they were manufactured for money”).
- 21 See Amaris Elliott-Engel, *Two Pittsburgh Asbestos Lawyers Liable in Fraud Cases*, Pittsburgh Post-Gazette, Dec. 31, 2012; Daniel Fisher, *Law Firm Hit With \$429,000 Verdict Over Faked Asbestos Suits*, Forbes, Dec. 21, 2012. 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.
- 22 See Susan Warren, *Silicosis Suits Rise Like Dust*, Wall St. J., Sept. 4, 2003.
- 23 *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 635 (S.D. Tex. 2005).
- 24 S.B. 411 (W. Va. 2015) (codified at W. Va. Code Ann. §§ 55-7F-1 et seq.).
- 25 States with medical criteria laws similar to West Virginia include Florida, Georgia, Iowa, Kansas, Ohio, Oklahoma, South Carolina, Tennessee, and Texas.
- 26 Examples of such jurisdictions include Boston, New York City, Chicago, and Baltimore City.
- 27 *In re Garlock Sealing Techs., LLC*, 504 B.R. 71, 86 (W.D.N.C. Bankr. 2014).
- 28 S.B. 411 (W. Va. 2015) (codified at W. Va. Code §§ 55-7E-1 et seq.).
- 29 Other states that have adopted trust transparency statutes include Arizona, Iowa, North Dakota, Ohio, Oklahoma, Mississippi, South Dakota, Tennessee, Texas, Utah, and Wisconsin. State courts have also adopted similar procedures.
- 30 W. Va. Code Ann. § 46A-2-128.
- 31 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).
- 32 S.B. 542 (W. Va. 2015). Prior law allowed statutory damages of between \$100 and \$1,000 subject to the discretion of the trial judge. This amount was subject to an inflation adjustment, however, allowing for damages as high as \$4,800 per violation.
- 33 S.B. 563 (2017) (to be codified at W. Va. Code Ann. § 46A-5-108).
- 34 S.B. 315 (W. Va. 2015) (amending W. Va. Code Ann. §§ 46A-6-106(b)).

- 35 *See In re W. Va. Rezulin Litig.*, 585 S.E.2d 52, 76 (W. Va. 2003).
- 36 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 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 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); Editorial, McGraw's Client is West Virginia, The Money from his Lawsuits Belong to the People, Not to Him, *Charleston Daily Mail*, Oct. 5, 2007, at 4A.
- 37 *See* Richie Heath, Op-ed, McGraw Owes West Virginians an Explanation, *W. Va. Rec.*, Aug. 23, 2012 (documenting surge of attorney general's office TV ad spending during election year and spending of tens of thousands of dollars of state funds on trinkets bearing McGraw's name).
- 38 *See, e.g.*, Alison Knezevich, AG Should Clear Settlements with Lawmaker, Delegate Says, *Charleston Gazette & Daily Mail*, Feb. 3, 2010, at 1C; Hoppy Kercheval, Op-ed, Legislators are Going After Darrell McGraw, Why Should he Not be Bidding Out Lucrative Contracts, *Charleston Daily Mail*, Feb. 24, 2006, at 4A.
- 39 *See, e.g.*, Walt Williams, The \$10 Million Question, *State J.*, Oct. 10, 2008, at 1; 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.
- 40 *See, e.g.*, Manhattan Inst., Trial Lawyers, Inc.: Attorneys General 7-8, 19 (2011) (listing McGraw among attorneys general viewed as friendliest to the plaintiffs' bar and detailing no-bid contracting practices); Hans Bader, The Nation's Worst State Attorneys General 16-17 (Competitive Enterprise Inst., 2010) (naming McGraw among the nation's six worst attorneys general).
- 41 *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 from the states, reflecting amounts from two West Virginia settlements that McGraw's office paid out to private lawyers and outside organizations while not reimbursing Medicaid).
- 42 *See* Office of the W. Va. Attorney General, Outside Counsel Policy, July 16, 2013.
- 43 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* A.G. Sets Policy on Hiring Outside Counsel, *Dominion Post*, July 31, 2013 (reporting support for the new policy from the U.S. Chamber Institute Legal Reform and American Tort Reform Association).
- 44 *See* Chris Dickerson, AG's Outside Counsel Policy has Saved the State Nearly \$4M, *W. Va. Rec.*, June 23, 2014.
- 45 *See* H.B. 4007 (2016) (codified at W. Va. Code Ann. § 5-3-3a).
- 46 *See* Phil Kabler, Beth Walker Wins WV Supreme Court Race; Ousts Benjamin, *W. Va. Gazette-Mail*, May 10, 2016.
- 47 *State ex rel. Johnson & Johnson Corp. v. Karl*, 647 S.E.2d 899 (W. Va. 2007).
- 48 S.B. 15 (W. Va. 2016) (codified at W. Va. Code Ann. § 55-7-30).
- 49 *See Kenney v. Liston*, 760 S.E.2d 434 (W. Va. 2014).
- 50 *See* 12 Okla. Stat. § 3009.1 (enacted 2011); N.C. Gen. Stat. ch. 8C, Rule 414 (enacted 2011); Tex. Civ. Prac. & Rem. Code § 41.0105 (enacted 2003); *Howell v. Hamilton Meats & Provisions, Inc.*, 257 P.3d 1130, 1133 (Cal. 2011); *Haygood v. De Escabedo*, 356 S.W.3d 390 (Tex. 2011).
- 51 S.B. 6 (W. Va. 2015) (codified at W. Va. Code Ann. § 55-7B-9d).

- 52 See *Hersh v. E-T Enterprises*, 752 S.E.2d 336 (W. Va. 2013).
- 53 *Id.* at 350 (Loughry, J., dissenting).
- 54 S.B. 13 (W. Va. 2015) (codified at W. Va. Code Ann. § 55-7-27).
- 55 See Victor Schwartz et al., *West Virginia as a Judicial Hellhole: Why Businesses Fear Litigating in State Courts*, 111 W. Va. L. Rev. 757, 782-85 (2009).
- 56 H.B. 2011 (W. Va. 2015) (codified at W. Va. Code Ann. § 23-4-2(d)(2)).
- 57 See *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).
- 58 S.B. 344 (W. Va. 2015) (codified at W. Va. Code Ann. §§ 55-7E-1 et seq.).
- 59 S.B. 37 (W. Va. 2015).
- 60 H.B. 2678 (W. Va. 2017) (amending W. Va. Code Ann. § 56-6-31).
- 61 H.B. 2850 (W. Va. 2017) (to be codified at W. Va. Code Ann. § 55-7-31).
- 62 H.B. 2726 (W. Va. 2015) (codified at W. Va. Code Ann. § 55-8-16). 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 West Virginia Supreme Court of Appeals' rejection of the learned intermediary doctrine.
- The legislature also adopted a similar law, specific, in 2011. See W. Va. Code Ann. § 55-8-16(a).
- 63 S.B. 3 (W. Va. 2015).
- 64 See *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, 920 (W. Va. 2004) (finding Medical Professional Liability Act "does not apply to other claims that may be contemporaneous to or related to the alleged act of medical professional liability").
- 65 *Id.* (amending W. Va. Code Ann. § 55-7B-2(e), (f), (g), (i)).
- 66 S.B. 6 (W. Va. 2015) (codified at W. Va. Code Ann. § 55-7B-7).
- 67 *Id.* (amending W. Va. Code Ann. 55-7B-8).
- 68 See Nat'l Center for State Courts, Court Statistics Project, State Court Structure Charts, at http://www.courtstatistics.org/Other-Pages/State_Court_Structure_Charts.aspx (last visited Dec. 5, 2017).
- 69 Roy Perry, *Caseload Characteristics: Understanding the Workload of the West Virginia Supreme Court* (Dec. 2015), at <http://www.courtsww.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.").
- 70 See *State ex rel. Loughry v. Tennant*, 732 S.E.2d 630, 633 (W. Va. 2012).
- 71 *Id.*
- 72 West Virginia Independent Commission on Judicial Reform, *Final Report* 8 (Nov. 2009).
- 73 *Id.* at 31.
- 74 *Id.* at 8.
- 75 See Perry, *supra*, at 2.
- 76 *Id.*
- 77 See W. Va. R. App. P. 21.
- 78 See Perry, *supra*, at 2.
- 79 See W. Va. Supreme Court Clerk's Office, *Supreme Court of Appeals of West Virginia Quick Reference Facts* (Aug. 1, 2017), at <http://www.courtsww.gov/supreme-court/clerk/statistics/15-16QuickFacts.pdf>.
- 80 *Id.*
- 81 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).
- 82 West Virginia Independent Commission on Judicial Reform, *Final Report* at 31.

- 83 Nevada Courts, Court of Appeals (last visited Dec. 5, 2017) at https://nvcourts.gov/Supreme/Court_Information/Court_of_Appeals/.
- 84 *Id.*
- 85 See Linda Harris, Legal Groups Seek Intermediate Court, Seat Belts, Medical Monitoring as Legislative Priorities, *State J.*, Feb. 6, 2017.
- 86 S.B. 277 (W. Va. 2017); see also Bill Raftery, West Virginia: Bill to Create Intermediate Appellate Court Filed; Only 9 States Don't Have an IAC, *Gavel to Gavel* (Feb. 15, 2017) (reporting that similar bills in years past would have had Circuit and Supreme Court justices sitting in panels of three).
- 87 David Yates, Poll Shows WV Voters Believe Lawsuits Hurting Job Creation, *Washington Examiner*, Nov. 6, 2017.
- 88 Jeffrey Robinette, WV Senate Bill 277, Establishment of an Intermediate Appellate Court, Robinette Legal Group, PLLC, Blog, Feb. 15, 2017, at <https://www.robinettelaw.com/blog/2017/02/senate-bill-277-establishment-of-an-intermediate-court-the-reincarnation-of-a-really-bad-idea-for-we.shtml>; see also Bordas & Bordas, Facts Don't Support Special-Interest Push for More Courts in West Virginia, *Bordas Law*, Feb. 13, 2012, at <http://www.bordaslaw.com/facts-dont-support-specialinterest-push-for-more-courts-in-west-virginia> (asserting that "[t]he addition of the intermediate court would be a taxpayer-funded second chance for convicted felons to get off on a technicality").
- 89 Editorial, West Virginia Needs an Intermediate Court of Appeals, *Charleston Gazette-Mail*, Jan. 5, 2015.
- 90 Zwerner, 117 W. Va. L. Rev. at 468.
- 91 Hoppy Kercheval, State Supreme Court Spends Big on Office Furniture, *MetroNews*, Nov. 15, 2017.
- 92 *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 440 (1997).
- 93 *Id.* at 442.
- 94 *Id.*
- 95 A flurry of state supreme courts followed the U.S. Supreme Court's reasoning in rapid succession. See *Lowe v. Philip Morris USA, Inc.*, 183 P.2d 181 (Or. 2008); *Paz v. Brush Engineered Materials, Inc.*, 949 So. 2d 1 (Miss. 2007); *Henry v. Dow Chem. Co.*, 701 N.W.2d 684 (Mich. 2005); *Wood v. Wyeth-Ayerst Labs.*, 82 S.W.3d 849 (Ky. 2002); *Hinton v. Monsanto Co.*, 813 So. 2d 827 (Ala. 2001); *Badillo v. American Brands, Inc.*, 16 P.3d 435 (Nev. 2000). 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 *Exxon Mobil Corp. v. Albright*, 71 A.3d 30 (Md. 2013); see also *Exxon Mobil Corp. v. Ford*, 71 A.3d 105 (Md. 2013); *Donovan v. Philip Morris USA, Inc.*, 914 N.E.2d 891, 902 (Mass. 2009).
- 96 *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 426-30 (W. Va. 1999).
- 97 *Id.* at 433-34.
- 98 *Id.*
- 99 *Id.* at 435 (Maynard, J., dissenting).
- 100 See Matt Harvey, Spelter Smelter Settlement Winding Down in Harrison County, *Exponent Telegram*, Jan. 18, 2016.
- 101 See Editorial, Who Would Turn Down a Quick \$400, *Charleston Gazette-Mail*, Sept. 14, 2011.
- 102 See *Perrine v. E.I. du Pont de Nemours & Co.*, 694 S.E.2d 815, 879-81 (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 881-96.

- 103 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).
- 104 For other important safeguards, see Victor E. Schwartz et al., Medical Monitoring: The Right Way and the Wrong Way, 70 Mo. L. Rev. 349 (2005).
- 105 S.B. 236 (W. Va. 2017) (passed 33-0 on Mar. 7, 2017).
- 106 *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879 (W. Va. 1979).
- 107 H.B. 2098 (W. Va. 1993).
- 108 W. Va. Code Ann. § 17C-15-49(d).
- 109 NHTSA, Seat Belts, at <https://www.nhtsa.gov/risky-driving/seat-belts> (last visited Dec. 6, 2017).
- 110 West Virginia Highway Safety Program, Highway Safety Performance Plan FY 2010, at 14.
- 111 See Malak Khader, Legislature Passes Primary Offense Seatbelt Law, Wrap-Up: The Official Newsletter of the West Virginia Legislature, vol. 24, iss. 7, Apr. 13, 2013, at 1.
- 112 H.B. 2108 (W. Va. 2013).
- 113 See *Nabors Well Servs., Ltd. v. Romero*, 456 S.W.3d 553, 555 (Tex. 2015).
- 114 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.”).
- 115 Medical Monitoring and Asbestos Litigation: a Conversation with Richard Scruggs and Victor Schwartz, Mealey’s Litig. Rep.: Asbestos, vol. 17, no. 3, at 5 (2002).
- 116 S.B. 213 (W. Va. 2003) (formerly codified at W. Va. Code Ann. § 56-1-1(c) (2003)).
- 117 See *Morris v. Crown Equipment Corp.*, 633 S.E.2d 292 (W. Va. 2006). Two justices on the five-member court issued separate concurring opinions. One justice dissented.
- 118 *Douglas v. New York, N.H. & H. R.R. Co.*, 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).
- 119 See W. Va. Code Ann. § 56-1-1a.
- 120 The Supreme Court of Appeals deserves credit for its sound decision upholding a decision of West Virginia’s Mass Litigation Panel dismissing 20 Zoloft plaintiffs from other states under the *forum non conveniens* statute’s eight-factor approach. See *State ex rel. J.C. v. Mazzone*, 759 S.E.2d 200 (W. Va. 2015).
- 121 *Bristol-Myers Squibb Co. v. Superior Ct. of Cal.*, 137 S. Ct. 1773 (2017).
- 122 *Id.* at 1781.
- 123 *Id.*
- 124 *Id.*
- 125 See *Daimler AG v. Bauman*, 571 U.S. ___, 134 S. Ct. 746, 754 (2014) (holding that a corporation’s mere registration to do business in a state is insufficient to convey general personal jurisdiction over that business in state courts, but that the corporation must be “at home” in the state, meaning it is incorporated or has its principal place of business there).
- 126 W. Va. R. Civ. Proc. 23. The most recent change, which took effect in March 2017, recognizes that few class members benefit from class actions. An amendment to Rule 23 authorizes courts to distribute half of residual funds (the amount remaining after payment of submitted claims) to Legal Aid of West Virginia and, after hearing, distribute the remaining half of residual funds among nonprofit organizations, schools, or foundations to support programs consistent with the purpose of the underlying litigation. See In re: Adoption of Amendment to Rule 23, Class Actions, of the West Virginia Rules of Civil Procedure, Docket No. 16-RULES-18 (W. Va. Mar. 8, 2017).
- 127 Many class action lawsuits are settled before class certification. When this occurs, only named plaintiffs (the class representatives) and the plaintiffs’ attorneys receive payment in exchange for dismissing the suit.

- 128 See generally Andrew J. Pincus, Unstable Foundation: Our Broken Class Action System and How to Fix It (Inst. for Legal Reform, Oct. 2017); Rebecca McPhail, Op-ed, Limiting Damage Caused by Abusive Class Action Lawsuits, *The Intelligencer*, Nov. 7, 2017 (authored by Executive Director of the West Virginia Manufacturers Association).
- 129 See *Tabata v. Charleston Area Med. Ctr.*, 759 S.E.2d 459 (W. Va. 2014).
- 130 *Id.* at 467.
- 131 See *id.* at 463-64.
- 132 *Id.* at 467 (Ketchum, J., dissenting).
- 133 See *In re W. Va. Rezulin Litig.*, 585 S.E.2d 52, 65 (W. Va. 2003) (“Any question as to whether a case should proceed as a class action in a doubtful case should be resolved in favor of class certification.”).
- 134 See *id.* at 63. For example, in the Rezulin litigation, the Supreme Court of Appeals ruled that a trial court erred in declining to certify a medical monitoring class composed of about 5,000 West Virginia residents who had used the diabetes medication after a judge found that evidence indicated at least 95% of the class members “tolerated the drug well without developing any form of liver reaction” and therefore the class lacked the commonality and typicality required for certification. *Id.*
- 135 See, e.g., *GMS Mine Repair & Maintenance, Inc. v. Miklos*, 798 S.E.2d 833, 842 (W. Va. 2017) (holding trial court erred in denying defendant’s motion to stay class discovery and defer ruling on class certification until after deciding a dispositive motion directed to the named plaintiff’s claim).
- 136 See Fairness in Class Action Litigation Act of 2017, H.R. 985 (passed U.S. House of Representatives on March 9, 2017); Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure 211-32 (Aug. 2016) (proposing amendments to Fed. R. Civ. P. 23 provisions governing class settlement process).
- 137 *GMS Mine Repair*, 798 S.E.2d 833 at 842.
- 138 *Id.* (quoting Federal Judicial Center, Manual for Complex Litigation (4th) § 21.133, p. 253).
- 139 Ashby Jones, Loan & Order: States Object to ‘Payday’ Lawsuit Lending, *Wall St. J.*, Apr. 28, 2013.
- 140 The Legislature created the Lending and Credit Rate Board, which is authorized to prescribe a maximum interest rates and charges on loans, credit sales, and transactions. W. Va. Code Ann. §§ 47A-1-1 et seq. Loans that exceed that maximum rate are usurious and unenforceable. W. Va. Code § 47-6-6. The current maximum rate for a consumer loan ranges from 31% APR (loan of \$2,000 or less) to 18% APR (loan of over \$10,000). See W. Va. Division of Financial Inst., Regulated Consumer Lender, at http://dfi.wv.gov/other_licenses/regulatedconsumerlender/Pages/default.aspx.
- 141 See S.B. 882 (Ark. 2015) (codified at Ark. Code Ann. § 4-57-109); H.B. 1127 (Ind. 2016) (codified at Ind. Code Ann. § 24-4.5-1-101.1); S.B. 1360 (Tenn. 2014) (codified at Tenn. Code Ann. §§ 47-16-101 et seq.); H.B. 84 (Vt. 2016) (codified at 8 Vt. Stat. Ann. §§ 2251 to 2260).
- 142 See Cary Silverman, Bad for Your Health: Lawsuit Advertising Implications and Solutions 6 (U.S. Chamber Inst. for Legal Reform, Oct. 2017).
- 143 See Am. Med. Ass’n, Resolution 208 (A-16) (received Apr. 25, 2016).
- 144 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).
- 145 See National Council for Community Behavioral Healthcare, Press Release, New Survey Shows Product Liability Litigation May Jeopardize Treatment Outcomes for People with Severe Mental Illness, June 13, 2007.
- 146 See Craig Hansen et al., Assessment of YouTube Videos as Source of Information on Medication Use in Pregnancy, 25 *Pharmacoepidemiology & Drug Safety* 35, 39 (2015).

- 147 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).
- 148 See Silverman, Bad for Your Health, *supra*, at 20-22 (presenting results of a May 2017 poll of patients commissioned by the U.S. Chamber Institute for Legal Reform).
- 149 See *id.* at 27-31 (quoting statements of concern by several doctors presented in testimony before Congress, op-eds, and other sources).
- 150 See *id.* at 35-40 (documenting examples).
- 151 W. Va. R. of Prof. Conduct 7.1 (emphasis added).



U.S. CHAMBER
Institute for Legal Reform

202.463.5724 main
202.463.5302 fax

1615 H Street, NW
Washington, DC 20062

instituteforlegalreform.com