

WEST VIRGINIA AS A JUDICIAL HELLHOLE: WHY BUSINESSES FEAR LITIGATING IN STATE COURTS

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I.	WHAT THE JUDICIAL HELLHOLES REPORT IS AND IS NOT	758
II.	FAILURES OF WEST VIRGINIA’S CIVIL JUSTICE SYSTEM.....	760
	A. <i>Lack of Appellate Review</i>	760
	B. <i>Home Court Advantage</i>	764
	C. <i>Procedural Unfairness</i>	766
	1. Mass Consolidation of Claims	766
	2. Forum Shopping	769
	3. Reverse-Bifurcation Approach to Punitive Damages Compromises Due Process	771
	D. <i>West Virginia Courts Deviate from Fundamental Tort Principles</i>	775
	1. Cash Awards for Medical Monitoring Without Physical Injury	775
	2. Wholesale Rejection of the “Learned Intermediary” Doctrine.....	778
	3. Circumventing the Workers’ Compensation System.....	782

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III.	WEST VIRGINIA'S PROBLEMS EXTEND BEYOND THE COURTROOM...	785
IV.	CONCLUSION.....	788

In 2008, West Virginia received the dubious distinction of being labeled the number one “Judicial Hellhole”™ in the United States, a position it reclaimed from 2006.¹ In fact, since the inception of the American Tort Reform Foundation’s (ATRF) annual report in 2002, the Foundation has consistently named West Virginia as the only statewide Judicial Hellhole.² Some, such as much-respected Professor Elizabeth G. Thornburg, have disputed this ranking, attempting to cast the report as an attack by the business community against West Virginia courts.³ This article, however, explains why West Virginia continues to present one of the nation’s worst legal climates, and why the Judicial Hellholes report and tort reform movements are not simply “the latest chapter in a decades-long effort to convince American voters that the tort law system has gone seriously awry,”⁴ but rather a reaction to an undeniable reality.

I. WHAT THE JUDICIAL HELLHOLES REPORT IS AND IS NOT

The Judicial Hellholes report is a publication of the ATRF, the educational arm of the American Tort Reform Association (ATRA). The report is an annual snapshot of where ATRA’s membership, a broad-based coalition of more than three hundred businesses, corporations, municipalities, associations, and professional firms, is most concerned that the scales of justice have tipped against them. As the report states, “Judicial Hellholes are places where judges systematically apply laws and court procedures in an unfair and unbalanced manner, generally against defendants in civil lawsuits.”⁵ Its focus is squarely on the judges, not juries, and its findings are limited to the civil, not criminal, justice system.

Most judges do a diligent and fair job for modest pay, which is why the report focuses on just a handful of jurisdictions, most at the county level, where the civil justice system appears to have tilted. The 2008/2009 report lists seven Judicial Hellholes. It also includes a “Watch List” of additional areas that have raised concern among ATRA members, “Dishonorable Mentions” that shine a spotlight on particularly unsound court decisions, and “Points of Light” highlighting judicial and legislative actions that have helped retain or restore fairness in a state’s civil justice system.

¹ See AM. TORT REFORM FOUND., JUDICIAL HELLHOLES 2008/2009 3-5 (2008), available at <http://www.atra.org/reports/hellholes/> (last visited Apr. 10, 2009).

² West Virginia was named in the “Watch List” of the first Judicial Hellhole report in 2002 and has been named a Judicial Hellhole in each successive report.

³ See Elizabeth G. Thornburg, *Judicial Hellholes, Lawsuit Climates and Bad Social Science: Lessons from West Virginia*, 110 W. VA. L. REV. 1097 (2008).

⁴ See *id.* at 1099.

⁵ See JUDICIAL HELLHOLES 2008/2009, *supra* note 1, at ii.

In order to arrive at its annual listing, ATRF begins by surveying counsel representing ATRA members. Then, ATRF carefully reviews court decisions, jury verdict reports, judicial branch statistics, and newspaper and legal trade press articles documenting litigation practices in jurisdictions of concern. Finally, ATRF documents its findings in the Judicial Hellhole report, including extensive footnotes to the sources underlying its conclusions. ATRF considers several factors when identifying Hellhole jurisdictions, including whether there is a tendency to allow forum shopping, permit new and expansive legal theories, allow mass joinder of lawsuits, render unsound rulings on discovery or evidentiary matters, or permit excessive awards, as well as whether there are questionable relationships between plaintiffs' attorneys, government officials, and the judiciary.⁶ Judicial Hellholes typically incorporate several elements of this criteria, creating an overall legal climate which is unbalanced and oppressive for civil defendants. As this article will demonstrate, West Virginia fits squarely in this mold. West Virginia's inclusion as a Judicial Hellhole, however, does not reflect on the fairness of individual judges, many of whom work diligently to follow the law, but on the legal climate as a whole, the tone of which is set by the state's highest court.

The Judicial Hellholes report does not claim to be a scientific study. It is based, as the report emphasizes in its opening preface, on the opinions of ATRA members and those familiar with the litigation backed by substantial research.⁷ Reasonable minds may disagree as to whether a particular jurisdiction should be listed or whether it should be "ranked" number one or number six. While criticism of the report has come from those such as Professor Thornburg who believe a particular jurisdiction should not be cast as a Judicial Hellhole or characterize the report as part of purported conspiracy by the business community to discredit the courts, ATRA also occasionally comes under fire for its praise of actions that attempt to address the concerns of its members.⁸

Ultimately, the purpose of the Judicial Hellholes report is to encourage courts in highlighted jurisdictions, such as West Virginia, to restore balance in their civil justice systems. Where necessary, state legislatures can also intervene to help fulfill that goal. It is important to note that although ATRA members are often defendants, the goal of the Judicial Hellholes report is for courts to be neither pro-plaintiff nor pro-defendant; what is sought is balanced decision making. West Virginia need not be a permanent fixture in the Judicial Hellholes report.

⁶ See *id.* at 2.

⁷ See *id.* at ii.

⁸ For example, soon after publication of the 2008/2009 report, ATRF received correspondence from a representative of Pennsylvania's Patients and Physicians Alliance, which strongly disagrees with the "Point of Light" awarded to the state for addressing rising medical malpractice liability, suggesting that reforms have not gone far enough to protect health care accessibility. In addition, some tort reform advocates have suggested that Los Angeles, California has experienced significant improvement in its litigation climate and that the problems identified by ATRF in its report are endemic to the state as a whole.

As experience in Madison County, Illinois, and various counties in Mississippi and Texas have demonstrated, concrete actions can level the scales of justice and lead ATRF to remove a jurisdiction from the list.

II. FAILURES OF WEST VIRGINIA'S CIVIL JUSTICE SYSTEM

The primary reasons underlying West Virginia's status as a Judicial Hellhole fall in four general areas. The state's lack of appellate review places defendants at a unique disadvantage. There is a perception that the judiciary generally favors local plaintiffs over out-of-state corporate defendants. Procedural unfairness, such as the judiciary's willingness to consolidate thousands of cases, allow forum shopping, authorize prejudicial trial plans, stack the deck from the get go, and place inordinate pressure on a defendant to settle even those cases that lack merit. Finally, jaw-dropping departures from core principles of tort law put the state outside the mainstream. These include court decisions permitting cash awards for medical monitoring claims without physical injury, wholly rejecting the learned intermediary doctrine, and allowing tort claims outside of the no-fault workers' compensation system.

A. *Lack of Appellate Review*

The right to appeal an adverse verdict is among the most basic safeguards that citizens expect in the civil justice system. In forty-eight states, the District of Columbia, and the federal court system, civil defendants have at least one appeal as of right, as further demonstrated below. In West Virginia, however, there is no such right, and the losing party must file a petition for appeal with the state's sole appellate court.⁹ The West Virginia Supreme Court of Appeals, has complete discretion as to whether to grant or deny a petition for appeal.¹⁰ The grant of the petition for review requires three of the court's five justices, an even higher standard than that required for a grant of certiorari by the U.S. Supreme Court, which operates based on a longstanding "rule of four" of the Court's nine justices.

The court structures of thirty-nine states include an intermediate appellate court, most of which provide for appeal of civil cases as a matter of right.¹¹ Ten states and the District of Columbia do not have intermediate appellate courts, but nevertheless provide for an appeal as a matter of right in the jurisdiction's high court.¹² In fact, in 2003, New Hampshire, the only state that, like West Virginia, had no intermediate appellate court and solely discretionary re-

⁹ W. VA. R. APP. P. 3, 5, 7; *see also* W. VA. CONST. art. 8, § 4.

¹⁰ W. VA. R. APP. P. 7.

¹¹ *See* NAT'L CTR. FOR STATE CTS., CT. STATS. PROJECT, STATE CT. STRUCTURE CHARTS, *available at* http://www.ncsconline.org/D_Research/Ct_Struct/Index.html (last visited Apr. 10, 2009).

¹² *See id.* These states include Alaska, Delaware, Maine, Montana, New Hampshire, Nevada, Rhode Island, South Dakota, Vermont, and Wyoming.

view in its supreme court, restored an appeal as a matter of right in its highest court.¹³

Now, only West Virginia and its “mother state,” Virginia, do not afford a right to appellate review in civil cases.¹⁴ Virginia, unlike its neighbor, however, has an intermediate appellate court with discretionary review¹⁵ and its highest court considers refusal of a petition for appeal “a decision on the merits.”¹⁶ That leaves West Virginia as the only state which denies a right to appellate review on the merits. While the West Virginia Supreme Court of Appeals opts to hear one of every three cases for which review is sought—a high percentage for discretionary review¹⁷—this provides little solace to parties who receive no appeal at all.

This statistic played out in 2007, when West Virginia was home to three of the seven largest civil awards in the nation, and in two of those three cases, the defendant has no appeal.¹⁸ The first involved a \$404 million verdict, including \$270 million in punitive damages, and found two major natural gas suppliers—Chesapeake Energy and NiSource, Inc.—liable for underpaying landowners under a royalties contract.¹⁹ In the second case, the high court denied review of a \$100 million punitive damages award against Massey Energy for a coal

¹³ See News Release, *New Hampshire Supreme Court, Supreme Court Announces Expansion of Appellate Review; Accepted Cases Expected To Double* (Jan. 22, 2003), available at <http://www.courts.state.nh.us/press/apprev.htm> (last visited Apr. 10, 2009).

¹⁴ See Adam Liptak, *U.S. Supreme Court is Asked to Fix Troubled West Virginia Justice System*, N.Y. TIMES, Oct. 12, 2008, available at <http://www.nytimes.com/2008/10/12/washington/12scotus.html> (last visited Apr. 10, 2009); Kimberly Atkins, *West Virginia Courts Could Get Supreme Scrutiny: Trio of Cases Allege Lack of Appeals Access, Judicial Improprieties*, LAWYERS USA, Sept. 29, 2008, available at <http://lawyersusaonline.com/index.cfm/archive/view/id/431919> (last visited Apr. 10, 2009).

¹⁵ See VA. CONST. art. VI, § 7; see also NAT’L CENTER FOR STATE CTS., CT. STATS. PROJECT, STATE CT. STRUCTURE CHARTS, available at http://www.ncsconline.org/D_Research/Ct_Struct/Index.html (last visited Apr. 10, 2009).

¹⁶ *Sheets v. Castle*, 559 S.E.2d 616, 619 (Va. 2002). In addition, Virginia protects against substantial punishment by capping punitive damages at \$350,000. See VA. CODE ANN. § 8.01-38.1. West Virginia law has no such safeguard against outlier awards.

¹⁷ See NAT’L CENTER FOR STATE CTS., EXAMINING THE WORK OF STATE CTS., 2005, at 76 (2006) (citing 2005 statistics), available at http://www.ncsconline.org/D_Research/csp/2005_files/0-EWWwhole%20Document_final_1.pdf (last visited Apr. 10, 2009).

¹⁸ See Verdict Search, *Top Verdicts of 2007*, available at <http://www.verdictsearch.com/index.jsp?do=top100> (last visited Dec. 22, 2008) (listing *Estate of Tawney v. Columbia Natural Res.*, Roane Co., W. Va., Cir. Ct., 03-C-10E, Jan. 27, 2007 verdict of \$404 million; *Perrine v. E.I. DuPont De Nemours & Co.*, Harrison Co., W. Va., Cir. Ct., No. 04-C-296-2fbas, October 19, 2007 verdict for \$252 million; *Wheeling Pittsburgh Steel Corp. v. Central W. Va. Energy Co.*, Brooke Co., W. Va., Cir. Ct., 05-C-85-MJG, July 2, 2007 verdict for \$119 million in compensatory damages and \$100 million in punitive damages).

¹⁹ One week following the verdict, Chesapeake Energy announced it was cancelling a \$35 million commitment to build a state-of-the-art regional headquarters in the state’s capital, Charleston. See David Ridenour, *The State Should Pursue Tort Reform*, CHARLESTON DAILY MAIL, July 15, 2008 at 4A.

shipment dispute with Wheeling-Pittsburgh Steel.²⁰ Following denial of review, both the defendants appealed both the NiSource and Massey cases to the U.S. Supreme Court—part of a disturbing trend where the highest court in the country has become the *de facto* court for first appeal in West Virginia.²¹

The third largest verdict of 2007, *Perrine v. E.I. DuPont de Nemours & Co.*, will receive a West Virginia appeal, but only after an extraordinary outcry in an equally extraordinary case. *Perrine* is reportedly the largest toxic tort verdict in the country, ordering DuPont to pay \$130 million in medical monitoring costs, \$55.5 million in cleanup expenses, and \$196 million in punitive damages and lawyers' fees.²² It stems from a class-action complaint filed on behalf of residents of Spelter, West Virginia alleging that a DuPont zinc smelting facility exposed them to arsenic, cadmium and lead.²³ In that instance, West Virginia Governor Joe Manchin took the usual step of filing an amicus brief asking the high court to provide meaningful review.²⁴ Governor Manchin joined defense counsel and several amici (including ATRA) in raising alarm that the court's denial of appellate review, particularly in cases involving punitive damages, may violate the due process guarantee of the U.S. Constitution.²⁵ Under the implicit threat of U.S. Supreme Court appeal, the West Virginia Supreme Court of Appeals, by a 4-1 vote, granted review.²⁶

²⁰ See Ken Ward, *Gov. Defends Aid for DuPont*, CHARLESTON GAZETTE, Aug. 23, 2008, at 1A.

²¹ See Petition for Writ of Certiorari, *NiSource, Inc. v. Estate of Garrison G. Tawney*, Nos. 08-219, 08-229 (U.S. filed Aug. 20, 2008); Petition for a Writ of Certiorari, *Massey Energy Corp. v. Wheeling Pittsburgh Steel Corp.*, Nos. 08-217, 08-218 (Aug. 2008). The U.S. Supreme Court denied certiorari in both cases, leaving the defendant with absolutely no appellate review. *NiSource, Inc. v. Estate of Tawney*, 129 S. Ct. 622 (2008); *Cent. W. Va. Energy Co. v. Wheeling Pittsburgh Steel Corp.*, 129 S. Ct. 626 (2008).

²² See *Let DuPont Appeal \$196 M Punitive Award, W. Va. Governor Says*, 29 NO. 1 ANDREWS ENVTL. LITIG. REP. 6, Aug. 6, 2008.

²³ *Id.*

²⁴ See *Amicus Curiae Br. on Behalf of Joe Manchin, III, Governor of the State of West Virginia, E.I. du Pont de Nemours & Co. v. Perrine*, No. 080721 (W. Va. June 24, 2008), available at <http://www.wvbusinesslitigationblog.com/stats/pepper/orderedlist/downloads/download.php?file=http%3A//www.wvbusinesslitigationblog.com/uploads/file/Manchin%2520amicus%2520brief.pdf>.

²⁵ See, e.g., *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) (finding that “[e]xacting appellate review ensures that an award of punitive damages is based upon an application of law, rather than a decisionmaker’s caprice”); *Honda Motors Co. v. Oberg*, 512 U.S. 415, 421 (1994) (“Judicial review of the size of punitive damages has been a safeguard against excessive verdicts for as long as punitive damages have been awarded.”); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 20-21 (1991) (emphasizing the availability of both “meaningful and adequate review by the trial court” and subsequent appellate review as necessary safeguards to “make [] certain that the punitive damages are reasonable in their amount and rational in light of their purpose.”).

²⁶ *Perrine v. E.I. duPont deNemours & Co.*, No. 081462, rev. granted, Sept. 24, 2008; see also Ken Ward, *High Court to Hear Appeal in DuPont Case*, CHARLESTON GAZETTE, Sept. 26, 2008, at 1C.

Beyond 2007's largest awards, the West Virginia's Supreme Court of Appeals has also refused to hear cases involving novel procedures and even cases where the trial court questions its own result. For instance, also in 2007, the court refused to hear a case in which a trial court authorized a highly controversial "reverse bifurcation" approach to deciding punitive damages.²⁷ The trial court had permitted jurors in a medical monitoring case brought by coal miners to hear evidence of punitive damages before determining basic liability, essentially finding that the defendant should be punished before finding the defendant liable.²⁸ The previous year, the high court refused to review a \$13 million verdict, including the \$10.5 million in undefined consequential damages, in a breach of confidentiality agreement and trade secrets claim.²⁹ In that case, even the trial court judge noted that he was "most troubled" by and "struggling with" the measure of damages, concluding, "I'm not going to reduce it, though I am concerned with it."³⁰

West Virginia's lack of appellate rights need not be set in stone. The judiciary has two choices—it can go the route of New Hampshire and provide for an appeal as a matter of right in the Supreme Court of Appeals or it can establish intermediate appellate courts. The second option may sound like a dramatic change, however, a century ago, only about one third of the state judiciaries included an intermediate appellate court.³¹ Their expansion is a recent phenomenon in response to rising caseloads. In fact, between 1972 and 1980, the number of states with intermediate appellate courts jumped from 23 to 34.³² While the number has not risen further since it reached its current 39 in 1998, states have continued to increase the number of intermediate appellate court judges to handle increasing caseloads.³³ West Virginia has not yet joined this trend aimed at providing or preserving a right to appeal. However, there is reason for optimism. In April of 2009, Governor Joe Manchin established a commission to study potential changes to the structure of the state's judiciary, including creation of an intermediate appellate court.³⁴

²⁷ Chemtall Inc. v. Madden, 655 S.E.2d 161 (W. Va. 2007), cert. denied sub nom., Chemtall Inc. v. Stern, 128 S. Ct. 1748 (2008) (No. 07-1033).

²⁸ See discussion of reverse bifurcation *infra* Section C-3 and medical monitoring *infra* Section D-1.

²⁹ Eagle Research Corp. v. Daniels Measurement Servs., Inc., No. 070375, rev. denied (W. Va. May 27, 2007).

³⁰ Petition for Writ of Certiorari, Daniel Measurement Servs., Inc. v. Eagle Research Corp., App. at 10a, 12a. The U.S. Supreme Court also denied certiorari, 128 S. Ct. 655 (2007), leaving no appellate review of this decision.

³¹ See U.S. DEP'T OF JUST., Bureau of Just. Stats., State Court Org., 1987-2004, NCJ 217996, at 4 (Oct. 2007), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/sco8704.pdf> (last visited Apr. 10, 2009).

³² See *id.*

³³ See *id.*

³⁴ Exec. Order No. 6-09 (W. Va. Ap. 3, 2009); see also Justin Anderson, *Manchin Creates Court Commission*, W. VA. REC., Apr. 6, 2009.

B. Home Court Advantage

The lack of appellate review is particularly concerning to out-of-state businesses that are hauled into West Virginia courts because they are placed at a distinct disadvantage against a hometown plaintiff and his or her local attorney. Richard Neely, who served as a West Virginia Supreme Court of Appeals Justice, including several terms as Chief Justice, for over twenty-two years until 1995, has spoken candidly on this issue. In his book, "The Product Liability Mess: How Business Can be Rescued from the Politics of State Courts," the former West Virginia Justice wrote:

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

It should be obvious that the in-state local plaintiff, his witnesses, and his friends, can all vote for the judge, while the out-of-state defendant can't even be relied upon to send a campaign donation.³⁵

Professor Thornburg recognizes "the quotation, is certainly a disturbing one," but then suggests that a "closer examination . . . shows that Justice Neely was neither speaking of himself nor endorsing the attitude portrayed in the quotation."³⁶ Others have suggested that Justice Neely was merely being "ironic."³⁷ Therefore, it is important to put the quote in greater context.

The focus of Justice Neely's book is the political pressure placed on state court judges to favor local plaintiffs (their "constituents") over business interests, particularly those located in other states. His statements on this topic begin on the first page of the book, where he professes to "sleeping well at night" by requiring a foreign defendant to pay a constituent's lifelong medical expenses where causation is dubious, and continue throughout.³⁸ For example, Justice Neely states:

³⁵ RICHARD NEELY, *THE PRODUCT LIABILITY MESS: HOW BUSINESS CAN BE RESCUED FROM THE POLITICS OF STATE COURTS* 4 (1998).

³⁶ Thornburg, *supra* note 3, at 1126.

³⁷ Justinian Lane, Are "Reformers" Lying or Just Being Sloppy When They Use this Quote?, Tort Deform: The Civil Justice Defense Blog, available at http://www.tortdeform.com/archives/2008/06/are_reformers_lying_or_just_be.html (last visited Apr. 10, 2009) (quoting retraction in *ABA Journal*, January 1989, in which the *Journal* stated, "Neely was using an ironic style to mimic the unspoken rationale he feels some judges use to rule for plaintiffs. The quote does not reflect Neely's personal position on the matter, and the *Journal* regrets inadvertently distorting his views.").

³⁸ See NEELY, *supra* note 35, at 1.

What do I care about the Ford Motor Company? To my knowledge Ford employs no one in West Virginia in its manufacturing processes, and except for selling cars in West Virginia, it is not a West Virginia taxpayer. . . .

The best that I can do, and I do it all the time, is make sure that my own state's residents get more money out of Michigan than Michigan residents get out of us.³⁹

If there remains any lack of clarity on Justice Neely's concern that West Virginia's judicial system inherently favors plaintiffs over foreign defendants, then consider his equally candid testimony to Congress, in which he stated:

If, for example, as a West Virginia judge I insist that West Virginia have conservative product liability law, all I will do is reduce my friends' and neighbors' claims on the existing pool of product liability insurance paid for by consumers through "premiums" incorporated into the price of everything we buy. This is the explicit rationale of *Blankenship versus General Motors*, 406 S.E.2d 781 (W. Va. 1991). . . . Thus, as a state judge I have admitted in a unanimous opinion written for the highest court of one of the fifty states that we, as a state court, cannot be rational in the crafting of product liability rules.⁴⁰

This type of systemic bias against out-of-state corporate defendants and in favor of wealth redistribution, a "structural problem" stemming from the elected judiciary, led Justice Neely to recognize a "liability crisis" and advocate in support of greater preemption of state product liability law with an increasing role for federal courts.⁴¹ While Justice Neely's statements speak in general terms regarding all state judiciaries, West Virginia's court decisions, as closely examined in this article, exemplify this philosophy in practice.

³⁹ *Id.* at 71-72.

⁴⁰ *Product Liability: Hearing Before the Subcomm. on the Consumer of the S. Comm. on Com., Science, and Trans.*, 102nd Cong. 38 (1991) (statement of West Virginia Supreme Court Justice Richard Neely, witness). *Blankenship* showed evidence of a philosophy to protect plaintiffs against corporations through adopting expansive pro-plaintiff liability rules. *Blankenship v. General Motors Corp.*, 406 S.E.2d 781, 786 (W. Va. 1991) ("[W]e do not claim that our adoption of rules liberal to plaintiffs comports, necessarily, with some Platonic ideal of perfect justice. Rather, for a tiny state incapable of controlling the direction of national law in terms of appropriate trade-offs among employment, research, development, and compensation for the injured users of products, the adoption of rules liberal to plaintiffs is simple self-defense.").

⁴¹ *Id.* at 36.

C. *Procedural Unfairness*

West Virginia courts have placed burdens on defendants that make it difficult, if not impossible, to fairly try cases. These practices include lumping together thousands of individual cases with diverse facts in mass consolidations, allowing cases to proceed against out-of-state defendants that have little or nothing to do with West Virginia, and permitting unorthodox trial plans that have a factfinder consider whether the defendant's conduct warrants punitive damages even before certifying a class or determining compensatory damages. Each of these practices has a common effect: to force a defendant to settle and settle early without regard to the merits of the case.

1. Mass Consolidation of Claims

West Virginia has a reputation for allowing mass consolidation of claims without the safeguards of class action treatment that require similarity of the facts and law applicable to each claimant. Because of the difference in the way that an injury came about and each individual's damages, consolidation of personal injury claims, through class action or otherwise, is highly disfavored.⁴² In such cases, there is virtually no opportunity for any defendant in the action to contest the individual claims against it. Furthermore, any defendant deciding to run the risk of such a massive trial may be subject to enormous punitive damages liability. The coercive terms of such plans contemplate (or count on) mass settlements to simplify trial matters and block post-trial review.⁴³ Using such leverage to force large block settlements of cases is certainly a quick way to clear trial court dockets, but may run afoul of litigants' due process rights.⁴⁴ Nevertheless, West Virginia not only permitted, but encouraged such practices.⁴⁵

For instance, in an infamous case in 2002, the West Virginia Supreme Court of Appeals allowed a Kanawha County court to consolidate the claims of

⁴² See, e.g., *Castano v. American Tobacco Co.*, 84 F.3d 734, 746 & n.23 (5th Cir. 1986) (providing numerous examples of courts rejecting class certification of complex mass torts).

⁴³ See *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, J.), cert. denied, 516 U.S. 867 (1995) (recognizing in class action context that mass aggregation can produce coercive legal "blackmail settlements").

⁴⁴ See *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 629 (1997) (invalidating proposed class action settlement of thousands of asbestos claims because the settlement failed to satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (relying on constitutional concerns as well as Rule 23 to invalidate proposed settlement).

⁴⁵ See Paul F. Rothstein, *What Courts Can Do In the Face of the Never Ending Asbestos Crisis*, 71 *Miss. L.J.* 1, 17-19 (2001) (discussing West Virginia's use of mass trials for tens of thousands of asbestos claims).

more than 8,000 asbestos plaintiffs into one legal action against more than 250 defendants.⁴⁶ Justice Elliott Maynard explained:

[T]his litigation involves thousands of plaintiffs; twenty or more defendants; hundreds of different work sites located in a number of different states; dozens of different occupations and circumstances of exposure; dozens of different products with different formulations, applications, and warnings; several different diseases; numerous different claims at different stages of development; and at least nine different law firms, with differing interests, representing the various plaintiffs. Additionally, the challenged conduct spans the better part of six decades.⁴⁷

Justice Maynard noted that these claims “migrated [to West Virginia] because of the asserted pro-plaintiff bias with which [the defendant claimed] this State handles asbestos litigation.”⁴⁸ While many of West Virginia’s mass consolidations have involved asbestos litigation, the practice extends to other areas.⁴⁹

While West Virginia continues to permit such practices, other state judiciaries have intervened to restore fairness. Case in point is Mississippi, several areas of which ATRF designated as Judicial Hellholes in the first two years of the report’s inception.⁵⁰ Prior to ATRF’s removal of Mississippi jurisdictions from the report in 2004, Mississippi courts had allowed plaintiffs to join numerous claims that few, if any, courts outside the state would permit to be joined together.⁵¹ A study commissioned by the Center for Legal Policy of the Manhattan Institute, a nonprofit think tank, issued a compelling and well-

⁴⁶ State *ex rel.* Mobil Corp. v. Gaughan, 563 S.E.2d 419 (W. Va.), cert. denied sub nom., Mobil Corp. v. Adkins, 537 U.S. 944 (2002); see also State *ex rel.* Appalachian Power Co. v. MacQueen, 479 S.E.2d 300 (W. Va. 1996) (holding in asbestos action that “[a] creative, innovative trial management plan developed by a trial court which is designed to achieve an orderly, reasonably swift and efficient disposition of mass liability cases will be approved so long as the plan does not trespass upon the procedural due process rights of the parties”).

⁴⁷ State *ex rel.* Mobil Corp. v. Gaughan, 565 S.E.2d 793, 794 (W. Va. 2002) (Maynard, J., concurring).

⁴⁸ *Id.* at 795.

⁴⁹ See, e.g., *In re Tobacco Litig.*, 624 S.E.2d 738 (W. Va. 2005) (involving consolidation of 1,000 personal injury cases against cigarette manufacturers discussed *infra* notes 92–93).

⁵⁰ ATRA named Mississippi’s 22nd Judicial Circuit, which includes Copiah, Claiborne, and Jefferson Counties, as a hellhole in both 2002 and 2003. ATRA added Holmes and Hinds Counties to its list in 2003. ATRF removed all Mississippi counties from its 2004 Judicial Hellholes report, noting that “Mississippi has transformed its litigation environment for the better over the past three years, making it th[e] report’s brightest ‘point of light.’” AM. TORT REFORM FOUND., JUDICIAL HELLHOLES 10 (2004), available at <http://www.atra.org/reports/hellholes/> (last visited Apr. 10, 2009).

⁵¹ See generally Mark A. Behrens & Cary Silverman, *Now Open for Business: The Transformation of Mississippi’s Legal Climate*, 24 MISS. C. L. REV. 393, 397–99 (2005) [hereinafter Behrens & Silverman].

documented indictment of Jefferson County, Mississippi's treatment of mass actions, while also noting that use of such practices was rising in West Virginia as judges intervened in Mississippi.⁵² Indeed, Mississippi courts stepped in to restore traditional standards to joinder and prevent courts from continuing to be a magnet court for nonresident claims.⁵³ Then, the Mississippi Supreme Court acted decisively in a series of cases in 2004 and 2005 to reign in mass action abuse, finding that "the benefits of efficiency must never be purchased at the cost of fairness,"⁵⁴ and revised its court rules.⁵⁵ In one case, Mississippi's high court went so far as to declare the joinder of asbestos injury claims by 264 plaintiffs exposed over a seventy-five year period to asbestos products associated with 137 named defendants in approximately 600 workplaces a "perversion of the judicial system unknown prior to the filing of mass-tort claims."⁵⁶ Some have suggested that reforms like those adopted in Mississippi are needed in West Virginia if the state is "ever to erase [its] well-deserved image as 'tort hell.'"⁵⁷

⁵² JOHN H. BEISNER ET AL., ONE SMALL STEP FOR A CO. CT. . . . ONE GREAT CALAMITY FOR THE NATIONAL LEGAL SYSTEM 3, 19-20 (Apr. 2003), available at http://www.manhattan-institute.org/html/cjr_7.htm (last visited Apr. 10, 2009) ("Available data suggest that in recent years, mass actions have been brought most frequently in Mississippi, but their incidence is growing in other states (e.g., West Virginia), where certain courts have demonstrated a willingness to apply loose joinder, consolidation, and special litigation rule standards to such cases.").

⁵³ See *id.* at 17 (discussing ruling of Judge Lamar Pickard in *Conway v. Hopeman Bros.* (Cir. Ct. Jefferson County, Miss. July 25, 2001)).

⁵⁴ *Janssen Pharmaceutica, Inc. v. Scott*, 876 So.2d 306, 307-08 (Miss. 2004) (reversing the trial court's decision to join the claims of sixty-five plaintiffs against drug manufacturer); see also *Illinois Cent. R.R. Co. v. Gregory*, 912 So.2d 829, 833-36 (Miss. 2005); *Amchem Prods., Inc. v. Rogers*, 912 So.2d 853, 858 (Miss. 2005); *3M Co. v. Hinton*, 910 So.2d 526, 527-28 (Miss. 2005); *3M Co. f/k/a Minnesota Mining & Mfg. Co. v. Johnson*, 895 So. 2d 151, 159 (Miss. 2005); *Harold's Auto Parts, Inc. v. Mangialardi*, 889 So.2d 493, 495 (Miss. 2004); *Culbert v. Johnson & Johnson*, 883 So. 2d 550, 551 (Miss. 2004); *Janssen Pharmaceutica, Inc. v. Jackson*, 883 So. 2d 91, 92 (Miss. 2004); *Janssen Pharmaceutica, Inc. v. Bailey*, 878 So. 2d 31, 48 (Miss. 2004); *Janssen Pharmaceutica, Inc. v. Armond*, 866 So. 2d 1092, 1098 (Miss. 2004).

⁵⁵ See *In re The Miss. R. Civ. P., No. 89-R-99001-SCT* (Miss. Feb. 20, 2004), available at <http://www.mslawyer.com/mssc/cases/20040226/89r99001.html> (last visited Apr. 10, 2009) (amending the comments to Rules 20 and 42 of the Mississippi Rules of Civil Procedure to clarify when cases can be consolidated for trial and requiring a "distinct litigable event linking the parties."). The Mississippi Tort Reform Act of 2004 further tightened venue provisions and joinder rules and expanded the ability of courts to transfer or dismiss claims under the doctrine of *forum non conveniens*. See H.B. 13, 2004 Leg., 2d Ex. Sess. (Miss 2004) (amending MISS. CODE ANN. § 11-11-3); see also Behrens & Silverman, *supra* note 51, at 415-16.

⁵⁶ *Mangialardi*, 889 So. 2d at 495.

⁵⁷ See Editorial, *Mississippi Can Do It, Why Can't West Virginia?*, HERALD DISPATCH (Huntington, W. Va.), June 20, 2004, at 6.

2. Forum Shopping

When West Virginia state courts allow practices that facilitate mass trials and adopt unconventional interpretations of longstanding tort law principles, and there is no right to appellate review of unjust results,⁵⁸ it is not surprising that lawyers who represent residents of other states with a less appealing legal climate seek to litigate in West Virginia. Each Judicial Hellholes report has discussed the particularly prevalent attempts at “forum shopping” or “litigation tourism” in West Virginia. In such an environment, venue reform and forum non conveniens—a doctrine firmly rooted in the common law and codified by statute in several states⁵⁹—take on greater importance in enabling courts to deny inappropriate claims with little or no connection to the forum state.

In the 1990s, long before the Judicial Hellholes reports set out to expose litigation abuses, West Virginia courts faced an onslaught of litigation, many of which involved asbestos claims brought by out-of-state plaintiffs.⁶⁰ West Virginia courts reacted by “adopt[ing] diverse, innovative, and often non-traditional judicial management techniques to reduce the burden of asbestos litigation,” including mass consolidation of claims.⁶¹ Instead of relieving burdened court dockets, however, expedited procedures and judicial shortcuts encouraged claims. As one West Virginia trial judge handling asbestos claims observed, “we thought [a mass trial] was probably going to put an end to asbestos, or at least knock a big hole in it. What I didn’t consider was that it was a form of advertising. . . . [I]t drew more cases.”⁶² During this same period, the West Virginia Supreme Court of Appeals exacerbated the situation by limiting the ability of courts to dismiss cases with little or no connection to the state, finding that the “doctrine of forum non conveniens is a *drastic* remedy which should be used with caution and restraint.”⁶³

The West Virginia Legislature, responding to the influx of claims from across the country and court’s limited use of forum non conveniens, amended the state’s venue statute in 2003. The reform, in part, stated that “a nonresident

⁵⁸ See *supra* section A-2.

⁵⁹ See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); *Baltimore & Ohio R.R. Co. v. Kepner*, 314 U.S. 44, 55 (1941) (referring to forum non conveniens as a “familiar doctrine”); *Douglas v. New York, N.H. & H. R.R. Co.*, 279 U.S. 377 (1929).

⁶⁰ See STEPHEN J. CARROLL ET AL., *RAND INST. FOR CIVIL JUSTICE, ASBESTOS LITIGATION* 62 (2005) (finding West Virginia had become one of a few states where most of the nation’s asbestos litigation flowed during the decade preceding adoption of the venue reform law); THE PERRYMAN GROUP, *THE NEGATIVE IMPACT OF THE CURRENT CIVIL JUSTICE SYSTEM ON ECONOMIC ACTIVITY IN WEST VIRGINIA* 3 (2003) (reporting that litigation activity increased 53.6 percent more rapidly in West Virginia than in the nation during the preceding decade).

⁶¹ *MacQueen*, 479 S.E.2d at 304.

⁶² *In re Asbestos Litig.*, Civ. Action No. 00-Misc.-222 (Cir. Ct. Kanawha County, W. Va. Nov. 8, 2000).

⁶³ *Abbott v. Owens-Corning Fiberglas Corp.*, 444 S.E.2d 285, 292 (W. Va. 1994) (emphasis added).

of the state may not bring an action in a court of this state unless all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state.”⁶⁴ The legislature also protected nonresidents by permitting them to bring claims in West Virginia courts if they are unable to obtain jurisdiction against the defendant in a state or federal court where the action arose, unless barred by the applicable statute of limitations.⁶⁵ This rational solution, however, was short-lived as the West Virginia Supreme Court of Appeals invalidated the venue law in 2006 as a violation of the Privileges and Immunities Clause of the United States Constitution.⁶⁶

The West Virginia high court’s decision in *Morris v. Crown Equip. Corp.* departed from well-established precedent upholding similar restrictions on lawsuits brought by out-of-state claimants, either by statute or through judicial application of traditional forum non conveniens principles, and ignored the fundamental state interest in distinguishing between residents and nonresidents to preserve limited judicial resources.⁶⁷ Several states, for example, have adopted venue and forum non conveniens statutes that make distinctions between residents and non-residents.⁶⁸ Similarly, many states have adopted specific venue laws targeting out-of-state claims for different types of litigation, such as asbestos or silica claims.⁶⁹ Moreover, the common law doctrine of forum non conveniens has, from its inception, considered the residency of the parties among other factors in deciding whether the case should be heard elsewhere.⁷⁰ Longstanding U.S. Supreme Court statutory jurisprudence recognizes “[t]here are manifest reasons for preferring residents in access to often over-

⁶⁴ W. VA. CODE § 56-1-1(c), held unconstitutional in *Morris v. Crown Equip. Corp.*, 633 S.E.2d 292 (W. Va. 2006), cert. denied, 127 S. Ct. 835 (2006).

⁶⁵ *Id.*

⁶⁶ *Morris v. Crown Equip. Corp.*, 633 S.E.2d 292 (W. Va. 2006), cert. denied, 127 S. Ct. 835 (2006).

⁶⁷ See, e.g., *Rosenthal v. Unarco Indus., Inc.*, 297 S.E.2d 638, 641 (S.C. 1982); *Qualley v. Chrysler Credit Corp.*, 217 N.W.2d 914, 915 (Neb. 1974) (citing *State of Missouri ex rel. Southern Ry. Co. v. Mayfield*, 340 U.S. 1 (1950)); *Gore v. U.S. Steel Corp.*, 104 A.2d 670, 675 (N.J. 1954); *Price v. Atchison, T & S.F. Ry. Co.*, 268 P.2d 457, 458 (Cal. 1954).

⁶⁸ See, e.g., LA. CODE CIV. PROC. art. 123(B); S.C. CODE § 15-5-150; VA. CODE ANN. § 8.01-265.

⁶⁹ See, e.g., FLA. STAT. § 774.205(1) (“A civil action alleging an asbestos or silica claim may be brought in the courts of this state if the plaintiff is domiciled in this state or the exposure to asbestos or silica that is a substantial contributing factor to the physical impairment of the plaintiff on which the claim is based occurred in this state.”); GA. CODE § 51-14-8; 2006 TENN. PUB. ACTS, ch. 728, § 9(a).

⁷⁰ See *State of Missouri ex rel. Southern Ry. Co. v. Mayfield*, 340 U.S. 1, 3-4 (1950); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947); *Baltimore & Ohio R.R. Co. v. Kepner*, 314 U.S. 44, 55 (1941).

crowded Courts, both in convenience and in the fact that broadly speaking it is they who pay for maintaining the Courts concerned.”⁷¹

In the wake of the *Morris* decision, the West Virginia Legislature passed a substitute law in 2007 that codified the already-existing doctrine of forum non conveniens rather than establish unambiguous clear venue rules as it had in 2003.⁷² This led ATRF to describe the new law as a “modest reform,” a characterization criticized by Professor Thornburg.⁷³ The 2007 law continues to rely on a factor-based approach that leaves significant discretion with West Virginia trial court judges whose historical reluctance to apply the doctrine is the very reason venue reforms were pursued in the first place. In essence, the law does not address the issue for which it was proposed, leaving West Virginia courts readily accessible to plaintiffs whose claims bear little connection to the state.

3. Reverse-Bifurcation Approach to Punitive Damages Compromises Due Process

A final example of West Virginia’s procedural unfairness is the judiciary’s use of a highly controversial and potentially unconstitutional procedure that permits trial courts to put the question of punitive damages before a jury prior to any determination of liability.⁷⁴ In this practice, known as reverse bifurcation, a trial is divided into two or more phases with damages determined in the first phase followed by a determination of liability in the second phase. While such an “extraordinary” procedure is not unprecedented,⁷⁵ and in fact is “well-recognized” in some jurisdictions as a means of encouraging settlement in complex asbestos litigation,⁷⁶ West Virginia appears to be one of a handful of states that has permitted its use when *punitive* damages are at issue.⁷⁷ The effect of reverse bifurcation is that the jury will hear the most damning evidence at the initial phase of the trial, painting the defendants as “bad actors” before the jury even considers whether (and to what extent) defendants are legally responsible

⁷¹ *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).

⁷² See W.VA. CODE § 56-1-1a.

⁷³ See Thornburg, *supra* note 3, at 1119.

⁷⁴ See JUDICIAL HELLHOLES 2008/2009, *supra* note 1, at 4.

⁷⁵ *Campolongo v. Celotex Corp.*, 681 F. Supp. 261, 262-63 (D. N.J. 1988); see also Victor E. Schwartz & Christopher E. Appel, *Putting the Cart Before the Horse: The Prejudicial Practice of a “Reverse Bifurcation” Approach to Punitive Damages*, 2 CHARLESTON L. REV. 375, 383-85 (2008).

⁷⁶ *Urbach v. Flintkote Co.*, 79 Pa. D. & C.4th 307, 328-29 (C.P. Pa., Phila. County 2005); see also Drury Stevenson, *Reverse Bifurcation*, 75 U. CIN. L. REV. 213, 236 (2006).

⁷⁷ See, e.g., *In re Simon II Litig.*, 407 F.3d 125, 138 (2d Cir. 2005); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 417-19 (5th Cir. 1998); *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006) (per curiam), *cert. denied*, 128 S. Ct. 96 (2007).

for damages; for example, did the defendant's alleged wrongful conduct cause the harm? In doing so, the procedure makes it very difficult, if not impossible, for defendants to receive a fair trial, and likely violates U.S. Supreme Court due process jurisprudence that requires adequate procedural safeguards against arbitrary punitive damage awards.⁷⁸

The West Virginia Supreme Court of Appeals first permitted reverse bifurcation in a 2005 case involving punitive damages, a consolidated action consisting of the personal injury claims of 1,000 individual smokers.⁷⁹ In that instance, the court answered the "narrow" question of whether a trial plan that permits a jury to decide whether the defendant is liable for punitive damages and, if so, a punitive damages multiplier, before compensatory damages was per se precluded by the U.S. Supreme Court's decision in *State Farm v. Campbell*.⁸⁰ The court found that it was not, but left "more specific issues for another day."⁸¹

Nevertheless, the West Virginia Supreme Court of Appeals refused to further examine this issue in two recent cases. In the first case, the Circuit Court of Marshall County adopted a trial plan that included reverse bifurcation in a class action in which the plaintiffs sought medical monitoring for diseases they claimed may develop in the future because of their exposure to polyacrylamide flocculants (products used to treat coal wash water at coal preparation plants).⁸² In the first phase of the plan proposed by plaintiffs and adopted wholesale by the court in *ex rel. Chemtall, Inc. v. Madden*,⁸³ the jury would consider whether a defendant's conduct warranted punitive damages and, if so, it would set a "multiplier" that the court will later apply to any medical monitoring recovery.⁸⁴ Not until the second phase of the trial would the court and jury consider class

⁷⁸ See Schwartz, *supra* note 75; Mark A. Behrens & Christopher E. Appel, "Reverse Bifurcation" *Approach to Punitive Damages Trials in West Virginia*, CLASS ACTION WATCH (Federalist Soc'y for Law & Pub. Pol. Studies), Mar. 2008, at 7.

⁷⁹ *In re Tobacco Litig.*, 624 S.E.2d 738 (W. Va. 2005). The court approved of the use of reverse bifurcation in a case not involving punitive damages in *State ex rel. Crafton v. Burnside*, 528 S.E.2d 768, 773 n.5 (W. Va. 2000), while recognizing its use as a rare and drastic technique.

⁸⁰ *In re Tobacco Litig.*, 624 S.E.2d at 741.

⁸¹ *Id.*

⁸² *State ex rel. Chemtall, Inc. v. Madden*, 655 S.E.2d 161 (W. Va. 2007), *cert. denied sub nom.*, *Chemtall Inc. v. Stern*, 128 S. Ct. 1748 (2008). The case was initially certified as a class-action lawsuit involving seven states; a decision vacated and remanded by the West Virginia Supreme Court of Appeals. See *State ex rel. Chemtall, Inc. v. Madden*, 607 S.E.2d 772, 786 (W. Va. 2004). On remand, the circuit court sidestepped the certification issue and instead proceeded by adopting a reverse bifurcation trial plan. See *generally Stern v. Chemtall Inc.*, 617 S.E.2d 876 (W. Va. 2005).

⁸³ Compare Memorandum Order at 27, *Stern v. Chemtall Inc.*, 617 S.E.2d 876 (W. Va. 2005) (No. 03-C049M) (Marshall County Cir. Ct. Jan. 9, 2007) with Plaintiffs' Proposed Case Management Order at 1, *Stern v. Chemtall, Inc.*, 617 S.E.2d 876 (W. Va. 2005) (No. 03-C049M) (Marshall County Cir. Ct. May 10, 2006).

⁸⁴ See Memorandum Order, *supra* note 83, at 27.

certification and whether the defendant is actually liable for medical monitoring.⁸⁵

In the second case, the Circuit Court for Ohio County approved a three-stage trial plan that consolidated more than 700 separate personal-injury actions brought by individual smokers against several tobacco companies.⁸⁶ In Phases I and I(A) of *Philip Morris USA v. Accord*, the jury would determine whether each defendant's conduct merits punitive damages and would set a punitive damages "multiplier" for each defendant.⁸⁷ The same jury would decide certain elements of compensatory liability based entirely on aggregate proof. In Phase II, a different jury would determine the remaining liability elements and compensatory damages. The court would then apply the Phase I multiplier to determine the amount of punitive damages owed by each defendant to each individual plaintiff.⁸⁸

In both cases, the West Virginia Supreme Court of Appeals rejected writs of prohibition and mandamus challenging the constitutionality of the trial plans.⁸⁹ Of course, a defendant facing a combination of the most expansive medical monitoring liability in the country in a class action,⁹⁰ a prejudicial reverse bifurcation procedure, and no assurance of appeal as of right is under extraordinary pressure to settle rather than roll the dice at trial. Ultimately, the U.S. Supreme Court also declined to consider either case.⁹¹

West Virginia's use of such trial court plans leaves important constitutional questions outstanding. The U.S. Supreme Court has repeatedly emphasized the importance of procedural protections for defendants as essential to sustaining a punitive damage award.⁹² A benchmark in determining whether a

⁸⁵ See *id.* at 28-29.

⁸⁶ See *Philip Morris USA v. Accord*, No. 07-806, (U.S., petition filed Dec. 17, 2007), *cert. denied*, 128 S.Ct. 1447 (U.S. Feb 25, 2008).

⁸⁷ See *id.*

⁸⁸ See *id.*

⁸⁹ See *State ex rel. Chemtall, Inc. v. Madden*, 655 S.E.2d 161, 167 (W. Va. 2007), *cert. denied sub nom.*, *Chemtall Inc. v. Stern*, 128 S. Ct. 1748 (2008); *State ex rel. Philip Morris USA v. Recht*, No. 072903 (W. Va. Nov. 7, 2007) (unreported).

⁹⁰ Initially, the trial court granted certification of a class including plaintiffs in seven states. To its credit, the West Virginia Supreme Court of Appeals vacated the seven-state class action, although it declined to require the trial court to limit members of the class to West Virginia residents. *State ex rel. Chemtall, Inc. v. Madden*, 607 S.E.2d 772 (W. Va. 2004).

⁹¹ See *Philip Morris USA v. Accord*, No. 07-806, *cert. denied*, 2008 WL 482117 (U.S. Feb 25, 2008); *State ex rel. Chemtall, Inc. v. Madden*, 655 S.E.2d 161 (W. Va. 2007), *cert. denied sub nom.*, *Chemtall Inc. v. Stern*, 128 S. Ct. 1748 (2008).

⁹² See *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1065 (2007) (finding that jury instruction did not properly cabin jury discretion and led to arbitrary punishment); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 443 (2002) (holding that review of punitive damage award must be de novo); *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 420-21 (1994) (finding unconstitutional the limited authority of Oregon appellate courts to review punitive damages awards).

court's method of calculating punitive damages violates due process is whether the court's plan departs from traditional procedures.⁹³ Using reverse bifurcation to decide punitive damages—which the West Virginia courts view as “creative, innovative” trial management⁹⁴—is assuredly not a time-tested common law procedure. Instead, reverse bifurcation “pose[s] an acute danger of arbitrary deprivation of property” and comes with “the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.”⁹⁵

Another theme of the U.S. Supreme Court's recent jurisprudence is that punitive damages may only be imposed to punish a defendant for conduct directed toward those before the court, and the harm to those parties.⁹⁶ When a jury considers punitive damages before certification of the class, and before a full determination of liability and damages, the defendant would not have “an opportunity to present every available defense” before such a decision is made.⁹⁷ Moreover, consideration of punitive damages before class certification would appear to leave the same crucial questions unanswered as in *Philip Morris USA v. Williams*: how many victims are there, how serious are their injuries, and how did their injuries occur?⁹⁸ *Williams* does not permit a jury to decide whether a defendant's conduct warrants punitive damages, and the appropriate amount or multiplier for such damages, in the absence of answers to these questions.

Campbell further illustrates the need for a punitive damage determination to focus on the defendant's conduct directed toward the individual or individuals before the court.⁹⁹ While the Court's decision was rooted in a violation of principles of federalism that would effectively allow a local court in one state to set regulatory policy in a sister state, “a more fundamental reason” for its invalidation of the award was the lack of a nexus between the punishment and the Campbells' harm.¹⁰⁰ A trial plan that provides for deciding a punitive damage “multiplier” before knowing who is before the court (prior to class certification), the extent of harm the class members experienced, and whether the defendants are responsible for their claims, is similar to the “hypothetical claim” that the U.S. Supreme Court found impermissible in *Campbell*.¹⁰¹ Determination of

⁹³ See *Oberg*, 512 U.S. at 421.

⁹⁴ *In re Tobacco Litig.*, 624 S.E.2d 738, 739 n.1 (W. Va. 2005).

⁹⁵ *Oberg*, 512 U.S. at 432.

⁹⁶ See *Williams*, 127 S. Ct. at 1063; *Campbell*, 538 U.S. at 422-23.

⁹⁷ *Williams*, 127 S. Ct. at 1063.

⁹⁸ *Id.*

⁹⁹ See generally *Campbell*, 538 U.S. 408.

¹⁰⁰ *Id.* at 422.

¹⁰¹ *Id.* at 422-23; see also *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18-20 (1991) (instructing that punitive damage awards must take into consideration “the character and degree of the wrong shown by the evidence” and be based on “a meaningful *individualized* assessment of appropriate deterrence and retribution”) (emphasis added).

whether, and to what extent, punitive damages may be awarded cannot occur in a vacuum, unanchored to any claim that has been shown to be eligible for damages, and before determination of the amount of any recovery.¹⁰² There is simply no basis for determining a proportional amount, or a multiplier, when the degree and extent of civil liability are unknown.¹⁰³ The Supreme Court's consistent refusal to adopt a "bright line" test for determining the constitutional propriety of the ratio between punitive damages and the actual or even potential damage to the plaintiff reaffirms the need for the fact finder to determine liability and economic damages before considering punitive damages.¹⁰⁴

In spite of these due process questions, West Virginia has permitted a reverse bifurcation approach to punitive damages and jeopardized defendants' right to a fair trial. While the practice thus far has only been infrequently employed, it presents yet another concrete example of the state's unique civil justice system and well-earned Judicial Hellhole distinction.

D. *West Virginia Courts Deviate from Fundamental Tort Principles*

In addition to imposing procedural disadvantages on defendants, the West Virginia Supreme Court of Appeals, year after year, has consistently abandoned fundamental tenants of tort law. Like Hubble's Law, the liability universe in West Virginia is constantly expanding.

1. Cash Awards for Medical Monitoring Without Physical Injury

In 1999, the West Virginia Supreme Court of Appeals issued a landmark opinion establishing an independent cause of action for recovery of future medical monitoring costs in the absence of physical injury.¹⁰⁵ The ramifications of *Bower v. Westinghouse* have been discussed in numerous Judicial Hellhole reports, which have characterized West Virginia's approach to medical monitoring as unique and "one-of-a-kind."¹⁰⁶ Yet, Professor Thornburg submits that "West Virginia's position on [medical monitoring] liability is completely mainstream."¹⁰⁷

As it turns out, the correct analysis depends on the level from which this position is viewed. At the 30,000 foot level, perhaps Professor Thornburg's perspective on this issue, a few other states can be seen to appear to share West

¹⁰² See *Williams*, 127 S. Ct. at 1063; *Campbell*, 538 U.S. at 422.

¹⁰³ *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580 (1996) (recognizing that the ratio between punitive damages and the actual harm inflicted on the plaintiff "[is] perhaps [the] most commonly cited indicium of an unreasonable or excessive punitive damages award").

¹⁰⁴ See *id.* at 582-83.

¹⁰⁵ *Bower v. Westinghouse*, 522 S.E.2d 424, 431 (W. Va. 1999).

¹⁰⁶ See, e.g., JUDICIAL HELLHOLES 2008/2009, *supra* note 1, at 1 (2008).

¹⁰⁷ Thornburg, *supra* note 3, at 1117.

Virginia's basic position on medical monitoring.¹⁰⁸ When more closely examined, however, West Virginia's anomalous nature becomes readily apparent. Moreover, it is this ground level that truly matters to litigants and where West Virginia's nuances yield unprecedented and controversial advantages for plaintiffs.

In *Bower*, the plaintiffs, who had no present symptoms of any disease, alleged that they were exposed to thirty toxic substances as a result of defendants maintaining a pile of debris from the manufacture of light bulbs.¹⁰⁹ The court, permitting recovery, "reject[ed] the contention that a claim for future medical expenses must rest upon the existence of present physical harm."¹¹⁰ This holding overruled two centuries of tort law that required physical injury to maintain a cause of action.¹¹¹

In addition to taking exception to fundamental tort law principles, West Virginia's high court discussed several other unconventional aspects of its newly created medical monitoring action. For example, it found that a trial court could award medical monitoring costs even if the amount of exposure to a toxic substance does not correlate with a level sufficient to cause injury¹¹² or if there is no effective treatment available for the potential disease.¹¹³ Instead, "[a]ll that must be demonstrated is that the plaintiff has a significantly increased risk of contracting a particular disease relative to what would be the case in the absence of exposure."¹¹⁴ The court's criteria state that this "significantly increased risk" must make it "reasonably necessary" to undergo medical monitoring that could allow early detection of the disease.¹¹⁵ The court explained, however, that "factors such as financial cost and the frequency of testing need not necessarily be given significant weight" in determining the reasonableness of a proposed monitoring program.¹¹⁶ The court's ruling also allowed for medical monitoring based on "the subjective desires of a plaintiff for information concerning the state of

¹⁰⁸ See D. Scott Abernethy, Note, *A Fifty-State Survey of Medical Monitoring and the Approach the Minnesota Supreme Court Should Take When Confronted with the Issue*, 32 WM. MITCHELL L. REV. 1095, 1114-16 (2006).

¹⁰⁹ See *Bower*, 522 S.E.2d at 426-27; 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, 150-54 (2008) [hereinafter *Medical Monitoring*].

¹¹⁰ *Bower*, 522 S.E.2d at 430.

¹¹¹ See *id.* at 435 (Maynard, J., dissenting); see also Victor E. Schwartz et al., *Medical Monitoring—Should Tort Law Say Yes?*, 34 WAKE FOREST L. REV. 1057, 1070-72 (1999).

¹¹² See *Bower*, 522 S.E.2d at 433 ("[T]he plaintiff is not required to show that a particular disease is certain or even likely to occur as a result of exposure.").

¹¹³ See *id.* at 433-34 ("[A] plaintiff should not be required to show that a treatment currently exists for the disease that is the subject of medical monitoring.").

¹¹⁴ *Id.* at 433 (stating that "no particular level of quantification is necessary to satisfy the ['increased risk'] requirement").

¹¹⁵ *Id.*

¹¹⁶ *Id.*

his or her health.”¹¹⁷ Finally, with regard to damages, the *Bower* court rejected the argument that any funds awarded should be awarded in a court-administered fund and instead awarded funds to plaintiffs in a lump sum.¹¹⁸

The multiple elements of *Bower* combine to form a unique approach to medical monitoring. West Virginia law allows uninjured plaintiffs to sue for medical monitoring even when testing is not medically necessary or beneficial, and permits direct monetary damages in which the plaintiff is not required to spend any of the award on medical costs. As explained in a strongly worded dissent by Justice Maynard,

[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.¹¹⁹

The respected torts scholars who served as the Reporters for the *Restatement Third, Torts: Products Liability* have further criticized *Bower*'s “superlative”-riddled criteria.¹²⁰ They note that *Bower*'s criteria “will not prevent most well-prepared cases from reaching triers of fact. There is no escaping the conclusion that defendants in these medical monitoring cases face potentially crushing liabilities.”¹²¹

In contrast, Professor Thornburg's statements regarding West Virginia's medical monitoring rely on broad and potentially misleading generalizations. In asserting that “recognition of the propriety of a medical monitoring remedy of some kind is nearly unanimous,”¹²² Professor Thornburg understates that medical monitoring absent physical injury is widely rejected by courts. She later claims that “states are split almost exactly up the middle” on whether a physical injury is required for medical monitoring,¹²³ but this too is misleading and col-

¹¹⁷ *Id.*

¹¹⁸ See *id.* at 434; see also Shannon L. Smith Wolfe, Note, *The Recovery of Medical Monitoring Costs: An Argument for the Fund Mechanism in the Wake of Bower v. Westinghouse*, 103 W. VA. L. REV. 103 (2000).

¹¹⁹ *Bower*, 522 S.E.2d at 435 (Maynard, J., dissenting).

¹²⁰ See James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. REV. 815, 845 (2002).

¹²¹ *Id.* (citations omitted).

¹²² Thornburg, *supra* note 3, at 1111.

¹²³ *Id.* at 1116.

lapses under her own numbers as the study she cites reports only fourteen states as permitting medical monitoring absent physical injury; a clear minority position.¹²⁴ Professor Thornburg also understates West Virginia's expansive rulings on medical monitoring causation and damages when conceding that "West Virginia goes farther than some other states in that it allows recovery of money damages" and that the state "supports medical monitoring even when the test results would not change the plaintiff's course of treatment or survival."¹²⁵ These are the very factors that combine to make the state's medical monitoring action unprecedented and unique.

Other courts addressing medical monitoring in the wake of *Bower* have, in growing numbers, rejected adoption of a similar approach. In fact, since 1999, seven of the eight state high courts addressing medical monitoring have expressly rejected such actions or damages absent physical injury.¹²⁶ Indeed, to its credit, the West Virginia Supreme Court of Appeals has scaled back or refused to extend its highly criticized decision in *Bower* to curb potential avenues of abuse.¹²⁷ Unfortunately, the core holdings of *Bower* remain, which have fueled West Virginia's medical monitoring litigation,¹²⁸ and contribute to the state's status as a Judicial Hellhole.

2. Wholesale Rejection of the "Learned Intermediary" Doctrine

In 2007, West Virginia made another unprecedented departure from longstanding tort law principles when it became the sole state to reject outright

¹²⁴ See *id.* at 1111 (citing *Aberson*, *supra* note 108, at 1114-16).

¹²⁵ *Id.* at 1112.

¹²⁶ See *Sinclair v. Merck & Co., Inc.*, 948 A.2d 587 (N.J. 2008); *Lowe v. Philip Morris USA, Inc.*, 183 P.3d 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, 701 (Mich. 2005); *Wood v. Wyeth-Averest Labs.*, 82 S.W.3d 849, 855 (Ky. 2002); *Badillo v. Am. Brands, Inc.*, 16 P.3d 435, 440-41 (Nev. 2001); *Hinton v. Monsanto*, 813 So. 2d 827, 829 (Ala. 2001). The lone recent exception is the Missouri Supreme Court's decision in *Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712 (Mo. 2007), which held that plaintiffs with no present physical injury may recover medical monitoring as an item of compensable damages when liability is established under a traditional tort law theory of recovery. See *Medical Monitoring*, *supra* note 109, at 135-36.

¹²⁷ See, e.g., *Carter v. Monsanto Co.*, 575 S.E.2d 342 (W. Va. 2002) (denying extension of *Bower*'s adoption of medical monitoring for individuals to environmental monitoring of real property).

¹²⁸ See, e.g., *Stern v. Chemtall, Inc.*, 617 S.E.2d 876, 887 (W. Va. 2005) (Starcher, J., concurring) (involving asymptomatic coal preparation plant workers: "we have dumped an additional pile of medical monitoring cases into the circuit judge's lap"); *In re Tobacco Litig. (Medical Monitoring Cases)*, 600 S.E.2d 188 (W. Va. 2004) (affirming verdict denying medical monitoring claim in class involving some 270,000 present and former West Virginia smokers); *State ex rel. E.I. DuPont de Nemours & Co. v. Hill*, 591 S.E.2d 318 (W. Va. 2003) (blood tests to approximately 50,000 individuals possibly exposed to material used to make fluoropolymers); *In re W. Va. Rezulin Litig.*, 585 S.E.2d 52 (W. Va. 2003) (medical monitoring class of approximately 5,000 users of prescription drug). While not all of these suits were successful, the parties were forced to incur substantial litigation costs.

the learned intermediary doctrine.¹²⁹ This doctrine generally provides that manufacturers or suppliers of prescription drugs fulfill their duty to warn consumers of the dangerous propensities of their products by conveying accurate warning information to prescribing physicians.¹³⁰ The rule is a common-sense approach which recognizes: (1) training and experience place physicians in a better position than the manufacturer to convey complex medical information and terminology to patients;¹³¹ (2) the physician has a relationship with the individual patient, making it possible to evaluate treatment needs and provide an assessment of the potential benefits and likely risks specific to the patient's medical and family history;¹³² and (3) it is more effective and efficient for manufacturers to provide a common set of warnings to an intermediary with more definable knowledge and skill characteristics than to a broad spectrum of consumers.¹³³ Nevertheless, in *State ex rel. Johnson & Johnson Corp. v. Karl*, the West Virginia Supreme Court of Appeals found the "justifications for the learned intermediary doctrine to be largely outdated and unpersuasive."¹³⁴

Karl was a case of first impression for the West Virginia high court, which is unlike most other state jurisdictions where the doctrine is well-

¹²⁹ See Victor E. Schwartz et al., *Marketing Pharmaceutical Products in the Twenty-First Century: An Analysis of the Continued Viability of Traditional Principles of Law in the Age of Direct-to-Consumer Advertising*, 32 HARV. J.L. & PUB. POL'Y 333 (2009) (providing an in-depth discussion of the history and development of the learned intermediary doctrine and its limited exceptions) [hereinafter Schwartz, *Continued Viability*].

¹³⁰ See RESTATEMENT, (THIRD) OF TORTS: PRODUCTS LIABILITY § 6 (1998); see also Diane Schmauder Kane, *Construction and Application of the Learned Intermediary Doctrine*, 57 A.L.R. 5th 1 (1998).

¹³¹ "Prescription drugs are likely to be complex medicines, esoteric in formula and varied in effect. As a medical expert, the prescribing physician can take into account the propensities of the drug, as well as the susceptibilities of his patient. His is the task of weighing the benefits of any medication against its potential dangers. The choice he makes is an informed one, an individualized medical judgment bottomed on a knowledge of both patient and palliative." *Reyes v. Wyeth Labs.*, 498 F.2d 1264, 1276 (5th Cir. 1974), cert. denied, 419 U.S. 1096 (1974); see also *West v. Searle & Co.*, 806 S.W.2d 608, 613-14 (Ark. 1991) (concluding that health care providers are the best assessor of relevant risks and benefits of a treatment course), appeal on remand, 879 S.W.2d 412 (Ark. 1994); *In re Zyprexa Products Liab. Litig.*, 489 F. Supp.2d 230 (E.D.N.Y. 2007) (recognizing that whether the physician in fact reads drug manufacturer's warning, or passes its contents along to recipient of drug, is irrelevant for purposes of learned intermediary doctrine).

¹³² "[O]nly health care professionals are in a position to understand the significance of the risks involved and to assess the relative advantages and disadvantages of a given form of prescription-based therapy." RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 6 cmt. b (1998). See also Barbara Flannagan, *Products Liability: The Continued Viability of the Learned Intermediary Rule as it Applies to Product Warnings for Prescription Drugs*, 20 U. RICH. L. REV. 405, 412 (1986).

¹³³ See *Vitanza v. Upjohn Co.*, 778 A.2d 829, 846 (Conn. 2001) (acknowledging that a physician "is in the best position to convey adequate warnings based upon the highly personal doctor-patient relationship"); *West*, 806 S.W.2d at 613 (listing common rationales supporting the doctrine); *Terhune v. A.H. Robins Co.*, 577 P.2d 975, 978 (Wash. 1978) ("The reasons for this rule should be obvious.").

¹³⁴ *State ex rel. Johnson & Johnson Corp. v. Karl*, 647 S.E.2d 899, 906 (W. Va. 2007).

settled.¹³⁵ The court grounded its holding on the influence of direct-to-consumer (“DTC”) marketing of pharmaceuticals, even though the patient, who had died just days after meeting with her primary care physician, was prescribed medication through traditional means.¹³⁶ The court stated that the “Norman Rockwell image of the family doctor no longer exists”¹³⁷ and the physician/patient relationship is transformed such that “all of [the doctrine’s] premises are absent.”¹³⁸ While the court acknowledged the “widely accepted” nature of the learned intermediary doctrine and that four state supreme courts adopted the doctrine during the previous decade in which DTC advertising proliferated, it found that other courts did not adequately consider changes occurring in the pharmaceutical industry.¹³⁹ As Justice Joseph P. Albright, who recently passed away, wrote in dissent, “By attaching undue importance to the effects of direct marketing, the majority downplays the continuing and vital role that a physician plays in the decision as to which prescription drugs are appropriate for a given patient based upon that particular individual’s specific medical needs.”¹⁴⁰

The majority in *Karl* also found the traditional exceptions to the learned intermediary doctrine unwieldy, stating, “Given the plethora of exceptions to the learned intermediary doctrine, we ascertain no benefit in adopting a doctrine that would require the simultaneous adoption of numerous exceptions in order to be justly utilized.”¹⁴¹ In fact, courts have recognized only three narrow exceptions for mass immunizations,¹⁴² prescription contraceptives (which only a minority of courts follow),¹⁴³ and the uncommon situation where the FDA explic-

¹³⁵ See *id.* at 902.

¹³⁶ See *id.* at 901.

¹³⁷ *Id.* at 910 (quoting Noah Lars, *Advertising Prescription Drugs to Consumers: Assessing the Regulatory and Liability Issues*, 32 GA. L. REV. 141, 180 n. 78 (1997)).

¹³⁸ *Id.* at 907-08 (quoting *Perez v. Wyeth Lab., Inc.*, 734 A.2d 1245, 1256 (N.J. 1999)).

¹³⁹ *Id.* at 908-09.

¹⁴⁰ *Id.* at 917 (Albright, J., dissenting).

¹⁴¹ *Id.* at 913.

¹⁴² See, e.g., *Mazur v. Merck & Co., Inc.*, 964 F.2d 1348, 1355 (3d Cir. 1992) (applying mass immunization exception to the learned intermediary doctrine in an action brought against the manufacturer of a measles, mumps, and rubella vaccine); *Brazzell v. United States*, 788 F.2d 1352, 1357-58 (8th Cir. 1986) (swine flu vaccine). The most common example of the mass immunization exception has occurred with polio vaccines. See, e.g., *Plummer v. Lederle Lab.*, 819 F.2d 349, 356 (2d Cir. 1987) *cert. denied*, 484 U.S. 898 (1987); *Givens v. Lederle*, 556 F.2d 1341, 1345 (5th Cir. 1977); *Reyes v. Wyeth Labs.*, 498 F.2d 1264, 1276 (5th Cir. 1974), *cert. denied*, 419 U.S. 1096 (1974); *Davis v. Wyeth Labs., Inc.*, 399 F.2d 121, 131 (9th Cir. 1968); see also *Brooks v. Medtronic, Inc.*, 750 F.2d 1227, 1232 (4th Cir. 1984) (“[T]he exception established for the [vaccine] cases is quite narrow and highly fact specific.”) (quoting *Stanback v. Parke-Davis & Co.*, 657 F.2d 642, 647 (4th Cir. 1981)).

¹⁴³ See, e.g., *MacDonald v. Ortho Pharm. Corp.*, 475 N.E.2d 65, 69-70 (Mass. 1985), *cert. denied*, 474 U.S. 920 (1985); *Odgers v. Ortho Pharm. Corp.*, 609 F. Supp. 867, 873-75 (D.C. Mich. 1985); *Stephens v. G.D. Searle & Co.*, 602 F. Supp. 379, 380-81 (E.D. Mich. 1985); *Lukaszewicz v. Ortho Pharm. Corp.*, 510 F. Supp. 961, 964-65 (E.D. Wis.), *opinion amended on other grounds*, 532 F. Supp. 211 (E.D. Wis. 1981). There is considerable judicial disagreement over the merits of

itly requires a direct-to-consumer warning.¹⁴⁴ Based on this dubious reasoning, the court concluded that the learned intermediary doctrine did not apply in West Virginia. Pharmaceutical manufacturers therefore may not rely upon physicians to transmit drug information to patients in West Virginia and are exposed to greater liability than in other states with respect to failure to warn claims.

West Virginia stands alone in completely rejecting the learned intermediary doctrine.¹⁴⁵ The closest comparison is New Jersey, which has formally adopted the learned intermediary rule, but applies a unique exception when the medication at issue was advertised directly to consumers.¹⁴⁶ *Karl*, however, drastically expands such reasoning, placing West Virginia firmly at odds with fundamental tort principles expressed in the Second and Third Restatements,¹⁴⁷ sound public policy, and the clear trend in other states toward expansion of the learned intermediary doctrine beyond pharmaceuticals.¹⁴⁸ Professor Thorn-

allowing an exception for oral contraceptives. *See, e.g.,* *Martin v. Ortho Pharm. Corp.*, 661 N.E.2d 352, 357 (Ill. 1996) (learned intermediary doctrine relieved manufacturer of duty to warn consumers that its contraceptives could cause physical deformities in the children of mothers who ingested it during pregnancy); *Reaves v. Ortho Pharm. Corp.*, 765 F. Supp. 1287, 1291 (W.D. Mich. 1991) (holding the learned intermediary doctrine applicable in cases involving oral contraceptives because they did not significantly differ from other prescription drugs); *McEwen v. Ortho Pharm. Corp.*, 528 P.2d 522 (Or. 1974) (same for contraceptive warnings related to circulatory and visual damage).

¹⁴⁴ *See* *Edwards v. Basel Pharmaceuticals*, 933 P.2d 298, 301 (Okla. 1997) (holding mandated FDA direct-to-consumer warnings on prescription nicotine patches provided exception to the learned intermediary doctrine).

¹⁴⁵ *See* *Schwartz, Continued Viability*, *supra* note 129.

¹⁴⁶ *See* *Perez v. Wyeth Lab., Inc.*, 734 A.2d 1245, 1251 (N.J. 1999). Importantly, in the decade following the New Jersey Supreme Court's decision in *Perez*, no other state high court has followed suit. *See In re Meridia Prods. Liab. Litig.*, 328 F. Supp. 2d 791, 812 n.19 (N.D. Ohio 2004) ("In the intervening period [after *Perez*], no other state has followed New Jersey's lead."); *see also* Corey Schaecher, "Ask Your Doctor if This Product is Right for You": *Perez v. Wyeth Laboratories, Inc., Direct-to-Consumer Advertising and the Future of the Learned Intermediary Doctrine in the Face of the Flood of Vioxx® Claims*, 26 ST. LOUIS U. PUB. L. REV. 421 (2007).

¹⁴⁷ *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 6 (1998); RESTATEMENT (SECOND) OF TORTS § 388 cmt. n (1965) ("Modern life would be intolerable unless one were permitted to rely to a certain extent on others' doing what they normally do, particularly if it is their duty to do so.").

¹⁴⁸ *See, e.g.,* *Smith v. Walter C. Best, Inc.*, 927 F.2d 736, 739 (3rd Cir. 1990) (using the term "knowledgeable purchaser"); *Phillips v. A.P. Green Refractories Corp.*, 630 A.2d 874, 883 (Pa. Super. Ct. 1993) (same); *Higgins v. E.I. DuPont de Nemours, Inc.*, 671 F. Supp. 1055, 1061 (D. Md. 1987) ("knowledgeable industrial purchaser"); *see also* Victor Schwartz & Christopher Appel, *Effective Communication of Warnings in the Workplace: Avoiding Injuries in Working with Industrial Materials*, 73 MO. L. REV. 1 (2008) (discussing the parallels and doctrinal interplay of the learned intermediary rule with the sophisticated user doctrine in the case of industrial materials); Carole Cheney, *Not Just For Doctors: Applying the Learned Intermediary Doctrine to the Relationship Between Chemical Manufacturers, Industrial Employers, and Employees*, 85 NW. U. L. REV. 562, 575 (1991); Keith Laughery, *Warnings in the Workplace: Expanding the Learned Intermediary Rule to Include Employers in the Context of Product Manufacture/Employer/Employee Relationship*, 46 S. TEX. L. REV. 627, 633 (2005).

burg's article, in comparison, provides no discussion nor even mentions the *Karl* decision or its impact on West Virginia. The Judicial Hellhole reports have brought to light the denial of this almost universally accepted tort rule and its impact on pharmaceutical litigation in West Virginia.¹⁴⁹

3. Circumventing the Workers' Compensation System

Workers' compensation is rooted in a trade-off in which employers accept vicarious liability for work-related injuries and forfeit all traditional defenses while employees waive traditional tort remedies in exchange for a system of compensation without consideration of fault or the cost and delay of litigation.¹⁵⁰ In other words, ordinary negligence actions go through the workers' compensation system. Intentional torts, for example, a boss punching his or her employee in the face, fall outside the workers' compensation system and may be brought as a tort action. In West Virginia, however, the judiciary has opened and reopened a loophole that allows employees to circumvent the no-fault system and routinely bring tort lawsuits for actions that do not approach an intentional or malicious act.

In 1978, the West Virginia Supreme Court of Appeals opened the floodgates with *Mandolidis v. Elkins Industries, Inc.*, when it ruled that an employee could show the "willful, wanton, and reckless conduct" necessary to bypass the workers' compensation system through evidence that his or her employer had a "subjective realization of the risk of bodily injury created by the activity."¹⁵¹ The Court found that "deliberate intent" does not actually mean intentional or deliberate, but knowledge of a higher degree of risk of physical harm than ordinary negligence, which a plaintiff may show through circumstantial evidence, such as knowledge of federal or state safety standards.¹⁵² For West Virginia employers, "Mandolidis" became synonymous for "lawsuits."¹⁵³ The decision was controversial and rejected by most other jurisdictions.¹⁵⁴

Following the *Mandolidis* decision, the West Virginia Legislature, seeking to reduce the subjectivity of the Court's deliberate intent standard and in-

¹⁴⁹ See AMERICAN TORT REFORM FOUND., JUDICIAL HELLHOLES 12 (2007).

¹⁵⁰ See Robin Jean Davis & Louis J. Palmer, Jr., *Workers' Compensation Litigation in West Virginia: Assessing the Impact of the Rule of Liberality and the Need for Fiscal Reform*, 107 W. VA. L. REV. 43, 45-60 (2004) (examining the purpose of workers' compensation laws and the history of their adoption and enactment in West Virginia).

¹⁵¹ *Mandolidis v. Elkins Indus., Inc.*, 246 S.E.2d 907, 913 (W. Va. 1978).

¹⁵² See *id.* at 914 n.10.

¹⁵³ See Juliet A. Terry, *To Employers, 'Mandolidis' is a Code Word for Lawsuits*, STATE J. (W. Va.), May 28, 2003, available at <http://www.statejournal.com/story.cfm?func=viewstory&storyid=2202> [hereinafter Terry].

¹⁵⁴ See MARK A. ROTHSTEIN, ACTIONS AGAINST EMPLOYERS—WILLFUL AND INTENTIONAL ACTS, OCCUPATIONAL SAFETY AND HEALTH LAW § 21:5 (2008 ed.) (noting that *Mandolidis* was expressly followed only in Ohio despite attempts at adoption in other states).

crease the predictability that is the purpose underlying workers' compensation, codified the exception.¹⁵⁵ The amendment required plaintiffs to prove each element of a five-factor test to establish deliberate intent.¹⁵⁶ Justice Workman recognized that the legislature amended the statute "in an attempt to make it more difficult for an employer to lose the immunity provided to him by the Workers' Compensation Act."¹⁵⁷ Nevertheless, in a decision seven years later, Justice Workman found that "[i]n an amazing irony, the Legislature in seeking to tighten the claim, actually broadened it."¹⁵⁸ Some court decisions following the 1983 codification minimized the plaintiffs' burden to meet the subjective realization element¹⁵⁹ and limited available defenses.¹⁶⁰ The court also found that an employer may lose its immunity by violating a general safety regulation, despite clear statutory language requiring a *specific* unsafe working condition that violates a safety statute, rule or regulation.¹⁶¹ In other cases, the high court maintained the employer's immunity against a deliberate intent challenge,¹⁶² yet such litigation defeats the purpose of the no-fault workers' compensation system as it imposes substantial costs on the employer.

That West Virginia's exception, as interpreted by the judiciary, is outside the mainstream is recognized by lawyers on both sides. As one West Vir-

¹⁵⁵ See W. VA. CODE § 23-4-2(c) (1983 amendment); see also ROTHSTEIN, *supra* note 154 (noting that the Legislature amended the statute to restrict the types of cases that can be brought under the deliberate intent exception and to preclude punitive damage awards).

¹⁵⁶ See W. VA. CODE § 23-4-2(d)(2)(ii)(A)-(E) (2003). The test requires a plaintiff to show: (A) a specific unsafe working condition existed in the workplace that presented a high degree of risk and strong probability of serious injury or death; (B) the employer had a subjective realization and appreciation of the existence of such specific unsafe working condition and the high degree of risk; (C) the specific unsafe working condition was a violation of a state or federal statute, rule or regulation, or a commonly accepted and well known safety standard within the industry; (D) the employer nevertheless exposed the employee to the specific unsafe working condition intentionally; and, (E) the employee so exposed suffered serious injury or death as a direct and proximate result of such specific unsafe working condition. *Id.*

¹⁵⁷ *Mayles v. Shoney's, Inc.*, 405 S.E. 2d 15, 19 (W. Va. 1990).

¹⁵⁸ *Blake v. John Skidmore Truck Stop, Inc.*, 493 S.E.2d 887, 892 (W. Va. 1997). Justice Maynard, dissenting, took issue with this characterization finding that "the Legislature did, in fact, narrow liability. . . ." *Id.* at 898 n.1.

¹⁵⁹ See, e.g., *Ryan v. Clonch Indus., Inc.*, 639 S.E.2d 756, 766 (W. Va. 2006); *Nutter v. Owens-Illinois, Inc.*, 550 S.E.2d 398 (W. Va. 2001); *Costilow v. Elkay Min. Co.*, 488 S.E.2d 406 (W. Va. 1997); *Blake*, 493 S.E.2d 887.

¹⁶⁰ See, e.g., *Roberts v. Consolidation Coal Co.*, 539 S.E.2d 478 (W. Va. 2000) (holding that employers cannot present evidence that is critical of the workers' conduct).

¹⁶¹ See *Ryan*, 639 S.E.2d at 766 (holding that plaintiff established deliberate intent by showing violation of Occupational Health and Safety Regulation requiring employer conduct a hazard assessment in the workplace in order to identify the need for use of personal protective equipment); see also *id.* at 767 (Benjamin, J., dissenting) (finding that the "majority contravenes clear legislative intent by deeming a general safety regulation sufficient to satisfy the statutory specificity requirement of a deliberate intent cause of action").

¹⁶² See, e.g., *Sedgmer v. McElroy Coal Co.*, 640 S.E.2d 129 (W. Va. 2006); *Marcus v. Holley*, 618 S.E.2d 517 (W. Va. 2005); *Deskins v. S.W. Jack Drilling Co.*, 600 S.E.2d 237 (W. Va. 2004).

ginia defense lawyer noted, “our state Supreme Court has continually interpreted the exception liberally in favor of finding liability at nearly every opportunity.”¹⁶³ Personal injury lawyers take full advantage of the broad exception. As one West Virginia plaintiffs’ law firm advertised on the internet:

West Virginia law, like the law of other jurisdictions, provides that a worker who is injured on the job and uses Workers’ Compensation benefits may not also sue his employer in the regular court system, because that employer is granted immunity. However, in West Virginia unlike most other jurisdictions, there is an exception by which an employee may, in certain limited circumstances, avoid the Workers’ Compensation immunity and pursue a claim against the employer for damages over and above the limited benefits available under the Workers’ Compensation system.¹⁶⁴

The ability to sue an employer in tort under West Virginia’s broad exception may be the reason why some plaintiffs attempt to bring workers’ compensation claims in West Virginia rather than their home state when there is only a fleeting connection to the state.¹⁶⁵

According to West Virginia University economics professor Russell S. Sobel, such decisions have a negative impact on the state’s business climate.¹⁶⁶ As one corporate executive recognized, workers’ compensation “is a unique animal in West Virginia. Even with workers’ comp., employers are still getting sued all the time.”¹⁶⁷

For these reasons, the West Virginia Legislature again intervened in 2005. It did so by striking statutory language requiring an employer to have a “subjective realization and an appreciation” of the specific unsafe condition and

¹⁶³ Brian Peterson’s West Virginia Weblog, *Deliberate Intent—The Narrow Exception You Can Drive a Truck Through*, Dec. 27, 2006, available at <http://legalweblog.blogspot.com/2006/12/deliberate-intent-narrow-exception-you.html> (commenting on *Ryan*, 639 S.E.2d 756) (author is a partner in the law firm of Bowles Rice McDavid Graff & Love LLP in the Martinsburg, West Virginia office whose practice includes employment law) (last visited Apr. 10, 2009).

¹⁶⁴ Kaufman & Bowen, PLLC, *Workplace Injuries*, available at <http://www.wvattorneys.com/PracticeAreas/Workplace-Injuries.asp> (last visited Apr. 10, 2009).

¹⁶⁵ See, e.g., *McGilton v. U.S. Xpress Enters., Inc.*, 591 S.E.2d 158 (W. Va. 2003) (affirming dismissal of interstate truck driver’s action pursuant to West Virginia deliberate intent exception because he was not regularly employed in West Virginia, and finding that the law of Tennessee or Texas, which did not provide for such an action, applied).

¹⁶⁶ See Kristen M. Leddy et al., *Should We Keep This Court?: An Economic Examination of Recent Decisions Made by the West Virginia Supreme Court of Appeals*, THE FEDERALIST SOCIETY FOR LAW AND PUBLIC POLICY STUDIES (2008), at http://www.fed-soc.org/publications/pubid.1160/pub_detail.asp (last visited Apr. 10, 2009).

¹⁶⁷ Terry, *supra* note 153 (quoting John Snider, former Director of the West Virginia Development Office and Vice President of External Affairs for Arch Coal, Inc.).

replacing it with language that requires that the employer, “prior to the injury, [have] actual knowledge” of the specific unsafe condition.¹⁶⁸ It remains to be seen as to whether this change will reduce attempts to evade the workers’ compensation system in West Virginia or whether the highest court will once again stunt the intent of the legislature.¹⁶⁹

III. WEST VIRGINIA’S PROBLEMS EXTEND BEYOND THE COURTROOM

A discussion and explanation of West Virginia’s status as a Judicial Hellhole is not complete without addressing the state’s legal environment outside of the courtroom. Relationships between the plaintiffs’ bar and key figures in the state’s executive and judicial branches, which have been an area of focus in each of the last six Judicial Hellholes reports, have fostered an inhospitable environment for corporate defendants and, at times, the appearance of impropriety.

One of most controversial public figures in West Virginia its Attorney General, Darrell McGraw, who routinely deputizes private lawyers on a contingency fee basis to pursue litigation on behalf of the state. This practice raises serious ethical and constitutional concerns because the primary incentive of the contingency fee attorney is to maximize the dollar amount of any recovery,¹⁷⁰ a profit-seeking motive that is not always in step with the public’s interest in assuring justice.¹⁷¹ In addition, the state may lack sufficient control over the litigation and in the accountability of the outsourced attorneys, leading to outcomes that are not in the state’s best interests.¹⁷² Further, the sharing of any funds awarded to the state with outside parties may violate constitutional separation of powers principles.¹⁷³ For such reasons, the government’s practice of hiring pri-

¹⁶⁸ S.B. 744 (W. Va. 2005) (codified at W. VA. CODE § 23-4-2(d)(2)(ii)(B)).

¹⁶⁹ *See id.* (applying amendment to all injuries occurring and all actions filed on or after July 1, 2005).

¹⁷⁰ *See* David A. Dana, *Public Interest and Private Lawyers: Toward a Normative Evaluation of Parens Patriae Litigation by Contingency Fee*, 51 DEPAUL L. REV. 315, 324-25 (2001); *see, e.g.,* Lewis v. Casey, 518 U.S. 343, 374 n.4 (1996) (noting that “the promise of a contingency fee should also provide sufficient incentive for counsel”).

¹⁷¹ *See* Brady v. Maryland, 373 U.S. 83, 88 n.2 (1963) (“[T]he Government wins its point when justice is done in its courts.”); Berger v. United States, 295 U.S. 78, 88 (1935) (stating that attorneys representing governments are “the representative[s] not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all”).

¹⁷² *See* State v. Lead Indus. Ass’n, 951 A.2d 428, 468-80 (R.I. 2008) (finding state use of contingency fee agreement permissible so long as the Attorney General has “absolute and total control over all critical decision-making,” including veto power over any decision made by outside counsel and a senior government attorney personally involved in all stages of the litigation, and appear to the public to be exercising such control).

¹⁷³ *See* Meredith v. Ieyoub, 700 So. 2d 478, 481 (La. 1997) (“[U]nless the Attorney General has been expressly granted the power in the constitution to pay outside counsel contingency fees from state funds, or the Legislature has enacted such a statute, then he has no such power.”). *But see*

vate contingency fee attorneys has been heavily criticized,¹⁷⁴ and expressly curtailed by numerous state legislatures.¹⁷⁵ Yet, in West Virginia, there are no restrictions on this practice, and the Attorney General has hired private attorneys to act as “special assistant attorneys general” in dozens of cases.¹⁷⁶

Equally as troubling as Attorney General McGraw’s decision to employ private contingency fee attorneys is the manner in which he selects the private firms to pursue public litigation. McGraw does not provide an open and competitive bidding process to select law firms, opting instead to base the decision on personal preferences.¹⁷⁷ Such a selection process not only risks depriving the state of the best possible use of taxpayer dollars, but is prone to a perception of unfairness and cronyism. The process at least presents the appearance of impropriety for the public office, especially where the firms selected happen to be large donors to the Attorney General’s re-election campaigns. For example, in a 2001 lawsuit brought on behalf of the state against Purdue Pharma, the maker of OxyContin, the four private firms hired by McGraw to handle the litigation split \$3.3 million of a \$10 million settlement, and those same firms had contributed tens of thousands of dollars to McGraw’s re-election campaigns.¹⁷⁸

As other cases further illustrate, these no-bid government contracts for legal services prove extremely lucrative for the private firms able to secure them. For example, McGraw paid out approximately \$33.5 million to private

State v. Hagerty, 580 N.W.2d 139, 148 (N.D. 1998); Philip Morris Inc. v. Glendening, 709 A.2d 1230 (Md. 1998).

¹⁷⁴ See, e.g., Exec. Order 13,433, “Protecting American Taxpayers from Payment of Contingency Fees,” 72 Fed. Reg. 28,441 (daily ed., May 16, 2007) (“[T]he policy of the United States that organization or individuals that provide such services to or on behalf of the United States shall be compensated in amounts that are reasonable, not contingent upon the outcome of litigation or other proceedings, and established according to criteria set in advance of performance of the services, except when otherwise required by law.”); Dana, *supra* note 170, at 320 (“[t]he most persuasive explanation for why AGs would retain contingency fee counsel is that the AGs perceive a need to bypass state legislatures.”).

¹⁷⁵ Several states have enacted specific legislation, such as the Private Attorney Retention Sunshine Act (PARSA), limiting or discouraging attorney general use of contingency fee lawyers. See COLO. REV. STAT. §§ 13-17-301 to 13-17-304; 2005 CONN. PUB. ACT. 3 § 104; KAN. STAT. ANN. § 75-37,135; MINN. STAT. § 8.065; N.D. CENT. CODE § 54-12-08.1; TEX. GOV’T. CODE § 2254.103; VA. CODE ANN. § 2.2-510.1.

¹⁷⁶ *AG’s Practices Questioned by House Committee*, W. VA. REC., Feb. 2, 2007 (reporting that in the last three years West Virginia Attorney General McGraw used private contingency fee attorneys in over twenty-five cases).

¹⁷⁷ See West Virginia Citizens Against Lawsuit Abuse, *Special Report: Flaunting Laws You Are Charged to Protect—A Critical Look at Fourteen Years in the Office of Attorney General Darrell McGraw* 7 (June 2007), available at <http://www.wvrecord.com/content/img/f196361/CALAreport.pdf> (last visited Apr. 10, 2009) [hereinafter CALA Report].

¹⁷⁸ See *id.* at 2; see also Watching West Virginia: Businesses Look at Litigation Climate and Leave the Mountain State, Update 6, Oct. 2008, at http://www.triallawyersinc.com/updates/tli_update_wviregina_1008.html (last visited Apr. 10, 2009) [hereinafter Watching West Virginia].

attorneys from West Virginia's share of the landmark 1998 tobacco settlement with forty-six states.¹⁷⁹ McGraw's own department kept just \$714,635 in fees.¹⁸⁰ In another case, McGraw's office settled with credit card companies MasterCard and Visa for \$11.6 million, and two West Virginia attorneys who contributed to the Attorney General's election campaign stand to collect \$3.9 million in fees.¹⁸¹ The public, in comparison, received a sales tax "holiday" on large appliances under the settlement, which kept voters happy in addition to drawing their attention away from the contingency fee attorneys' take.

Such cases are not atypical. They are part of a strategy in which Attorney General McGraw has sponsored private attorney actions against unpopular defendants where voter support is more favorable, and used contributions from the law firms he has selected to advance the litigation to help fund his continued stay in office.¹⁸² Plaintiffs' attorneys get richer, and the public receives less, but enough to remain satisfied. This strategy has proved very effective as McGraw was recently re-elected to an unprecedented fifth term. Over this time, the Attorney General's symbiotic relationship with the plaintiffs' bar has only grown more entrenched.

McGraw's family relationships also add to the aura of impropriety throughout West Virginia's civil justice system. The Attorney General's brother Warren McGraw is a former West Virginia Supreme Court of Appeals Justice who presided over cases for six years while Attorney General McGraw was in office. While serving on the state's five member high court, Warren McGraw helped make up the narrow majority in key cases, such as the *Bower* decision allowing a medical monitoring cause of action absent the showing of physical injury.¹⁸³ Further, Warren McGraw's son is a plaintiffs' lawyer who brought several medical monitoring cases with claims in the billions of dollars after his father authored the decision directly impacting those claims.¹⁸⁴ Such conflicts ultimately paved the way for Warren McGraw to be voted out of office in 2004

¹⁷⁹ See CALA Report, *supra* note 177, at 6.; see also Sam Trnum, *Lawyer Receives \$3.85 Million; Attorney Was Only Briefly Involved in Tobacco Lawsuit*, CHARLESTON DAILY MAIL, June 27, 2002, at 1A.

¹⁸⁰ See Cheryl Carlson, Editorial, *Our Grievances Pay Handsomely: Lawyer's Speaking on Citizens' Behalf Got \$33.5 Million?*, CHARLESTON DAILY MAIL, July 10, 2002, at A5.

¹⁸¹ The resolution of the fee award is pending at the time of this publication. See Jessica Legge, *Group Questions Legal Arrangements Following Visa/MasterCard Settlement*, TIMES WEST VIRGINIAN, Aug. 2, 2008, at 2008 WLNR 16183909; see also Mike Meyer, *McGraw Trying to Divert Attention*, INTELLIGENCER: WHEELING NEWS REGISTER, Aug. 23, 2008, available at <http://theintelligencer.net/page/content.detail/id/513391.html?nav=509&showlayout=0> (last visited Apr. 10, 2009).

¹⁸² See *Watching West Virginia*, *supra* note 178.

¹⁸³ See *supra* Part II.C.1.

¹⁸⁴ See Robert D. Mauk, *McGraw Ruling Harms State's Reputation in Law, Medical Monitoring*, CHARLESTON DAILY MAIL, Mar. 1, 2003, at A5.

despite his having amassed, similar to his brother, \$2.5 million in campaign donations from plaintiffs' attorneys.¹⁸⁵

The appearance of improper activities and favoritism surrounding the state's chief law enforcement official does not end there. In receiving the proceeds from settlements or judgments awarded to the state, Attorney General McGraw has unilaterally distributed the state's recovery not just to private plaintiffs' lawyers, but to entities and causes reflecting his personal preferences. For example, following the \$10 million settlement with Purdue Pharma discussed above, McGraw distributed a third of the money to the outside counsel who worked on the case, a portion to state agencies, and the balance to institutions and projects of his choosing however unrelated to the case. The University of Charleston, for instance, received \$500,000 for a new pharmacy school.¹⁸⁶ While such action may promote the Attorney General's status among the voting public, it usurps the role of the West Virginia legislature in allocating state funds and raises a serious constitutional separation of powers question.¹⁸⁷

The fact that McGraw has not so much as received a reprimand for operating in this manner, illustrates just how disturbing West Virginia's legal environment is outside of the courtroom. These externalities represent very real and longstanding issues for civil defendants conducting business in the state, and contribute an important piece of West Virginia's persistent Judicial Hellhole reputation.

IV. CONCLUSION

The combination of West Virginia's lack of appellate review, procedural disadvantages imposed on defendants, deviation from fundamental tort law principles, and the operations of its state officials, particularly the Attorney General, demonstrate that West Virginia maintains a uniquely unfavorable legal environment for businesses and other civil defendants. The Judicial Hellholes reports have attempted to shine the spotlight on these factors and others, which have earned West Virginia a reputation as one of the most undesirable jurisdictions in the country to face a lawsuit. But all is not lost. Other jurisdictions have, through a variety of judicial actions, legislative reforms, or other corrective measures, improved fairness in litigation, and have shed their negative reputation. Jurisdictions in Mississippi, Louisiana and Texas provide just a few examples. Even Madison County, Illinois, twice named as the nation's Number One Judicial Hellhole, has turned the corner and is now closer than ever to becoming a success story.

¹⁸⁵ See Bill Bissett, Editorial, *Plaintiffs' Lawyers Were Spending, Too; They Put More Than \$2.5 Million into Court Contest*, CHARLESTON DAILY MAIL, Dec. 29, 2004, at 4A.

¹⁸⁶ See Editorial, *AG's Gone Wild*, WALL ST. J., Nov. 13, 2007, at A24.

¹⁸⁷ See Phil Kabler, *Legislative Audit Questions Attorney General's Authority*, CHARLESTON GAZETTE, Jan. 8, 2002, at 5A (citing "constitutional requirement that the Legislature appropriate state funds").

West Virginia could follow a similar path, but it will require a comprehensive effort on multiple fronts, and will likely not occur overnight.