

MODERN PRODUCTS LIABILITY LAW IN WEST VIRGINIA

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I. INTRODUCTION

A. *The Importance of Modern Products Liability Law*

Over the last two decades, due to our State's aggressive and capable plaintiffs' bar, West Virginia has often been at the forefront of products liability litigation. For example, just in relation to the pharmaceutical industry, West Virginia has experienced major litigation in the last two decades concerning prescription medications (Fen-phen, Vioxx, Risperdal, Lotronex, Digitek, Baycol, Rezulin, Paxil, Propulsid), breast implants, orthopedic implants, contraceptives, hormone therapy, transdermal patches, surgical sutures, and vaccines. Obviously, products liability is an exceptionally important area of the law in this state. And, due to the fact there has been substantial tort reform in other areas, such as medical malpractice and insurance bad faith litigation, but *not* in relation to products liability suits, we predict that the volume of products liability litigation will continue to increase.

B. *Purpose and Scope of this Article*

Despite the centrality of products liability litigation to West Virginia's jurisprudence, there is a dearth of resources for lawyers who practice in this field. The purpose of this Article is to assist lawyers litigating products liability cases in state and federal courts in West Virginia by (1) setting forth West Virginia's substantive law governing products liability actions (Parts II-VII), (2) collating and analyzing the leading products opinions that apply West Virginia's substantive law (throughout), and (3) identifying issues that commonly arise in the prosecution and defense of these cases (Part VIII).

We begin with two disclosures. First, we are trial lawyers, not scholars; thus, we have relied heavily on the work of actual scholars, particularly Professor David G. Owen's *Products Liability Law*.¹ Although we have acknowledged the direct quotations or references to Professor David G. Owen's hornbook, *Products Liability Law*, that alone does not reflect this Article's substantial reliance on his work. Second, we defend rather than prosecute products liability cases. That said, we have tried to state what the law is rather than advocate what we think it should be.

¹ DAVID G. OWEN, *PRODUCTS LIABILITY LAW* (2d ed. 2008).

C. Morningstar v. Black & Decker Mfg. Co.

Modern products liability law in West Virginia began in 1979 with the West Virginia Supreme Court of Appeal's decision in *Morningstar v. Black & Decker Mfg. Co.*² The core principles of *Morningstar* are the following: (1) a product is defective unless it is "reasonably safe" for its "intended use;"³ and (2) there are three principal theories of defect, i.e., a product may be defective due to a defect in its design, manufacture, or "use" (warnings).⁴

Although decided more than three decades ago, *Morningstar* remains the most important West Virginia products liability case, and, therefore, it is necessary to review its holdings in detail.

Mrs. Morningstar's husband was injured when the safety guard failed to close on his Black & Decker saw.⁵ She sued, claiming a loss of consortium, and the district court sought clarification from the West Virginia Supreme Court of Appeals certifying the following question:

[W]hether or to what extent a third party, who has not contracted to buy the product, can recover for personal injuries occasioned by the product from the seller or manufacturer of the product in a tort action. This discussion assumes the injured party has no contract with the seller or manufacturer, and therefore enjoys no "privity" of contract.⁶

Thus, the case squarely presented the issue of whether privity of contract was a potential defense in West Virginia.

The West Virginia Supreme Court of Appeals, after disposing of several procedural points, weighed the merits of three competing approaches to products liability law: (1) section 402A of the *Restatement (Second) of Torts*, (2) Chief Justice Traynor's opinion in *Greenman v. Yuba Power Products*, and (3)

² 253 S.E.2d 666, 678–80 (W. Va. 1979). An inquiry into pre-1979 products liability law is beyond the scope of this Article. For our purposes, it is sufficient that prior to *Morningstar* products law in this state was based on negligence, warranty, and misrepresentation. Our courts, like the courts of every other state, wrestled with the difficulty of applying these theories to products cases, particularly when addressing issues such as privity of contract and contractual disclaimers. West Virginia's substantive products liability law prior to the adoption of strict liability is thoroughly addressed in Professor Thomas C. Cady's *Law of Products Liability in West Virginia*, 74 W. VA. L. REV. 283 (1972), and Justice Miller's retrospective survey in *Morningstar*. On the history of products liability law more generally, see OWEN, *supra* note 1, at 11–48.

³ Syl. pts. 4–6, *Morningstar*, 253 S.E.2d at 667.

⁴ *See id.* at 666.

⁵ *Id.* at 668.

⁶ *Id.* at 676.

the doctrine of “inherently dangerous products” established in *Rylands v. Fletcher*.⁷

The court reviewed these doctrines and carefully explained that the term “strict liability” is a misnomer because the doctrine does not impose absolute liability, nor does it make the manufacturer an insurer of its product.⁸ The court noted that strict liability is fairer to the plaintiff than a negligence standard because it relieves the plaintiff from “proving specific acts of negligence” and eliminates several potential defenses, including “notice of breach, disclaimer, and lack of privity in the implied warranty concepts of sales and contracts.”⁹

The court then reviewed its prior jurisprudence and noted that “privity of contract was never a bar in this state to a tort action against the manufacturer.”¹⁰ Although the court claimed that it was rejecting the tests set forth in the *Restatement*¹¹ and *Rylands v. Fletcher*,¹² and adopting the holding of *Greenman, v. Yuba*, what the court actually did was graft section 402A’s “reasonableness requirement” into the *Greenman v. Yuba* standard:

4. In this jurisdiction the general test for establishing strict liability in tort is whether the involved product is defective in the sense that it is not reasonably safe for its intended use. The standard of reasonable safeness is determined not by the particular manufacturer, but by what a reasonably prudent manufacturer’s standards should have been at the time the product was made.

5. The term “unsafe” imparts a standard that the product is to be tested by what the reasonably prudent manufacturer would accomplish in regard to the safety of the product, having in mind the general state of the art of the manufacturing process, including design, labels and warnings, as it relates to economic costs, at the time the product was made.

⁷ *Id.* at 668 (citations omitted). The court reviewed section 402A and found that it imposed strict liability on a manufacturer “who sells any product in a defective condition unreasonably dangerous to the user” *Id.* at 676. The court then explained that *Greenman v. Yuba*, 59 Cal. 2d 57 (1963), removed the “unreasonably dangerous” prong and imposed strict liability when a product “place[d] on the market . . . proves to have a defect that causes injury to a human being.” *Morningstar*, 253 S.E.2d at 677. The court then found that *Rylands v. Fletcher*’s doctrine of abnormally dangerous activities for the most part had not been applied in the products context. *Id.* at 684.

⁸ *Id.* at 677.

⁹ *Id.* (quoting *Dippel v. Sciano*, 155 N.W.2d 55, 63 (Wis. 1967)).

¹⁰ *Id.* at 680.

¹¹ Syl. pt. 7, *id.* at 667.

¹² Syl. pt. 8, *Morningstar*, 253 S.E.2d. at 668.

6. The question of what is an intended use of a product carries with it the concept of all those uses a reasonably prudent person might make of the product, having in mind its characteristics, warnings and labels.¹³

In addition to adopting strict liability as a theory of recovery, *Morningstar* also established three categories of product defect: design, structural (manufacturing), and use (warning):

We recognize that a defective product may fall into three broad, and not necessarily mutually exclusive, categories: design defectiveness; structural defectiveness; and use defectiveness arising out of the lack of, or the inadequacy of, warnings, instructions and labels.

Characteristically, under the first two categories of defectiveness the inquiry centers on the physical condition of the product which renders it unsafe when the product is used in a reasonably intended manner. In the third category of defectiveness the focus is not so much on a flawed physical condition of the product, as on its unsafeness arising out of the failure to adequately label, instruct or warn.¹⁴

Morningstar remains the leading case on products law in this state. Indeed, the decision foreshadowed the *Restatement (Third) of Torts: Products Liability* section 2 published two decades later.¹⁵

Although strict liability is the most robust theory of products liability, it was not intended to supplant the other causes of action, a point subsequently made by the court:

Product liability actions may be premised on three independent theories—strict liability, negligence and warranty. Each theory contains different elements which plaintiffs must prove in order to recover. No rational reason exists to require plaintiffs in products liability actions to elect which theory to submit to the jury after the evidence has been presented when they may elect to bring suit on one or all of the theories.¹⁶

¹³ Syl. pts. 4–6, *id.* at 667.

¹⁴ *Id.* at 682.

¹⁵ RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998). This *Restatement* has not been adopted in West Virginia, despite its fundamental similarity to the law and reasoning in *Morningstar*.

¹⁶ Syl. pt. 6, *Ilosky v. Michelin Tire Corp.*, 307 S.E.2d 603, 605 (W. Va. 1983).

In addition to the three theories enumerated in *Morningstar* and *Ilosky*, parties injured by a defective product in West Virginia may seek recovery pursuant to the theories of negligent or tortious misrepresentation.¹⁷ Each of these four substantive theories is discussed below: strict liability, Part II; warranty, Part III; negligence, Part IV; and misrepresentation, Part V.

II. THE SUBSTANTIVE LAW OF WEST VIRGINIA AS APPLIED TO THE THREE STRICT LIABILITY CLAIMS ESTABLISHED BY *MORNINGSTAR*: DESIGN DEFECT, MANUFACTURING DEFECT, AND USE DEFECT

As set forth above, *Morningstar* establishes the three substantive theories of strict liability products litigation. Relying on one (or more) of these theories, a plaintiff may file suit against any of the entities in the chain of distribution of a new product, even if that entity is not responsible for the defect.¹⁸

A. *Design Defect*

1. Background

If the product is not reasonably safe for its intended use due to a specific design flaw, then the product is defective.¹⁹ Historically, there were two major analytical frameworks used to test design defectiveness: the consumer expectations test and the risk-utility test.²⁰ As its name implies, the consumer expectations test focuses on whether the design meets the product user's reasonable expectations. The risk-utility framework focuses on whether the product's design reasonably balances the risk of the harm and the costs of reducing that risk.²¹

¹⁷ *Wilson v. Brown & Williamson Tobacco Corp.*, 968 F. Supp. 296, 301 (S.D. W. Va. 1997).

¹⁸ *Dunn v. Kanawha Cnty. Bd. of Educ.*, 459 S.E.2d 151, 157 (W. Va. 1995). As stated by the court:

Extending liability to those in the chain of distribution in this manner is meant to further the public policy that an injured party not have to bear the cost of his injuries simply because the product manufacturer is out of reach. The liability of a party in the chain of distribution is based solely upon its relationship to the product and is not related to any negligence or malfeasance.

Id. Strict liability applies not only to the manufacturer, but also to the entities in the chain of distribution. *Id.* This includes the reassembler, *Yost v. Fuscaldo*, 408 S.E.2d 72 (W. Va. 1991); the wholesaler, *Hill v. Joseph T. Ryerson & Son, Inc.*, 268 S.E.2d 296 (W. Va. 1980); and the retailer, *Star Furniture Co. v. Pulaski Furniture Co.*, 297 S.E.2d 854 (W. Va. 1982). Issues related to the chain of distribution are more fully addressed in Part VIII.

¹⁹ *See Morningstar*, 253 S.E.2d at 666.

²⁰ OWEN, *supra* note 1, at 502.

²¹ "Costs," in this context, is much broader than financial cost and includes the calculus of the following: the product's utility, the product's risk of injury, and the economic burden of reducing the particular risk through design. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). This calculus was most simply stated by Judge Learned Hand in the negligence con-

Initially, the majority of courts used the consumer expectations test. However, in the last thirty years, the broad majority of courts have shifted towards some version of the risk-utility doctrine.²² This shift makes sense, because the risk-utility analysis allows the fact finder to balance all of the competing interests encompassed in the design of the product and subsumes the consumer expectations test, by incorporating the consumer's expectations into the risk-utility calculus.²³

West Virginia has followed the majority trend and adopted its own version of the risk-utility test. As enunciated in *Morningstar*, West Virginia's test requires the jury to determine the standards a reasonably prudent manufacturer would have employed to design the product at the time it was manufactured.²⁴ The jury is further required to take into account industry standards, the general state of the art at the time of manufacture, and the economic costs of making the product safer.²⁵

The term "unsafe" imparts a standard that the product is to be tested by what a reasonably prudent manufacturer would accomplish in regard to the safety of the product, having in mind the general state of the art of the manufacturing process, including design, labels and warnings, as it relates to the economic costs, at the time the product was made.²⁶

text, in this case. *Id.* As reformulated for the products context, the Hand Formula is $B < P \times L = D$. If the B (burden of eliminating a potential risk) is less than the P (probability of that loss) times the L (magnitude of that loss) then the failure to adopt a design that eliminates that risk constitutes D (negligence/defect). *Id.* This formula is very robust because it permits the fact finder to balance potentially competing factors and to apply a different value to each factor in the particular context of the specific product and harm that allegedly should have been eliminated through better design. *Id.* The balancing of risk and utility also contemplates the practical situation where, if reducing or eliminating the risk also reduces or eliminates the utility of the product, the result may be that the product ceases to exist at all and society would then be deprived of the use of that product. For example, the utility of a knife is to cut, which also presents a risk of laceration. If the design alternative eliminating that risk results in a dull knife blade such that it can no longer cut, then the product cannot function as intended.

²² See OWEN, *supra* note 1, at 504–20 for an explanation of when and why this shift occurred.

²³ See Syl. pt. 6, *Morningstar*, 253 S.E.2d at 667 (“The question of what is an intended use of a product carries with it the concept of all of those uses a reasonably prudent person might make of the product, having in mind its characteristics, warnings and labels.”). “We acknowledge that our definition of a defective condition differs from [the consumer expectations test] followed by the California court in *Barker v. Lull Engineering Co.*,[] 573 P.2d 443 (Ca. 1978), in that ours is somewhat more restrictive.” *Morningstar*, 253 S.E.2d at 680–81, 684 (citations omitted) (addressing *Barker* and consumer expectations).

²⁴ Syl. pt. 4, *Morningstar*, 253 S.E.2d at 667.

²⁵ Syl. pt. 5, *id.* at 667.

²⁶ Syl. pt. 5, *id.* at 667, 682 (“We believe that a risk/utility analysis does have a place in a tort product liability case by setting the general contours of relevant expert testimony concerning the defectiveness of the product.”).

2. Elements of a Design Defect Claim

In West Virginia, the elements of a defective design case are as follows: (1) that the product was not reasonably safe (2) for its intended use (3) due to a defective design feature (4) which proximately caused plaintiff's injury.²⁷ Pursuant to *Morningstar*, the first element, whether the product was "reasonably safe," includes the sub-elements that (1) the safety is to be tested by the conduct of a reasonably prudent manufacturer, (2) the relevant time period is the date of manufacture, and (3) the risk-utility analysis is used to determine whether the design was reasonable.²⁸

3. Important Issues in Design Cases

Under *Morningstar* and subsequent West Virginia cases, there are a number of important issues that frequently arise in defective design cases.

a. Necessity of an Alternative, Feasible Design

A threshold legal issue is whether the plaintiff, in her affirmative case-in-chief, must prove that there is a feasible, alternative design that will eliminate the risk and render the product "reasonably safe." In other words, can the plaintiff merely argue that the manufacturer's design was flawed or must she also point to a feasible alternative design that appropriately eliminates that particular risk?

This issue has received little attention from the court because, as a practical matter, plaintiff's counsel almost always put forth an alternative design even in the absence of a requirement. The only West Virginia Supreme Court of Appeals case addressing the issue is *Church v. Wesson*,²⁹ in which the court in a per curiam opinion upheld a directed verdict for the defendant, in a strict liability context, on the ground that the plaintiff failed to establish the feasibility of a proffered alternative design.³⁰

²⁷ See *id.* at 666.

²⁸ See Syl. pt. 4–6, *id.* at 687.

²⁹ 385 S.E.2d 393 (W. Va. 1989) (per curiam).

³⁰ *Id.* *Church* is discussed and analyzed in the *Restatement (Third) of Torts: Products Liability* section 2 as follows:

In West Virginia, the Supreme Court of Appeals has adopted the standard of reasonable safety, as determined "by what a reasonably prudent manufacturer's standards *should have been* at the time the product was made." *Morningstar v. Black & Decker Mfg.*, 253 S.E.2d 666, 683 (W. Va. 1979) (emphasis added). This language can only be read to require the production of evidence on reasonable alternative design, to gauge what "should have been."

...

[M]erely because a state recognizes the possibility that proof of a reasonable alternative design may not be required in every case does not mean that such a

b. State of the Art

Syl. pt. 5 of *Morningstar* states that the design process is to be judged by the general state of the art in the industry as of the date of manufacture and not by subsequent developments that improve that process.³¹ In many products liability cases this will be the central dispute, i.e., whether the product was defective when judged by the standards of the time of its manufacture.

c. Compliance With Safety Standards

The manufacturer may offer proof that the product complied with safety standards as evidence that the design was reasonable.³² Such evidence is proper, and may be considered by the jury, but is not conclusive on the issue of defect.³³

d. Inherent Risks

Many products contain inherent risks that simply cannot be eliminated through design. In such cases, the product is not defectively designed by virtue of the inherent risk.³⁴ There are no cases from the Supreme Court of Appeals that address this issue. However, two federal courts have predicted that the Supreme Court of Appeals will adopt this doctrine if the issue is presented to the court.³⁵

e. Optional Features

There is a split of authority on the issue of whether a manufacturer can be held liable for designing a product that offers particular safety features as an

showing is not required in most cases. Thus, decisions in a number of jurisdictions support the proposition that proof of a reasonable alternative design is necessary as a general rule to support a claim for design defect, while recognizing, in dicta, that there may be instances when a product has both such negligible utility and such a high degree of risk that, regardless of alternatives, the product should not have been marketed at all. This position is reflected in § 2, comment *e* and is perfectly consistent with this Restatement.

RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998).

³¹ Syl. pt. 5, *Morningstar*, 253 S.E.2d at 667.

³² *Johnson v. Gen. Motors Corp.*, 438 S.E.2d 28, 39 (W. Va. 1993).

³³ *Estep v. Ferrell Ford Lincoln-Mercury, Inc.*, 672 S.E.2d 345 (W. Va. 2008); *Johnson*, 438 S.E.2d at 28; OWEN, *supra* note 1, at 95.

³⁴ See OWEN, *supra* note 1, at 556; RESTATEMENT (SECOND) OF TORTS § 402A cmts. i, j, k (1965); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) cmt. d (1998).

³⁵ See *Rohrbough v. Wyeth Labs, Inc.*, 719 F. Supp. 470, 477 (N.D. W. Va. 1989); *Smith v. Wyeth Laboratories, Inc.*, 1986 WL 720792 (S.D. W. Va. 1986). *Smith* and *Rohrbough* are discussed *infra*.

option rather than as standard equipment.³⁶ There are no West Virginia cases that address this issue.

B. Manufacturing Defect (Structural Defect)

1. Background

The second category of defect established by *Morningstar* involves “structural” defects, more commonly known as “manufacturing” defects.³⁷ *Morningstar* defines this category of defect as follows: “[W]hen a product comes off the assembly line in a substandard condition it has incurred a manufacturing defect.”³⁸ Cases involving a manufacturing defect, flaw, or irregularity arising from errors in production are the simplest, least controversial area of products liability. The theory behind these cases is very simple: manufacturers and other suppliers should be liable for injuries caused by manufacturing defects in the products they sell.

2. Elements of a Manufacturing Defect Claim

The elements of a manufacturing defect claim are as follows: (1) the product was defective (i.e., not reasonably safe for its intended use) (2) due to a manufacturing defect (3) present at the time the product left the manufacturer’s control and (4) which proximately caused plaintiff’s injury.³⁹

3. Defect Must Be Present at the Time the Product Left the Manufacturer

A principal issue in manufacturing defect cases is that the defect must have been present at the time the product left the manufacturer’s control.⁴⁰ For example, in a case involving a missing or broken piece of safety feature, liability can be imposed on the manufacturer only if the defect was present at the time the product left the manufacturer. If the part was present when it left the manufacturer but was subsequently removed by a third-party, the manufacturer would not be liable under a manufacturing defect theory.

³⁶ See OWEN, *supra* note 1, at 558–66.

³⁷ See OWEN, *supra* note 1, at 447.

³⁸ *Morningstar*, 253 S.E.2d 666, 681 (W. Va. 1979) (quoting *Barker v. Lull Eng’g Co.*, 573 P.2d 443, 454 (Cal. 1978)).

³⁹ *Id.* at 680 (“Once it can be shown that the product was defective when it left the manufacturer and that the defect proximately caused the plaintiff’s injury, a recovery is warranted absent some conduct on the part of the plaintiff that may bar his recovery.”).

⁴⁰ *Id.*; OWEN, *supra* note 1, at 453.

C. *Use Defect (Failure to Warn Claims)*

1. Background

Morningstar refers to the third category of defective product by the term “use defectiveness.” “Use defectiveness covers situations when a product may be safe as designed and manufactured, but which becomes defective because of the failure to warn of dangers which may be present when the product is used in a particular manner.”⁴¹ As pointed out in *Morningstar*, the analysis applicable to use/warnings claims is fundamentally different from that used for design and manufacturing cases because those cases focus on the physical condition of the product, whereas a use/warnings claim focuses on the failure to instruct or warn the user.⁴² The rationale for a warnings claim is that, even if a product is properly designed and manufactured, it may still be defective if the user is not properly informed of the product’s risks.

2. Elements of a Warnings Claim

The elements for a warnings claim are as follows: (1) the product was defective (i.e., not reasonably safe for its intended use) (2) due to an absent or inadequate warning that a reasonably prudent manufacturer should have included at the time the product was made and (3) which proximately caused plaintiff’s injury.

3. Important Issues

a. The Manufacturer Must Warn and, If Appropriate, Instruct

Warnings claims encompass both “the duty to warn” (to inform buyers and users of hidden dangers in a product) and the duty to instruct (“to inform buyers on how to avoid a product’s dangers in order to use it safely”).⁴³ An example of this distinction would be in regard to tires. It is insufficient to mere-

⁴¹ Syl. pt. 2, *Ilosky v. Michelin Tire Corp.*, 307 S.E.2d 603, 605 (W. Va. 1983).

⁴²

Characteristically, under the first two categories of defectiveness the inquiry centers on the physical condition of the product which renders it unsafe when the product is used in a reasonably intended manner. In the third category of defectiveness the focus is not so much on a flawed physical condition of the product, as on its unsafeness arising out of the failure to adequately label, instruct or warn.

Morningstar, 253 S.E.2d at 682. A warning defect is a distinct claim, and should not be piggy-backed on to a design or structural defect claim (i.e., product is defective in design and manufacturer at fault for not warning of the design defect). *Id.*

⁴³ OWEN, *supra* note 1, at 584 (italics omitted).

ly warn that an “overly inflated tire” poses the risk of explosion. The manufacturer should also instruct the user as to the tire’s maximum permissible pressure so as to instruct the user as to how he can avoid the risk of explosion.

b. The Duty to Warn Encompasses Risks Presented by Foreseeable Uses of the Product

“For the duty to warn to exist, the use of the product must be foreseeable to the manufacturer or seller.”⁴⁴ This requires the manufacturer to warn against the risks presented by the product’s intended use as well as other reasonably foreseeable uses or misuses.⁴⁵

If the misuse was not reasonably foreseeable, then there is no duty to warn. Typically, the question of whether a particular use was reasonably foreseeable would be resolved by the fact finder.⁴⁶

c. The Warning/Instruction Must be Both Substantively and Procedurally “Adequate”

The core of a warning claim is that the warning is in some manner substantively or procedurally “inadequate”, which thereby renders the product defective.⁴⁷

1. Substantive Adequacy

In order to be substantively adequate, the warning or instruction must “clearly and comprehensibly describe the nature and degree of a product’s specific risk.”⁴⁸ This concept conflates three ideas: (1) the warning must be expressed in clear and comprehensible terms, (2) the warning must describe with reasonable precision the particular ways in which the product is dangerous, and

⁴⁴ Syl. pt. 3, *Ilosky*, 307 S.E.2d at 605.

⁴⁵ *Id.* at 609 (“The question of what is an intended use of a product carries with it the concept of *all those uses* a reasonably prudent person might make of the product, having in mind its characteristics, warnings and labels.”) (quoting *Morningstar*, 253 S.E.2d at 683 (emphasis added)). *Ilosky* quotes with approval the following statement regarding foreseeability:

Foreseeability as applied to a manufacturer’s products liability is a narrow issue. A manufacturer must anticipate all foreseeable uses of his product. In order to escape being *unreasonably* dangerous, a *potentially* dangerous product must contain or reflect warnings covering all foreseeable uses. These warnings must be readily understandable and make the product safe.

Id. at 610 (quoting *Smith v. United States Gypsum Co.*, 612 P.2d 251, 254 (Okla. 1980) (emphasis in original)).

⁴⁶ *Id.* at 610.

⁴⁷ OWEN, *supra* note 1, at 598.

⁴⁸ *Id.*

(3) the warning must convey the degree of risk presented.⁴⁹ The warning must describe all foreseeable risks presented by the product's intended use and reasonably foreseeable misuses.⁵⁰

2. Procedural Adequacy

Additionally, the warning must be procedurally adequate, i.e., "it must be conveyed in such a form that it is likely to reach and be comprehended" by the product's user.⁵¹ Procedural adequacy includes consideration of the warning's conspicuity and location. Conspicuousness depends on such factors as the warning's type size, style, and color.⁵² Location emphasizes the physical placement of the warning. In addition to textual warnings, important warnings may also be conveyed through the use of pictograms. A critical external reference source regarding the procedural adequacy of a particular warning is whether it complies with the standards adopted by the American National Standards Institute (ANSI) or the International Organization for Standardization (ISO).⁵³

3. Overpromotion

Several other jurisdictions have considered the issue of whether an otherwise adequate warning can be eviscerated by contradictory safety claims or conduct imputable to a defendant that undercuts the warning.⁵⁴ An example is *Levey v. Yamaha Motor Corp.*,⁵⁵ in which the court found that the manufacturer's warnings and instructions were overridden by a salesman's demonstration of the product which was contrary to the warnings.⁵⁶

⁴⁹ *Id.*

⁵⁰ *Id.* at 599.

⁵¹ *Id.*

⁵² *Id.*

⁵³ ANSI is a voluntary organization that seeks to promote consensus standards. See AM. NAT'L STANDARDS INST., <http://www.ansi.org> (last visited Oct. 30, 2010). The European counterpart is ISO. See INT'L ORG. FOR STANDARDIZATION, <http://www.iso.org> (last visited Oct. 30, 2010).

⁵⁴ OWEN, *supra* note 1, at 609

⁵⁵ 825 A.2d 554 (N.J. Super. Ct. App. Div. 2003).

⁵⁶ *Id.* at 556. Although it arises in a different context (using promotional literature to establish foreseeable misuse), an analogous concept is set forth in Syl. pt. 8, *King v. Kayak Mfg. Corp.*, 387 S.E.2d 511, 513 (W. Va. 1989). In *King*, the court held that a manufacturer's promotional literature may be introduced as evidence that a particular use was foreseeable, despite the fact that the injured party never saw the material and thus could not have relied upon it. *Id.* If the West Virginia Supreme Court of Appeals adopts the concept of "overpromotion," a sub-issue will arise as to whether the overpromotion must be communicated to the injured party, or whether overpromotion in and of itself can be used to attack the warning. Logically, unless the overpromotion is communicated to the injured person (or someone who communicates the overpromotion to the injured person) it is not a proximate cause of the plaintiff's injury.

4. Warnings Pollution

Tension exists between the concept that a manufacturer must warn of all specific risks and the reality that if too many warnings are included, the user will be overwhelmed and less likely to heed those warnings that are most critical. This concept has been termed “information overload” or “warnings pollution.”⁵⁷ Typically, in warnings cases the plaintiff’s expert advocates that a particular warning should have been included and the defense counters that to include all potential warnings would reduce the effectiveness of each particular warning.⁵⁸

5. Promotional Literature

One issue that may arise in a use claim is whether the plaintiff may introduce promotional literature to argue that the specific use the plaintiff was engaging in at the time of the injury was foreseeable to the defendant. For example, in *King v. Kayak Mfg. Corp.*,⁵⁹ the plaintiff was rendered a quadriplegic after he dove into a swimming pool that was four feet deep.⁶⁰ The plaintiff sought to introduce promotional literature from the manufacturer, which “showed persons diving into similar Kayak-made, above-ground pools.”⁶¹ The defense objected, pointing out that the literature was outdated and that the plaintiff had never seen the promotional material at issue.⁶² The court rejected the defense’s claim and held: “In a product liability case, the manufacturer’s advertising or promotional material concerning the uses of the product are a part of reasonable use of the product and may be admitted into evidence even though the user is not aware of the material.”⁶³ The court then added: “Certainly, as foregoing courts have recognized, the manufacturer’s suggested uses for a product contained in its advertising or other literature are admissible on the issue of what is an appropriate, intended use of a product.”⁶⁴

⁵⁷ See OWEN, *supra* note 1, at 611–13.

⁵⁸ To avoid warnings pollution by certain industries, warning placement may be prescribed and limited by regulatory agencies. For example, the National Highway Traffic Safety Administration has specified that warnings relating to airbags be placed on the sun visors in automobiles. Nat’l Highway Traffic Safety Admin., 40 C.F.R. § 571.208 (2008).

⁵⁹ 387 S.E.2d 511 (W. Va. 1989).

⁶⁰ *Id.* at 513.

⁶¹ *Id.* at 522.

⁶² *Id.*

⁶³ Syl. pt. 8, *id.* at 513.

⁶⁴ *Id.* at 523.

6. Defenses Solely or Primarily Applicable to Warnings Claims

Fundamentally, a manufacturer is entitled to expect that a user will heed the warnings and instructions provided with its product.⁶⁵ In addition to this fundamental principle, there are a number of specific, recognized defenses to warnings claims.

a. Open and Obvious Danger

If the risk or danger is obvious or generally known, then the jury may find that it is reasonable to assume that all consumers either know or should have known about the risk and that the manufacturer is, therefore, excused from warning about it.⁶⁶ In *Wilkinson*, the court found that, in ascertaining whether a duty to warn exists, “the fundamental inquiry is whether it was reasonably foreseeable that the product would be unreasonably dangerous if distributed without a particular warning.”⁶⁷ This language suggests that, where the danger is commonly known, a warning is not required if the product is reasonably safe.

At this time, no opinion from the West Virginia Supreme Court of Appeals has expressly adopted the “open and obvious” defense in the products context, although several federal courts have predicted that the court will adopt the defense when the issue is presented.⁶⁸ In *Wilson v. Brown & Williamson Tobacco Corp.*,⁶⁹ Judge Haden addressed this issue in the context of a loose tobacco suit and found that the West Virginia Supreme Court of Appeals recognized the open and obvious danger exception in premises liability cases⁷⁰ and

⁶⁵ *Morningstar v. Black & Decker Mfg. Co.*, 253 S.E.2d 666, 683 (W. Va. 1979).

⁶⁶ See 63A AM JUR. 2D *Products Liability* 1155 (2010) (“As a rule, there is no duty to warn of dangers which are generally known and recognized. In other words, a product supplier cannot be held liable for a failure to warn of dangers that are common knowledge to the public. This limitation on the duty to warn . . . is recognized in the Restatement (Second) Torts as to both negligence and strict liability. . . .”). *Id.* Ultimately, this is a causation analysis. If the consumer knew (or should have known) of the risk, then the absence of a warning informing them of that risk did not cause the injury.

⁶⁷ *Wilkinson v. Duff*, 575 S.E.2d 335, 340 (W. Va. 2002) (emphasis added).

⁶⁸ *Wilson v. Brown & Williamson Tobacco Corp.*, 968 F. Supp. 296, 300–01 (S.D. W. Va. 1997) (Judge Haden finding that West Virginia appears to have adopted open and obvious danger doctrine in a case involving loose tobacco); *Robertson v. Morris*, 546 S.E.2d 770, 774 (W. Va. 2001) (holding no duty to warn independent contractor of dangers that were “readily apparent” or “common knowledge”); *Huffman v. Appalachian Power Co.*, 415 S.E.2d 145, 153 (W. Va. 1991) (holding no duty to warn trespassers of dangers that they “would be expected to discover”); *but see Harris v. Karri-On Campers, Inc.*, 640 F.2d 65, 76 (7th Cir. 1981) (applying West Virginia law and concluding that *Morningstar* rejects the obvious danger doctrine because it declined to follow the unreasonably dangerous requirement of *Restatement (Second) of Torts* section 402A).

⁶⁹ 968 F. Supp. at 300–01.

⁷⁰ 622 F.2d 72 (4th Cir. 1980).

“that there is no duty to warn of obvious dangers present in products.”⁷¹ Judge Haden then found that this defense was available in West Virginia, but that the facts of the case were not sufficiently developed to support it.⁷²

Recently, Judge Chambers, in a polyvinyl chloride suit, agreed “that West Virginia would adopt the open and obvious exception to a duty to warn in the products liability context.”⁷³ However, under the facts presented in that case, Judge Chambers held that the defendant failed to demonstrate that the defense should apply to exposure to vinyl chloride monomer (the major raw component of polyvinyl chloride):

[I]ts hazards may now be readily accepted in the scientific, medical, and industrial communities, and known throughout the workplace, at the time of exposure it could not be considered an “open and obvious danger.” Nor were the hazardous properties of VCM readily apparent from simple observation of the chemical, in the way of open and obvious hazards on the premises.⁷⁴

b. Warning Causation

The alleged defect must be a proximate cause of the plaintiff’s injuries. This causation element is frequently hotly contested in warnings cases due to the ephemeral nature of these claims. In *Morningstar*, the court implicitly addressed this issue holding that “[t]he seller is entitled to have his due warnings and instructions followed; and when they are disregarded, and the injury results, he is not liable.”⁷⁵ The court then expressly embraced warnings causation in *Tracy v. Cottrell*.⁷⁶

⁷¹ *Wilson*, 968 F. Supp. at 300–01.

⁷² *Id.*

⁷³ *Roney v. Gencorp.*, 654 F. Supp. 2d 501 (S.D. W. Va. 2009).

⁷⁴ *Id.* at 503; *see also* *Burdette v. Burdette*, 127 S.E.2d 249, 252 (W. Va. 1962) (holding no duty to warn of open and obvious dangers in trespass to land cases); *Fox v. Martin*, 453 S.E.2d 335, 339 (W. Va. 1994) (same); *Robertson v. Morris*, 546 S.E.2d 770, 774 (W. Va. 2001) (holding no duty to warn independent contractor of dangers that were “readily apparent” or “common knowledge”); *Huffman v. Appalachian Power Co.*, 415 S.E.2d 145, 153 (W. Va. 1991) (holding no duty to warn trespassers of dangers that they “would be expected to discover”); *Higgins v. Honda Motor Co.*, 974 F.2d 1331 (4th Cir. 1992) (unpublished) (applying West Virginia law and holding that an all-terrain vehicle’s lack of rollover protection is an open and obvious danger).

⁷⁵ *Morningstar v. Black & Decker Mfg. Co.*, 253 S.E.2d 666, 682 (W. Va. 1979); *see also* *Singleton v. Int’l Harvester Co.*, 685 F.2d 112, 117 (4th Cir. 1981) (applying Maryland law and finding that plaintiff failed to prove that the inadequate warning was a but-for cause of the accident); *Santos v. Ford Motor Co.*, 893 N.Y.S.2d 537, 538 (2010); *Berger v. Ford Motor Co.*, 95 Fed. Appx. 520, 522 (4th Cir. 2004).

⁷⁶ In *Tracy v. Cottrell*, 524 S.E.2d 879 (W. Va. 1999), the West Virginia Supreme Court of Appeals held that the following jury instruction accurately states the proximate causation standard in failure-to-warn cases:

Warning causation focuses on whether the user would have avoided injury if the product had carried the plaintiff's proposed warning. In *Wilkinson*, the court found that there was no proximate cause as a matter of law where the prescriber already believed that prescribing the drug to someone in the plaintiff's condition violated the standard of care.⁷⁷ The court found that the proximate cause of plaintiff's harm was the prescriber's failure to obtain critical information from the patient, not any inadequacy of the product's label. Causation was independently defeated by prescriber testimony that "the labels provided by the manufacturer and distributor did not motivate his dispensing of [the drug] to [plaintiff]."⁷⁸ Similarly in *Bertovich*, a federal court applying West Virginia law rejected claims based upon alcohol advertising, finding that "but for" causation was not present where the plaintiffs did not allege "that they themselves were deceived by, or even saw or heard, any of the [defendants'] advertising."⁷⁹

In *Rohrbough*, a signed patient consent form, "acknowledging that [plaintiff] had read certain forms describing the risks and possible side effects, and that [plaintiff] nonetheless requested that the [product] be administered" defeated a warning claim as a matter of law.⁸⁰

Failure of an assembler to read warnings was suggested as a fatal defect in *Ilosky*.⁸¹ The defendant sent warnings of the relevant risk to an "assembler" who "failed to read it."⁸² Where "warnings were given to the assembler and that the assembler [acted] against the manufacturer's warnings, liability should fall on the assembler rather than the manufacturer."⁸³ But, "determination of wheth-

In order to recover under a failure to warn theory, plaintiff must prove by a preponderance of the evidence that the lack or inadequacy of warnings in the 1988 Chevrolet Celebrity proximately caused Douglas Tracy's death. GM may only be liable to petitioner for failure to warn where there is evidence that a warning would have made a difference. Therefore, plaintiff must prove that the lack of a warning regarding the seat belts in the 1988 Chevrolet Celebrity proximately caused Douglas Tracy's death, and that the presence of a warning would have prevented his death. Plaintiff must establish that the warning suggested by plaintiff would have caused Douglas Tracy to act differently or otherwise change his behavior in a manner which would have avoided his death. If you find that a warning by GM would not have prevented Douglas Tracy's death, then you must find in favor of GM.

Id. at 879 n.9.

⁷⁷ *Wilkinson v. Duff*, 575 S.E.2d 340, 341 (W. Va. 2002).

⁷⁸ *Id.*

⁷⁹ *Bertovich v. Advanced Brands & Importing, Co.*, 2006 WL 2382273, at *7-8 (N.D. W. Va. 2006).

⁸⁰ *Rohrbough v. Wyeth Labs., Inc.*, 719 F. Supp. 470, 478 (N.D. W. Va. 1989).

⁸¹ *Ilosky v. Michelin Tire Corp.*, 307 S.E.2d 603, 611 n.8 (W. Va. 1983).

⁸² *Id.*

⁸³ *Id.*

er a defendant's efforts to warn of a product's dangers are adequate is a jury question."⁸⁴

In two pre-*Karl*⁸⁵ medical learned intermediary cases, *Pumphrey* and *Allen*, the courts found "but for" causation lacking. In *Pumphrey*, the prescriber's "considered judgment" to continue use of the product after signs that the risk at issue was developing severed causation.⁸⁶ In light of the prescriber's decision, "[t]here [was] no evidence to show that the doctor would have heeded [a different] warning of the manufacturer."⁸⁷ In *Allen*, a case involving allegations of improper drug promotion, the defendant's evidence that plaintiff's prescribers "were not doctors to whom [defendant] had promoted [the drug]," combined with plaintiff's failure to offer any contrary evidence, resulted in summary judgment for the defendant.⁸⁸

In two post-*Karl* pharmaceutical cases, *In re Zyprexa Products Liability Litigation*⁸⁹ and *Meade v. Parsley*,⁹⁰ the defendant obtained summary judgment where there was no evidence that the plaintiff had ever read the package insert. In *Zyprexa*, the court granted summary judgment because the defendant "was entitled to expect" that the plaintiff would "read and understand" the drug's labeling.⁹¹ Where the label went unread by the plaintiff, "there is no evidence from which a jury could find that a different warning by [defendant] would have prevented him from taking [the drug]."⁹² In *Meade*, the court found that post-*Karl*, it was an open issue whether a drug manufacturer's duty to warn ran to both the physician and patient or just the patient.⁹³ The court found that under the facts presented in *Meade*, it was unnecessary to resolve this issue because the undisputed evidence showed that neither the patient nor the doctor read the warning label prior to the patient ingesting the drug.⁹⁴

Thus, defendants have prevailed on warning causation defenses under the following circumstances: (1) failure of the plaintiff or intermediary to read the challenged warning,⁹⁵ (2) prior knowledge by the prescriber of the relevant

⁸⁴ *Id.* at 611.

⁸⁵ *Johnson & Johnson v. Karl*, 647 S.E.2d 899 (W. Va. 2007), is addressed in the next section.

⁸⁶ *Pumphrey v. C.R. Bard, Inc.*, 906 F. Supp. 334, 339 (N.D. W. Va. 1995).

⁸⁷ *Id.*

⁸⁸ *Allen v. Purdue Pharma, L.P.*, 2002 WL 32726841, at ¶¶5–6 (W. Va. Cir. June 26, 2002).

⁸⁹ 2009 WL 1514628 (E.D.N.Y. 2009) (applying West Virginia law).

⁹⁰ *Meade v. Parsley*, 2010 WL 4909435 (S.D. W. Va.) (Copenhaver, J.).

⁹¹ *Zyprexa*, 2009 WL 1514628, at *12.

⁹² *Id.*

⁹³ *Meade*, 2010 WL 4909435, at *23.

⁹⁴ *Id.*

⁹⁵ See *Zyprexa*, 2009 WL 1514628, at *12; *Meade*, 2010 WL 4909435, at *23; *Illosky v. Michelin Tire Corp.*, 307 S.E.2d 603 (W. Va. 1983); and *Bertovich v. Advanced Brands & Importing, Co.*, 2006 WL 2382273 (N.D. W. Va. 2006).

risk,⁹⁶ (3) lack of reliance upon the manufacturer's warnings,⁹⁷ (4) the prescriber's/plaintiff's lack of exposure to the allegedly inadequate information,⁹⁸ and (5) signed patient consent indicating assumption of the risk.⁹⁹

c. Learned Intermediary Doctrine

The "learned intermediary" doctrine is a defense that applies in the overwhelming majority of jurisdictions in drug and medical device cases.¹⁰⁰ The theory of the defense is that due to the nature of the United States' health care system, prescription drugs and medical devices are not dispensed directly to the consumer, but rather must be purchased through an intermediary, the physician.

The federal courts that addressed this issue uniformly anticipated that West Virginia would adopt the learned intermediary doctrine.¹⁰¹ However, in 2007 in the case of *State ex rel. Johnson & Johnson v. Karl*,¹⁰² the West Virginia Supreme Court of Appeals, rejected these federal court opinions and held that the learned intermediary doctrine did not apply in the case of prescription drugs that are marketed directly to consumers, holding:

[U]nder West Virginia products liability law, manufacturers of prescription drugs are subject to the same duty to warn consumers about the risks of their products as other manufacturers. We decline to adopt the learned intermediary exception to this general rule.¹⁰³

In *Karl*, the plaintiff alleged that his mother died as a result of taking the prescription drug Propulsid.¹⁰⁴ Plaintiff sued the manufacturer under a panoply of products theories and filed a medical malpractice action against the physi-

⁹⁶ See *Wilkinson v. Duff*, 575 S.E.2d 335 (W. Va. 2002); *Pumphrey v. C.R. Bard, Inc.*, 906 F. Supp. 334 (N.D. W. Va. 1995).

⁹⁷ See *Wilkinson*, 575 S.E.2d 335; *Bertovich*, 2006 WL 2382273.

⁹⁸ See *Allen v. Purdue Pharma., L.P.*, 2002 WL 32726841 (W. Va. Cir. June 26, 2002); *Bertovich*, 2006 WL 2382273.

⁹⁹ See *Rohrbough v. Wyeth Labs., Inc.*, 719 F.Supp. 470 (N.D. W. Va. 1989).

¹⁰⁰ OWEN, *supra* note 1, at 631 ("Sprouting in the 1960s, and becoming firmly planted in the 1970s the learned intermediary doctrine is an established fixture in American products liability law, adopted now in a large majority of states.") (footnotes omitted).

¹⁰¹ See *Johnson & Johnson v. Karl*, 647 S.E.2d 899, 914 n.18 (W. Va. 2007) (citing *Ashworth v. Albers Med., Inc.*, 395 F. Supp. 2d 395, 407 (S.D. W. Va. 2005)); *Pumphrey v. C.R. Bard, Inc.*, 906 F. Supp. 334, 338 (N.D. W. Va. 1995); *Rohrbough v. Wyeth Labs., Inc.*, 719 F. Supp. 470, 478 (N.D. W. Va. 1989), *aff'd*, 916 F.2d 970 (4th Cir. 1990).

¹⁰² 647 S.E.2d 899 (W. Va. 2007).

¹⁰³ *Id.* at 914.

¹⁰⁴ *Id.* at 901.

cian.¹⁰⁵ Prior to trial, the manufacturer filed a motion in limine asserting the learned intermediary doctrine to bar the plaintiff from arguing that the manufacturer had a duty to directly warn the decedent, rather than her physician.¹⁰⁶

After addressing procedural issues, the West Virginia Supreme Court of Appeals squarely rejected the learned intermediary doctrine.¹⁰⁷ Initially, the court reviewed the law in other jurisdictions and took issue with prior cases assessing the general acceptance of the doctrine, ultimately concluding that the doctrine had been adopted by a majority of jurisdictions, but not an “overwhelming majority.”¹⁰⁸ The court then addressed the policy justifications that support the doctrine¹⁰⁹ and concluded that these policy considerations were outdated due to the advent of direct-to-consumer marketing of pharmaceutical products.¹¹⁰ The court also addressed the difficulty in application of the exceptions to the doctrine and found that fairness required the duty to warn be imposed on the manufacturer.¹¹¹ As a result of those three factors, the doctrine was rejected.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 914.

¹⁰⁸ *Karl*, 647 S.E.2d at 902–04. Justice Davis reviewed prior decisions addressing the broad acceptance of the doctrine, including, *In re Norplant*, 215 F. Supp. 2d 795, 806–09 (E.D. Tex. 2002) (finding that forty-eight states, the District of Columbia, and Puerto Rico had adopted the doctrine); *Vitanza v. Upjohn Co.*, 778 A.2d 829, 838 n.11 (Conn. 2001) (finding that forty-four jurisdictions had adopted the doctrine); and *Larkin v. Pfizer, Inc.*, 153 S.W.3d 758, 768 n.3 (Ky. 2004) (thirty-four jurisdictions). Justice Davis then pointed out that in many of these states the doctrine had been adopted by a lower court, but not by the highest court of that state. *Karl*, 647 S.E.2d at 902–04. By her tally the doctrine had been adopted by the highest courts of only twenty-one states and one state by statute. *Id.* at 904.

¹⁰⁹ As stated by the court in *Karl*:

Among the primary justifications that have been advanced for the learned intermediary doctrine are (1) the difficulty manufacturers would encounter in attempting to provide warnings to the ultimate users of prescription drugs; (2) patients’ reliance on their treating physicians’ judgment in selecting appropriate prescription drugs; (3) the fact that it is physicians who exercise their professional judgment in selecting appropriate drugs; (4) the belief that physicians are in the best position to provide appropriate warnings to their patients; and (5) the concern that direct warnings to ultimate users would interfere with doctor/patient relationships.

Id. at 905.

¹¹⁰ *Id.* at 906.

¹¹¹

Finally, because it is the prescription drug manufacturers who benefit financially from the sales of prescription drugs and possess the knowledge regarding potential harms, and the ultimate consumers who bear the significant health risks of using those drugs, it is not unreasonable that prescription drug manufacturers should provide appropriate warnings to the ultimate users of their products.

Id. at 913.

Although *Karl* has established that the learned intermediary doctrine does not apply in the context of pharmaceutical products that have been directly marketed to consumers, it remains to be seen whether the doctrine will apply in other contexts. For example, medical devices are rarely marketed directly to consumers and are typically selected by the physician. It remains an open issue whether the court will or will not apply the doctrine in regard to those actions.

d. Sophisticated User Doctrine

If a buyer/user of a product has particular expertise in the use of that product, there may be no duty to warn. Again, this is a causation analysis. If, due to the buyer's/user's expertise, he or she already possesses the substantive knowledge that would have been imparted by the warning, then a failure to warn of that risk would not be a proximate cause of a resulting injury.

The defense is rooted in section 388 of the *Restatement (Second) of Torts*, including comment n, which states the following:

[2] Section 388 of the Restatement (Second) of Torts addresses a supplier's potential liability for a "Chattel Known to Be Dangerous for Intended Use." It proposes that liability will attach when such a supplier

(a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and

(b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and

(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

...

[I]t is obviously impossible to state in advance any set of rules which will automatically determine in all cases whether one supplying a chattel for the use of others through a third person has satisfied his duty to those who are to use the chattel by informing the third person of the dangerous character of the chattel, or of the precautions which must be exercised in using it in order to make its use safe. There are, however, certain factors which are important in determining this question. There is necessarily some chance that information given to the third person will not be communicated by him to those who are to use the chattel. This chance varies with the circumstances existing at the time the chattel is turned over to the third person, or permis-

sion is given to him to allow others to use it. These circumstances include the known or knowable character of the third person and may also include the purpose for which the chattel is given. 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.¹¹²

Although the West Virginia Supreme Court of Appeals has cited section 388 and comment n, with approval in dicta, to date, the sophisticated user defense has never been squarely before the West Virginia Supreme Court of Appeals. In *Ilosky*, the court addressed a case in which the plaintiff crashed her vehicle allegedly as a result of placing radial tires on the front axle and conventional tires on the rear.¹¹³ The plaintiff argued that this incorrect installation caused an unsafe oversteer condition and her wreck.¹¹⁴ In dicta, the court indicated that the duty to warn might be satisfied by warning the product assembler that installed the tires:

Where the ultimate user of the product claims that the “defect” consists of a lack of adequate warnings or labels and the manufacturer can show that such warnings were given to the assembler and that the assembler utilized the component against the manufacturer’s warnings, liability should fall on the assembler rather than the manufacturer.¹¹⁵

In 2009, Judge Chambers, in *Roney*, discussed above, addressed the issue of whether the court would adopt the sophisticated user defense before it and more specifically, whether the court’s decision in *Karl*, rejecting the learned intermediary defense, also signals a rejection of the sophisticated user doctrine in general.¹¹⁶ Ultimately, Judge Chambers distinguished *Karl* as “extremely context specific,” driven by the particular facts of direct-to-consumer advertising of pharmaceuticals, and found that it “is not applicable to a scenario outside of the prescription pharmaceutical context and the rise of direct-to-consumer advertising.”¹¹⁷ The court then analyzed the issue as follows:

In deciding *Karl*, the court recognized that through such advertising pharmaceutical companies had gained direct access to pa-

¹¹² *Roney v. Gencorp.*, 654 F. Supp. 2d 501, 503–04 (S.D. W. Va. 2009) (quoting RESTATEMENT (SECOND) OF TORTS § 388 cmt. n. (1965)).

¹¹³ *Ilosky v. Michelin Tire Corp.*, 307 S.E.2d 603, 607–08 (W. Va. 1983).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 610–11 n.8 (citing RESTATEMENT (SECOND) OF TORTS § 388 cmt. n. (1965)).

¹¹⁶ *See Roney*, 654 F. Supp. 2d at 501.

¹¹⁷ *Id.* at 505.

tients, a relationship starkly different than that which had existed when the doctrine was developed—when patients received drug information exclusively through their doctors. *Id.* at 907. At the time of Mr. Roney's exposure, the PVC [polyvinyl chloride] and VCM [vinyl chloride monomer] industries were much more like the early pharmaceutical industry described in *Karl*. Workers would have had little opportunity to influence the choice of products to which they would be exposed. Instead, they relied upon their employer to determine the scope of their duties and the production process. They were insulated from the manufacturer of the chemicals they used, much as the patient used to be insulated from the drug manufacturer. Because it was based on reasoning entirely inapplicable here, the *Karl* decision does not persuade the Court that West Virginia would refuse to accept any form of the sophisticated user defense. It does, however, counsel caution in adopting a version of the defense which could be applied too broadly. It is the opinion of this Court, based in part on the supreme court's signal in *Ilosky*, that West Virginia would apply some version of the sophisticated user defense.¹¹⁸

Judge Chambers then looked to a trio of Fourth Circuit cases applying Virginia law on the issue.¹¹⁹ The court then concluded that the *Oman-Willis* approach was superior to the *Goodbar* approach¹²⁰ because it tied the defense

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 505–07 (citing *Goodbar v. Whitehead Bros.*, 591 F. Supp. 552 (W.D. Va. 1984); *Oman v. Johns-Manville Corp.*, 764 F.2d 224 (4th Cir. 1985); *Willis v. Raymark Indus., Inc.*, 905 F.2d 793 (4th Cir. 1990)).

¹²⁰ As analyzed by Judge Chambers in *Goodbar*, the district court concluded that Virginia had adopted comment n, and developed a balancing test to determine whether the supplier had a duty to warn independent from that of the employer. *Roney*, 654 F. Supp. 2d at 505. The district court then simplified the standard, holding that “if the danger related to the particular product is clearly known to the purchaser/employer, then there will be no obligation to warn placed upon the supplier . . . when the supplier has reason to believe that the purchaser of the product will recognize the dangers associated with the product, no warnings are mandated.” *Id.* at 506 (quoting *Goodbar*, 591 F. Supp. at 561). The court then concluded that there was evidence in the record that the employer was aware of the danger of silicosis, and that it would have been difficult for the bulk supplier to have warned the employees, and thus found that the supplier had no duty to warn the employees. *Id.* In *Oman* and *Willis*, the court applied the same balancing test but found that the defense could not be relied upon in those cases. In *Oman*, the defense was found to not apply because the product was “very dangerous;” the burden on the manufacturer in placing the warning was small; and the employer had, in fact, not warned the employees. *Id.* In *Willis*, the defense was found to not apply because although the court found that the employer had knowledge of the product's dangers that “[t]he fact that an employer possesses knowledge of a product's dangers does not extinguish the manufacturer's liability unless the manufacturer can show that it had reason to believe the employer was or would be acting to protect the employees.” *Id.* (quoting *Willis*, 905 F.2d at 797).

more closely to the factors derived from comment n and focused “not on the employer’s knowledge but rather the reasonableness of relying on the employer to generate or pass on warnings.”¹²¹ Adding that the defense required the supplier to prove that the employer had knowledge of the product’s dangers, that the supplier was aware of the employer’s sophistication, and that it was reasonable to expect the employer to pass on such warnings, Judge Chambers then held that “West Virginia would allow an application of the sophisticated user defense as described by the Fourth Circuit Court of Appeals in *Oman* and *Willis* and as a factor to be considered in applying comment n of section 388 of the *Restatement (Second) of Torts*.”¹²²

e. Bulk Supplier Doctrine

Another potential defense arising from section 388 comment n is the bulk supplier defense which may apply if there is no way to warn of a product’s potential dangers due to the nature of the product or the way in which it is sold.¹²³ As explained by Judge Chambers, “While the sophisticated user defense focuses on the reasonableness of reliance on the employer, the bulk user defense concerns the burden which would be imposed on the supplier if it were bound to directly warn all users.”¹²⁴

Relying on comment n, federal courts applying West Virginia law have adopted the following six-factor test to establish this defense:

- (1) the dangerous condition of the product;
- (2) the purpose for which the product is used;
- (3) the form of any warnings given;
- (4) the reliability of the third party as a conduit of necessary information about the product;
- (5) the magnitude of the risk involved;
- (6) the burden imposed on the supplier by requiring that he directly warn all users.¹²⁵

Examples of products that would likely meet this standard include fungible products such as gravel, sand, coal, etc., which are commonly sold in bulk by tanker truck or rail car. In *Roney*, discussed above, Judge Chambers found that West Virginia would adopt the bulk supplier defense in the context of a vinyl chloride monomer case.¹²⁶ Judge Chambers also cited with approval Victor E. Schwarz and Christopher E. Appel, *Effective Communication of Warnings*

¹²¹ *Id.* at 507.

¹²² *Roney*, 654 F. Supp. 2d at 507.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* (relying on *Goodbar*, 591 F. Supp. at 557; *Oman*, 764 F.2d at 233; and *Willis*, 905 F.2d at 797).

¹²⁶ *Id.* at 508.

in the Workplace: Avoiding Injuries in Working with Industrial Materials,¹²⁷ which describes the trend in the courts to bundle the bulk supplier and sophisticated user defenses together.¹²⁸

7. Adequacy is Typically a Jury Issue

In Syl. pt. 4 of *Ilosky*, the West Virginia Supreme Court of Appeals held that “[t]he determination of whether a defendant’s efforts to warn of a product’s dangers are adequate is a jury question.”¹²⁹ Despite *Ilosky*’s categorical statement, courts can and do grant summary judgment in warnings claims.¹³⁰ Additionally, even though our court has not addressed overpromotion or warnings pollution, such issues would likely be factors that could be argued to the jury for consideration in its calculus as to whether the warning was adequate.

8. Disclaimers are Prohibited

It is important that the practitioner distinguish between a warning and a disclaimer. Whereas a warning seeks to warn the user regarding the danger of the product, the disclaimer attempts to avoid liability by stating so.¹³¹

9. No Post-Sale Duty to Warn

West Virginia does not recognize a post-sale duty to warn of defects that are discovered after a product leaves the manufacturer’s control. In *Johnson v. General Motors*, the West Virginia Supreme Court of Appeals expressly declined the opportunity to impose this duty upon manufacturers.¹³² While the court acknowledged that other jurisdictions have recognized a post-sale duty in various forms, the court noted that the boundaries of any such duty in West Virginia would be tied directly to the definition of a defect as set forth in *Morningstar*.¹³³ Pursuant to *Morningstar*, the reasonable safety of a product is determined by the state of the art at the time the product was manufactured.¹³⁴ As discussed above, the term “unsafe” imparts a standard that the product is to be

¹²⁷ 73 MO. L. REV. 1, 19–22 (2008).

¹²⁸ *Roney*, 654 F. Supp. 2d at 507 n.2.

¹²⁹ Syl. pt. 4, *Ilosky v. Michelin Tire Corp.*, 307 S.E.2d 603, 605 (W. Va. 1983).

¹³⁰ *Neary v. Charleston Area Med. Ctr., Inc.*, 460 S.E.2d 464, 469 (W. Va. 1995).

¹³¹ See *Hill v. Joseph T. Ryerson & Son, Inc.*, 268 S.E.2d 296 (W. Va. 1980) (same); *Morningstar v. Black & Decker Mfg. Co.*, 253 S.E.2d 666, 666 (W. Va. 1979) (no disclaimers permitted).

¹³² 438 S.E.2d 28, 39 (W. Va. 1993); see also *Wilkinson v. Duff*, 575 S.E.2d 335 (W. Va. 2002) (dismissing third party complaint against drug manufacturer asserting failure to warn claims).

¹³³ 253 S.E.2d at 666.

¹³⁴ *Id.* at 682–83.

tested by what the reasonably prudent manufacturer would accomplish in regard to the safety of the product, having in mind the general state of the art of the manufacturing process, including design, labels, and warnings, as it relates to economic costs at the time the product was made.¹³⁵

Morningstar makes clear that the warnings that must be provided with the product are determined by what the manufacturer knew, and what the general state of the art was, at the time the product was manufactured.¹³⁶ If a product was not defective at the time it was sold, under *Morningstar*, the later discovery of new information that might arguably enhance the safety of the product cannot form the basis to impose a duty to provide additional warnings.

III. THE APPLICATION OF BREACH OF WARRANTY TO PRODUCTS LIABILITY ACTIONS IN WEST VIRGINIA

A. *General*

The concept of warranty springs from contract principles embodied in the Uniform Commercial Code (UCC). A “warranty” is an assurance or promise by one party concerning a fact upon which another party may rely. In the context of the sale of goods, a “warranty” by the seller is an assurance to the “buyer” that the goods will be of a certain quality or will perform in a certain way. Generally speaking there are two types of warranties: express and implied. Express warranties are made by some overt act of the seller, while implied warranties are created by operation of law.¹³⁷

Despite the theory’s contractual underpinnings, West Virginia generally abolished privity of contract in actions grounded on the breach of express or implied warranty.¹³⁸ Accordingly, today a West Virginia litigant who suffers injuries as the result of a defective product may recover against a defendant manufacturer, wholesaler, or retailer for breach of warranty without standing in privity of contract with that party. However, the court recently clarified the abolition of privity in a case involving a limited express warranty specifically limited to the original purchaser.¹³⁹

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ See generally OWEN, *supra* note 1, at 148–52.

¹³⁸ Dawson v. Canteen Corp., 212 S.E.2d 82 (W. Va. 1975).

¹³⁹ McMahan v. Advance Stores Co., Inc., No. 35467, slip op. (W. Va. Nov. 24, 2010) (W. Va. Code section 46A-6-108(a) does not apply to suits for breach of a limited warranty by subsequent purchasers where the limited express warranty involved specifically limits its availability to original purchasers. The court further stated, “[w]hile our holding in *Dawson* would appear, at first glance, to apply to all express and implied warranties, we believe that the application of the *Dawson* holding should be limited to actions that are essentially product liability claims, consistent with the facts then before this Court. Nothing in *Dawson* or its progeny suggests that our holding in *Dawson* should extend to the \$49 consumer transaction between Advance and Mr. McMahan or the subsequent motor vehicle transaction between Mr. McMahan and Ms.

In addition to the sale of goods, a warranty may also be created in certain lease transactions of goods.¹⁴⁰

As a general rule, the four-year statute of limitations under the UCC applies to an express or implied warranty claim.¹⁴¹ However, for warranty claims involving personal injury, the two-year tort statute of limitations applies.¹⁴²

B. *Express Warranty*

1. Background

An express warranty is an affirmation of fact or promise made by the seller of a good which relates to the goods and becomes part of the basis of the parties' bargain.¹⁴³ This concept is set forth in West Virginia Code section 46-2-313, which states the following:

Express warranties by affirmation, promise, description, sample.

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement

John. To expand *Dawson* to Advance's limited express warranty herein would essentially have this Court rewrite the stated limitation of the warranty itself and thereby rendering the bargained-for limitations by the parties meaningless.").

¹⁴⁰ W. VA. CODE §§ 46-2A-210 to -216 (2010).

¹⁴¹ W. VA. CODE § 46-2-725 (2010).

¹⁴² *Taylor v. Ford*, 408 S.E.2d 270 (W. Va. 1991).

¹⁴³ W. VA. CODE § 46-2-313 (2010).

purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.¹⁴⁴

2. Important Issues

a. Form of the Affirmation

The affirmation at issue must be an affirmation of "fact."¹⁴⁵ "[E]quivocal language is hardly an express warranty."¹⁴⁶ This affirmation can be created in any manner. There is no requirement that it be in writing and it can arise through oral or pictorial representations as well.

b. Falsity

In order to give rise to an express warranty claim, the specific affirmation must be false.¹⁴⁷ The code specifically exempts a seller's puffing because such a statement is understood by the purchaser to be part of the sales process and not an affirmation of fact.¹⁴⁸

c. Basis of the Bargain

In order to create a warranty, the affirmation must be part of the basis of the bargain.¹⁴⁹

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* § 46-2-313(1)(a) (express warranty created by any affirmation of fact).

¹⁴⁶ *Rohrbough v. Wyeth Labs, Inc.*, 719 F. Supp. 470, 477 n.3 (N.D. W. Va. 1989) (language that frequency of risk is "unknown," but "seem[s] to be exceedingly rare" did not give rise to an express warranty because it was equivocal). There must be evidence that the challenged statement is "false." *Id.*

Manufacturers of products are not liable under a breach of warranty theory to persons, who, having taken or received drugs, contract that which the drug was designed to prevent, where brochures published by the manufacturer . . . contain no warranty, either express or implied, as to the absolute effectiveness of the drug.

Whittington v. Eli Lilly & Co., 333 F. Supp. 98, 100 (S.D. W. Va. 1971); *see also id.* ("virtually" did not mean "absolutely").

¹⁴⁷ *Whittington*, 333 F. Supp. at 100.

¹⁴⁸ W. VA. CODE § 46-2-313(2) (providing that an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty).

¹⁴⁹ *Id.* § 46-2-313(1)(a).

3. Important Cases/Treatises

An express warranty is created only when the affirmation of fact, promise or description of the goods is part of the basis of the bargain made by the seller to the buyer about the goods being sold.¹⁵⁰

C. *Implied Warranties*

In product litigation, implied warranty claims tend to arise more frequently. In addition to any “express” warranties provided by the merchant, the product must be “merchantable.”¹⁵¹ For goods to be “merchantable,” they must be at least fit for the ordinary purposes for which such goods are used.¹⁵² For example, the product must be substantially free of defects.¹⁵³

1. Implied Warranty of Merchantability

a. Background

The “implied warranty of merchantability is an assurance, imposed by law upon the seller, that a product is reasonably suitable for the general uses for which it is purchased and sold.”¹⁵⁴ This warranty has been statutorily adopted in West Virginia Code section 46-2-314, and it cannot be disclaimed.¹⁵⁵

b. Elements

The elements of an implied warranty of merchantability claim are as follows:

(1) there must be a sale or lease; (2) by a merchant with respect to goods of that kind; (3) merchantable goods must: (a) pass without objection in the trade under the contract description; and (b) in the case of fungible goods, be of fair average quality within the description; and (c) be fit for the ordinary purposes for which such goods are used; and (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and (e) be adequately contained, packaged, and labeled as the agree-

¹⁵⁰ Reed v. Sears Roebuck & Co., 426 S.E.2d 539 (W. Va. 1992).

¹⁵¹ W. VA. CODE § 46-2A-212 (2010).

¹⁵² *Id.* § 46-2A-212(2).

¹⁵³ *Id.*

¹⁵⁴ OWEN, *supra* note 1, at 171.

¹⁵⁵ W. VA. CODE § 46-2-314 (2010).

ment may require; and (f) conform to the promises or affirmations of fact made on the container or label if any; and (4) unless excluded or modified, other implied warranties may arise from course of dealing or usage of trade.¹⁵⁶

c. Important Issues

1. Sale

In order for the warranty to arise, there must be a sale or lease of goods.¹⁵⁷

2. By a Merchant with Respect to Goods of the Kind

Pursuant to West Virginia Code section 46-2-314(1), the sale must be by a merchant with respect to the type of goods sold to the plaintiff.¹⁵⁸

3. Defect

To prevail on a theory of breach of implied warranty of merchantability, a plaintiff must establish that the product was not fit for the ordinary use of that type of product.¹⁵⁹ The requirement that a product be merchantable does not mean that it must be perfect in every detail. To the contrary, a plaintiff may only prevail on the theory of breach of implied warranty of merchantability by proving that the product contained a defect that rendered the product not reasonably suitable for ordinary use.¹⁶⁰

d. Important Cases/Treatises

Evidence indicating that the manufacturer exercised reasonable care in the design of the product is relevant to the issue of whether the implied warranty of merchantability was breached.¹⁶¹

In order to recover under a breach of an implied warranty of merchantability theory, the plaintiff must prove the following by a preponderance of the evidence: (a) the product was not fit for both the ordinary purposes for which it

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* § 46-2A-210-16.

¹⁵⁸ *Id.* § 46-2-314(1).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ W. VA. CODE § 46-2-314 (2010); *id.* at cmts. 1-13; *Reed v. Sears Roebuck & Co.*, 426 S.E.2d 539, 539 (W. Va. 1992); *Anderson v. Chrysler Corp.*, 403 S.E.2d 189 (W. Va. 1991); *Mountaineer Contractors v. Mountain State Mack, Inc.*, 268 S.E.2d 886 (W. Va. 1980); *Jones, Inc. v. W.A. Wiedebusch Plumbing & Heating Co.*, 201 S.E.2d 248 (W. Va. 1973).

was intended, as well as its reasonably foreseeable uses, at the time that it was placed into the stream of commerce; and (b) the breach of warranty was a proximate cause of the plaintiff's damages.¹⁶²

2. Implied Warranty of Fitness for a Particular Purpose

a. Background

Whereas the implied warranty of merchantability ensures that goods are fit for the general purpose for which they are sold, the implied warranty of fitness for a particular purpose ensures that the goods are suited for a specific, particular purpose.¹⁶³ This warranty is established by West Virginia Code section 46-2-315:

Implied warranty: Fitness for Particular Purpose

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section [46-2-316] an implied warranty that the goods shall be fit for such purpose.¹⁶⁴

A warranty of fitness for particular purpose does not exist where the plaintiff uses the product for only "its ordinary purpose."¹⁶⁵

b. Elements

The elements of a claim for implied warranty of fitness for a particular purpose are as follows:

(1) that the seller had reason to know that the buyer intended to use the product for a particular purpose of which the seller was aware; (2) that the seller had reason to know that the buyer was relying on the seller's skill or judgment to select or furnish a product suitable for that purpose; (3) that the buyer did thereby

¹⁶² W. VA. CODE §§ 46-2-314 & -315 (2010); *Jones, Inc.*, 201 S.E.2d at 248; *Hill v. Joseph T. Ryerson & Son, Inc.*, 268 S.E.2d 296 (W. Va. 1980); *Dawson v. Canteen Corp.*, 212 S.E.2d 82 (W. Va. 1975).

¹⁶³ W. VA. CODE § 46-2-314.

¹⁶⁴ *Id.* § 46-2-315.

¹⁶⁵ *Wilson v. Brown & Williamson Tobacco Corp.*, 968 F. Supp. 296, 302 (S.D. W. Va. 1997).

rely on the seller; and (4) that the product was not in fact fit for the particular purpose.¹⁶⁶

In order to recover, a plaintiff must prove that the implied warranty of fitness for a particular purpose arose in a transaction for the sale of goods and that the lack of fitness for the particular purpose caused plaintiff's harm.

IV. APPLICATION OF NEGLIGENCE TO PRODUCTS LIABILITY ACTIONS IN WEST VIRGINIA

A. *Background*

Despite the ascendancy of strict liability and breach of warranty as the principal theories in products liability actions, negligence remains a viable theory. This point is made expressly in *Ilosky*, which states that negligence and strict liability are independent theories that contain “different elements which plaintiffs must prove to recover.”¹⁶⁷ Therefore, “[n]o rational reason exists to require plaintiffs in product liability actions to elect which theory to submit to the jury after the evidence has been presented when they may elect to bring suit on one or all of the theories.”¹⁶⁸

As strict liability evolves it has converged with negligence in its definition of defect. For example, *Morningstar* defines a defective product as “what the reasonably prudent manufacturer would accomplish in regard to the safety of the product.”¹⁶⁹ *Strahin v. Cleavenger* defines the negligence standard as “that level of care a person of ordinary prudence would take in like circumstances.”¹⁷⁰

We asked plaintiffs' counsel who litigate product liability actions in West Virginia why, given the advent of strict liability, they continue to assert negligence claims in their products complaints. One answer is that they do so because of a combination of the following factors: (a) negligence is conceptually simpler and more intuitive than strict liability, thus, enhancing jury appeal; (b) the jury instructions given in a negligence case are simpler than the byzantine strict liability instructions, again, enhancing the ease of proof; (c) the technical elements of a negligence case are simpler and better understood by trial judges, thus, making it more likely they will survive summary judgment; and (d)

¹⁶⁶ § 46-2-315; see also OWEN, *supra* note 1, at 182.

¹⁶⁷ Syl. pt. 6, *Ilosky v. Michelin Tire Corp.*, 307 S.E.2d 603, 603 (W. Va. 1983).

¹⁶⁸ *Id.*

¹⁶⁹ 253 S.E.2d 666, 683 (W. Va. 1979).

¹⁷⁰ 603 S.E.2d 197, 205 (W. Va. 2004). The convergence of strict liability and negligence is discussed extensively in OWEN, *supra* note 1, at 107–12. Owen points out that on a national level the theory of negligence suffered a marked decline with the advent of strict liability but then began a “resurgence” in the 1980s. Owen further points out the similarity or “functional equivalence” of the two theories in design and warnings cases. *Id.* at 108–09.

in a case that is a realistic punitive damages candidate, they will attempt to prove more than that the product was simply defective and will also be attempting to prove malicious and intentional conduct on the part of the manufacturer. Therefore, the specific allegedly malicious and intentional acts will simultaneously support both their punitive case and their negligence case.

B. Elements

The elements of a negligence products liability claim the following: (1) the manufacturer owed the consumer a duty to design/manufacture/warn regarding the product, (2) the product was defective thereby breaching that duty, (3) the breach of the duty proximately caused the plaintiff's injuries, and (4) the plaintiff was injured.

C. Issues

1. Need to Identify a Negligent Act

The obvious drawback for a plaintiff asserting a negligence claim is that he must prove that the manufacturer committed a specific, negligent act, rather than simply arguing that, regardless of the reason, the product was "not reasonably safe for its intended use."

2. Contributory/Comparative Negligence

In West Virginia, the defense of contributory negligence is void as against the state's public policy¹⁷¹ and has been replaced by the doctrine of modified comparative negligence.¹⁷² As in strict liability, the comparative fault (negligence) of the plaintiff reduces the verdict against the defendant unless the plaintiff's percentage of fault equals or exceeds fifty percent as compared to the fault of the defendants.¹⁷³ If the plaintiff's fault equals or exceeds fifty percent, there is no recovery.¹⁷⁴

¹⁷¹ See Syl. pt. 3, *Mills v. Quality Supplier Trucking, Inc.*, 510 S.E.2d 280 (W. Va. 1998) (public policy of West Virginia bars the defendant from asserting the defense of contributory negligence in a wrongful death case applying Maryland law, even though contributory negligence is a complete bar under Maryland's law).

¹⁷² *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879 (W. Va. 1979).

¹⁷³ *King v. Kayak Mfg. Corp.*, 387 S.E.2d 511 (W. Va. 1989) (citing *Adkins v. Whitten*, 297 S.E.2d 881 (W. Va. 1982)).

¹⁷⁴ *Id.*

3. Prima Facie Negligence

If a party can prove that the other party's conduct violated a statute or regulation during the negligent act, it may give rise to a prima facie case of negligence.¹⁷⁵ Of course, the converse is important also; compliance with a statute or regulation in a product liability case based on negligence tends to affirmatively demonstrate reasonable prudence.¹⁷⁶

In order to establish a prima facie case of negligence, the plaintiff must establish that there was a violation of a statute or regulation and that such violation was the proximate cause of his injury.¹⁷⁷ Assuming plaintiff meets this burden, a prima facie case of negligence arises. This prima facie case may be rebutted by evidence tending to show that the manufacturer "did what might reasonably have been expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law."¹⁷⁸ Frequently, the defendant will attempt to prove that the alleged violation did not cause the plaintiff's injuries.

4. Res Ipsa Loquitor

Another issue that may arise in a negligence products liability case is whether the plaintiff may rely on the existence of res ipsa loquitor to prove his or her case. As discussed above, in a negligence case, a plaintiff "must prove, with specificity, the manner in which the defendant was negligent in making or selling the product that injured the plaintiff. Proof merely that a product malfunctioned and caused an accident usually does not suffice."¹⁷⁹

However, there may be cases in which the plaintiff is unable to point to the specific negligent act by the defendant, but may attempt to prove her case through the doctrine of res ipsa loquitor ("the thing speaks for itself"). As explained by the West Virginia Supreme Court of Appeals, res ipsa loquitor is an evidentiary rule (not a rule of substantive law) in which "in the absence of evidence to the contrary, . . . the mere fact that a damage-causing event occurs . . . suffices for liability."¹⁸⁰

¹⁷⁵ See Syl. pts. 2–3, *Waugh v. Traxler*, 412 S.E.2d 756 (W. Va. 1991); Syl. pts. 2–3, *Spurlin v. Nando*, 114 S.E.2d 913 (W. Va. 1960). Under traditional terminology, such a violation was described as negligence per se. See OWEN, *supra* note 1, at 86–95. However, the West Virginia Supreme Court of Appeals has made it clear that a statutory violation gives rise to a prima facie case of negligence rather than negligence per se. Typically, prima facie negligence is asserted by the plaintiff, but it is also possible for the defendant to argue that the plaintiff's violation of a statute gives rise to a prima facie case of comparative fault.

¹⁷⁶ *Estep v. Mike Ferrell Ford Lincoln Mercury, Inc.*, 672 S.E.2d 345, 356–57 (W. Va. 2008).

¹⁷⁷ Syl. pt. 2, *Waugh*, 412 S.E.2d at 756.

¹⁷⁸ *Id.*

¹⁷⁹ OWEN, *supra* note 1, at 96–97 (citations omitted).

¹⁸⁰ *Beatty v. Ford Motor Co.*, 574 S.E.2d 803, 807–08 (W. Va. 2002).

The standard for proving *res ipsa loquitur* is set forth in Syl. pt. 4 of *Foster v. City of Keyser*,¹⁸¹ which states the following:

Pursuant to the evidentiary rule of *res ipsa loquitur*, it may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when (a) the event is of a kind which ordinarily does not occur in the absence of negligence; (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and (c) the indicated negligence is within the scope of the defendant's duty to the plaintiff.

In applying this rule, the *Foster* court has stated accordingly:

It is the function of the court to determine whether the inference may reasonably be drawn by the jury, or whether it must necessarily be drawn. It is the function of the jury to determine whether the inference is to be drawn in any case where different conclusions may reasonably be reached.¹⁸²

Further, the *Beatty* court stated the following:

In other words, the test set forth in *Foster* allows a trial court to make a preliminary determination that the evidence that a plaintiff intends to present is indeed circumstantial evidence that will lead to reasonable inferences by the jury, and is not simply evidence which would force the jury to speculate in order to reach its conclusion.¹⁸³

Typically, it is difficult for a plaintiff to prove the elements of *res ipsa loquitur* in a products liability case because there are usually alternative explanations for the cause of the accident, including the possibility that the plaintiff or a third-party misused the product. An illustrative case is *Beatty v. Ford Motor Co.*¹⁸⁴ In that case, the plaintiff alleged that he was driving a van "at approximately 40 miles per hour when he heard a 'metal to metal' noise, and then immediately lost control of the ability to steer" leading to a wreck.¹⁸⁵ When the plaintiff exited the vehicle, he discovered that the "drag link" on the vehicle was severely damaged.¹⁸⁶ Plaintiff, acting as his own expert, claimed that a broken

¹⁸¹ 501 S.E.2d 165 (W. Va. 1997).

¹⁸² *Id.* at 185.

¹⁸³ *Beatty*, 574 S.E.2d at 808.

¹⁸⁴ *Id.* at 803.

¹⁸⁵ *Id.* at 805.

¹⁸⁶ *Id.* at 806.

drag link could not occur in the absence of negligence and, thus, constituted *res ipsa loquitor*. Ford countered that there were alternative causes of the broken drag link, including the impact forces of the accident.¹⁸⁷ Under these facts, the circuit court granted summary judgment and the West Virginia Supreme Court of Appeals affirmed, holding that the plaintiff failed to meet his burden of proving that the drag link could not break in the absence of defect.¹⁸⁸ The doctrine of *res ipsa loquitor* does not apply to warranty claims.¹⁸⁹

V. TORTIOUS MISREPRESENTATION

The torts of negligent misrepresentation and intentional misrepresentation/fraud remain important substantive theories in products liability litigation.

Surprisingly, very few cases from the West Virginia Supreme Court of Appeals address misrepresentation in the products liability context. Despite the paucity of reported cases, the tort is commonly alleged at the trial court level, has been addressed by several federal courts applying West Virginia substantive law,¹⁹⁰ and has long been included in the *Restatement of Torts*.¹⁹¹

The principle substantive difference between the torts of negligent and intentional misrepresentation is, of course, the *scienter* requirement. It remains an open issue whether liability can be imposed for an innocent misrepresentation in the products liability context,¹⁹² there are no West Virginia cases that address this issue.¹⁹³

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 808. *Beatty* also involved issues of whether the plaintiff could prove defect in strict liability without an expert, through circumstantial evidence, a topic addressed in Part VIII.A.1. The court found that under the circumstances of that accident, he could not, relying on a similar analysis to the rejection of his *res ipsa loquitor* claim, i.e., that this is an accident that could have happened in the absence of a defect, and thus expert testimony was required. *See id.* at 807. *See OWEN, supra* note 1, at 96–107 for an extensive discussion of the elements and proof issues presented by *res ipsa loquitor* products cases.

¹⁸⁹ *Crawford v. General Motors Corp.*, 2007 WL 1960611, at *4 (N.D. W. Va. July 2, 2007).

¹⁹⁰ *Wilson v. Brown & Williamson Tobacco Corp.*, 968 F. Supp. 296, 301 (S.D. W. Va. 1997); *Baker v. Purdue Pharma L.P.*, 2002 WL 34213424 (S.D. W. Va. Mar. 28, 2002).

¹⁹¹ *See* RESTATEMENT (SECOND) OF TORTS §§ 310–11, 402B (1963–64); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 9 (1963–64).

¹⁹² *See* RESTATEMENT (SECOND) OF TORTS §§ 310–11, 402B (1963–64); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 9 (1963–64).

¹⁹³ *See OWEN, supra* note 1, at 139; *see* RESTATEMENT (THIRD) OF TORTS § 9 cmt. b (1997). The *Restatement (Third) of Torts* recognizes a product-based claim for innocent misrepresentation:

b. Liability for innocent misrepresentation. The rules governing liability for innocent product misrepresentation are stated in the Restatement, Second, of Torts § 402B. Case law has followed that Section. Section 402B contains two caveats. The first caveat leaves open the question whether a seller should be liable under § 402B for an innocent misrepresentation that is made to an individual and not to the public at large. This question remains open. Case

A. *Negligent Misrepresentation*

1. Background

Misrepresentation has long been a basis for imposing liability in the products context, as well as forming the basis of separate claims for causes of action including, where applicable, warranty and contract claims.¹⁹⁴ The rationale for the tort of negligent misrepresentation is simple: if a seller negligently misrepresents the product in question and those misrepresentations cause injuries, the seller, as the party at fault, should bear the costs.

2. Elements

The elements for a claim of negligent misrepresentation are the following: (1) an entity engaged in the business of selling or distributing products (2) in connection with a sale of a product (3) made a misrepresentation (4) of a material fact (5) that proximately caused (6) harm to person or property.¹⁹⁵

3. Important Issues

a. Strict Liability

Strict liability concepts do not apply to a negligent misrepresentation as the very nature of the claim requires the selling party to have negligently misrepresented the product.

b. Materiality

In order for liability to be imposed, the misrepresentation must be in regard to a material fact.¹⁹⁶ If the misrepresentation concerns a non-material fact,

law on the subject of liability for innocent misrepresentation has dealt exclusively with public misrepresentations. The second caveat to § 402B leaves open the question whether a seller should be liable for an innocent misrepresentation that causes harm to the person or property of one who is not a consumer of the product. Case law has not resolved the issue of whether an innocent misrepresentation may, in the absence of a product defect, be a basis of liability to a non-consumer who suffers harm as a result of reliance by an intermediary.

Id. Of course, if the other elements were present, an innocent misrepresentation could give rise to an implied warranty claim.

¹⁹⁴ *Wilson*, 968 F. Supp. at 296; RESTATEMENT (THIRD) OF TORTS § 9 (1997); Alissa J. Strong, "But he told me it was safe!": *The Expanding Tort of Negligent Misrepresentation*, 40 U. MEM. L. REV. 105 (2009).

¹⁹⁵ OWEN, *supra* note 1, at 133.

¹⁹⁶ *Id.* at n.12.

then liability will not be imposed because the misrepresentation would not be a proximate cause of the plaintiff's injuries.

c. Causation

In order for liability to be imposed, the plaintiff must have relied on the misrepresentation and the misrepresentation must be the proximate cause of the plaintiff's injury.¹⁹⁷ A misrepresentation that does not lead to injury is non-actionable.¹⁹⁸

d. Comparative Fault

As set forth in Part IV(C)(2), the ordinary principles of comparative fault would apply. In other words, if the plaintiff is found to be fifty percent or more at fault, there is no recovery.

B. Intentional/Fraudulent Misrepresentation

1. Background

The key importance of fraud as a legal doctrine is that, if proved, it permits the plaintiff to seek enhanced remedies, some of which are not available pursuant to any other products liability theory.

2. Elements

The elements of a fraudulent misrepresentation claim are as follows: (1) a representation that is made in conjunction with the sale of a product, (2) the representation was false, (3) the representation was material, (4) the speaker had knowledge of the representation's falsity, (5) the speaker intended that the representation be acted upon, (6) the purchaser was ignorant of the falsity, (7) the purchaser reasonably relied upon the misrepresentation, and (8) the purchaser's damages were proximately caused by the misrepresentation.¹⁹⁹

3. Important Issues

An extensive analysis of the tort of fraud is beyond the scope of this article. We will briefly mention some issues presented in the products liability context.

¹⁹⁷ *Id.* at 134; Meade v. Parsley, 2010 WL 4909435, at *27–29 (holding that reliance and proximate causation are an element of all misrepresentation claims).

¹⁹⁸ OWEN, *supra* note 1, at 134.

¹⁹⁹ Martin v. ERA Goodfellow Agency, Inc., 423 S.E.2d 379, 381 (W. Va. 1992) (per curiam); *see also* OWEN, *supra* note 1, at 115.

a. Enhanced Pleading

Because an allegation of fraud can, in and of itself, be very damaging, fraud claims must be plead with particularity pursuant to Rule 9(b) of the West Virginia Rules of Civil Procedure.²⁰⁰ The rationale for this heightened pleading requirement is to insure that fraud is not alleged without some evidentiary support and to permit the defendant to better prepare a defense.²⁰¹

b. Standard of Proof

Fraud must be proved by clear and convincing evidence.²⁰²

c. Representation of Fact Rather than Opinion

In order to constitute fraud, the misrepresentation must be of a fact, not an opinion.²⁰³

d. Fraudulent Omissions

Fraudulent omissions are equally actionable.²⁰⁴

e. Reliance

The court in *Lengyel v. Lint* stated the following:

The complaining party must, generally, have relied upon the representation claimed to be false, but: It is not necessary that the fraudulent representations complained of should be the sole consideration or inducement moving the plaintiff. If the representations contributed to the formation of the conclusion in the plaintiff's mind, that is enough."²⁰⁵

²⁰⁰ The Rule states in section (b): "*Fraud, mistake, condition of the mind, negligence*—In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." W. VA. R. CIV. P. 9(b).

²⁰¹ See *Hager v. Exxon Corp.*, 241 S.E.2d 920, 923 (W. Va. 1978); *Pocahontas Mining Co., Ltd. P'ship v. Oxy USA, Inc.*, 503 S.E.2d 258, 260 (W. Va. 1998) (stating that an allegation of "fraud is of such gravity that the strict requirements of Rule 9(b) were included to afford a party charged with fraud an opportunity to prepare an adequate defense").

²⁰² Syl. pt. 2, *Nugen v. Simmons*, 489 S.E.2d 7 (W. Va. 1997).

²⁰³ OWEN, *supra* note 1, at 122.

²⁰⁴ *Smith v. First Cmty. Bancshares, Inc.*, 575 S.E.2d 419, 432 (W. Va. 2002) ("Fraud is the concealment of the truth just as much as it is the utterance of a falsehood.").

²⁰⁵ 280 S.E.2d 66, 69 (W. Va. 1981).

Further, the court in *Trafalgar House Construction, Inc. v. ZMM, Inc.*, stated the following: “If a plaintiff performs an independent investigation of facts which are easily ascertainable, that plaintiff cannot later complain of detrimentally relying upon fraudulent misrepresentations or concealment by the defendant.”²⁰⁶

f. Remedies Available

One major benefit of proving fraud rather than relying on a claim of strict liability or negligence is that, if a party prevails on a claim for fraud, it may ask the Court to award attorney’s fees. “Where it can be shown by clear and convincing evidence that a defendant has engaged in fraudulent conduct which has injured a plaintiff, recovery of reasonable attorney’s fees may be obtained in addition to the damages sustained as a result of the fraudulent conduct.”²⁰⁷

g. Fraud on the Federal Drug Administration (FDA):
Claims Preempted

In drug and medical device cases, plaintiffs frequently attempt to claim that the manufacturer withheld evidence from the FDA. Such claims are preempted.²⁰⁸

4. Cases/Treatises

Although there are no West Virginia cases that apply fraud in the products context, the subject is treated extensively in *Products Liability Law*.²⁰⁹

C. *Consumer Fraud or Deceptive Trade Practices*

Although outside the scope of this article, another component of the products liability landscape in West Virginia is the West Virginia Consumer Credit and Protection Act (WVCCPA).²¹⁰ The WVCCPA prohibits the following:

(L) Engaging in any other conduct which similarly creates a likelihood of confusion or of misunderstanding;

²⁰⁶ 567 S.E.2d 294, 300 (W. Va. 2002).

²⁰⁷ Syl. pt. 4, *Bowling v. Ansted Chrysler-Plymouth-Dodge, Inc.*, 425 S.E.2d 144 (W. Va. 1992); *see also* *Eriksen Constr. Co., v. Morey*, 923 F. Supp 878 (S.D. W. Va. 1996).

²⁰⁸ *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341 (2001).

²⁰⁹ OWEN, *supra* note 1, at 114–31.

²¹⁰ W. VA. CODE §§ 46A-1-101 to -8-102 (2010).

(M) The act, use or employment by any person of any deception, fraud, false pretense, false promise or misrepresentation, or the concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any goods or services, whether or not any person has in fact been misled, deceived or damaged thereby.²¹¹

The WVCCPA provides for a private cause of action by “[a]ny person who purchases . . . goods . . . and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice prohibited or declared to be unlawful by the provisions of this article.”²¹²

As set forth above, the application of the WVCCPA is beyond the scope of the article. However, it is essential for the practitioner to be familiar with this statutory cause of action, the available remedies, and its application.

VI. DEFENSES TO PRODUCTS LIABILITY ACTIONS IN WEST VIRGINIA²¹³

Rule 8(c) of the West Virginia Rules of Civil Procedure enumerates nineteen affirmative defenses.²¹⁴ In addition to these specifically enumerated affirmative defenses, there are numerous common-law defenses as well, some of which apply to products liability cases.²¹⁵

²¹¹ *Id.* § 46A-6-102(7)(L–M).

²¹² *Id.* § 46A-6-106(a).

²¹³ Some of the “defenses” discussed in this section are not actually “defenses” but rather are elements of the plaintiff’s case, such as establishing jurisdiction or proving that the defendant’s conduct is because the proximate cause of the injury. We have chosen to address these issues in this section since they will typically be raised by the defense even if they are not true affirmative defenses. It is important to remember that, in a true affirmative defense, the defense has the burden of proof whereas in these other “defense-like” contexts, the burden would remain with the plaintiff.

²¹⁴ Rule 8(c) states the following:

[A] party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of the risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense.

W. VA. R. CIV. P. 8(c).

²¹⁵ *See, e.g.*, COMMONWEALTH LAW BOOK CO., WEST VIRGINIA AFFIRMATIVE DEFENSE HANDBOOK (Supp. 2009) (lists and discusses more than a hundred potential defenses); Robert L. Massie, *Products Liability Defenses, West Virginia*, DRI-PRODUCT LIABILITY DEFENSES at 15 (2004) (a state-by-state compendium).

A. *Defenses that are Per Se Void Pursuant to West Virginia Public Policy*

These are some defenses that are per se void against the public policy of this state and, therefore, may not be asserted in a West Virginia court even when the court applies the substantive law of another state pursuant to *lex loci delicti*. The most prominent of these forbidden defenses is classic contributory negligence, in which, if the plaintiff's fault is a proximate cause of the accident, he or she is completely barred from recovery.²¹⁶ Similarly, in a case involving Alabama's substantive law, Judge Goodwin held that applying the learned-intermediary defense in a pharmaceutical case involving a death alleged to have resulted from a fentanyl transdermal patch contravened the public policy of West Virginia.²¹⁷

B. *Defenses Related to Jurisdiction, Venue, and Service of Process*

1. Jurisdiction in Products Cases

a. Background

Due to the global economy, many products used and sold in West Virginia are manufactured internationally. For this reason, products cases frequently examine the outer limits of the jurisdictional powers of West Virginia's state and federal courts. Although it is beyond the scope of this article to comprehensively address all of the issues related to jurisdiction in products cases, we will briefly address the key concepts.

b. The Two-Step Analysis

Although this is a complex and fact-intensive area of the law, at least the legal standard is clear:

A court must use a two-step approach when analyzing whether personal jurisdiction exists over a foreign corporation or other nonresident. The first step involves determining whether the defendant's actions satisfy our personal jurisdiction statutes set forth in W. Va. Code § 31-1-15 [1984]²¹⁸ and W. Va. Code § 56-3-33 [1984]. The second step involves determining whether

²¹⁶ See Syl. pt. 3, *Mills v. Quality Supplier Trucking, Inc.*, 510 S.E.2d 280 (W. Va. 1998) (public policy of West Virginia bars the defendant from asserting the defense of contributory negligence in a wrongful death case applying Maryland law, even though contributory negligence is a complete bar under Maryland's law).

²¹⁷ *Woodcock v. Mylan, Inc.*, 661 F. Supp. 2d 602 (S.D. W. Va. 2009); *Vitaoe v. Mylan Pharm., Inc.*, 2010 WL 1008788 (N.D. W. Va. Mar. 5, 2010) (applying Louisiana law).

²¹⁸ W. Va. Code § 31-1-15 was subsequently repealed and has been replaced by W. Va. Code §§ 31D-1-101 to -17-1703 (2010).

the defendant's contacts with the forum state satisfy federal due process.²¹⁹

1. West Virginia's Long Arm Statutes

The first step in the analysis requires the court to examine West Virginia's two long-arm statutes: West Virginia Code section 31D-15-1510 and West Virginia Code section 56-3-33. If the plaintiff can establish jurisdiction under either of these statutes, this prong of the analysis is satisfied.

West Virginia Code section 31D-15-1510 permits the service of process upon a foreign corporation that has a registered agent. If the corporation has no registered agent or its registered agent cannot be served after reasonable diligence, then the foreign corporation may be served by registered mail or certified mail addressed to the corporation's Secretary.²²⁰

Additionally, West Virginia Code section 56-3-33 permits the exercise of long-arm jurisdiction when a defendant "(4) [c]aus[es] tortious injury in this state by an act or omission outside this state if he or she regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state"²²¹ These two long-arm statutes are intended to convey jurisdiction to the full extent permissible under federal due process.²²²

2. Federal Due Process

The second prong of the analysis is whether the plaintiff can establish general or specific jurisdiction over the defendant consistent with the Due Process Clause of the United States Constitution.²²³ The crux of the analysis is whether there are minimum contacts between the non-West Virginia defendant and West Virginia such that it would be fair for the court to exercise jurisdiction over the party at issue.²²⁴ Unfortunately, there is no clear guidance from the United States Supreme Court regarding the issue of whether placing a product in

²¹⁹ Syl. pt. 5, *Abbott v. Owens-Corning Fiberglas Corp.*, 444 S.E.2d 285 (W. Va. 1994); *see also* Syl. pt. 1, *Lane v. Boston Scientific Corp.*, 481 S.E.2d 753 (W. Va. 1996).

²²⁰ Of course, all service of process upon foreign corporations that are signatories to the Hague Treaty must comply with the provisions of that Treaty. *See* Part VI.B.2.b.3.

²²¹ W.VA. CODE § 56-3-33 (2010).

²²² Syl. pt. 2, *CSR Ltd. v. MacQueen*, 441 S.E.2d 658 (W. Va. 1994) ("[T]he rule in West Virginia will always be congruent with the outer edge of the due process envelope that, as determined by the Supreme Court of the United States, circumscribes jurisdiction.").

²²³ U.S. CONST. amend. XIV, § 1. Specific jurisdiction involves the specific actions within the forum state that led to the alleged injuries whereas general jurisdiction may be exercised over a defendant whose "activities in the forum state have been 'continuous and systematic[.]'"

²²⁴ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (the "defendant's conduct and connection with the forum State [must be] such that he should reasonably anticipate being haled into court there").

the stream of commerce is sufficient to convey jurisdiction over a product supplier or manufacturer. In *Asahi Metal Industry Co. v. Superior Court of California*,²²⁵ an evenly split Supreme Court addressed this issue and was unable to reach a majority opinion.²²⁶ “At base, the Justices in *Asahi* unanimously agreed that the defendant must have the purpose and intent to reach the forum state in order for a court to assert jurisdiction over him.”²²⁷

c. Issues Related to Jurisdictional Litigation

1. Plaintiff Bears the Burden of Proof

As the party seeking to invoke the jurisdiction of the court, the plaintiff bears the burden of proving by a preponderance of the evidence that jurisdiction is proper.²²⁸

2. Component Parts

Federal judges in the Southern District of West Virginia have disagreed over the emphasis to be given regarding whether the product is a component part or a finished product. In *Estes v. Midwest Products, Inc.*,²²⁹ Judge Goodwin engaged in an elaborate analysis, which emphasized that the defendant had manufactured a “finished” product rather than a component part.²³⁰ However, in *Jeffers v. Wal-Mart Stores, Inc.*,²³¹ Judge Chambers held that there is no constitutionally significant difference between component parts and finished products.²³²

3. Web Sites and Toll-Free Numbers

In *Jeffers*,²³³ Judge Chambers found that the fact the company had established a website and a toll-free number did not convey jurisdiction (discussed below).²³⁴

²²⁵ 480 U.S. 102 (1987).

²²⁶ *Id.*

²²⁷ *Estes v. Midwest Prods., Inc.*, 24 F. Supp. 2d 621, 627 (S.D. W. Va. 1998).

²²⁸ *Id.* at 622.

²²⁹ *Id.* at 630.

²³⁰ *Id.*

²³¹ 152 F. Supp. 2d 913, 921 (S.D. W. Va. 2001).

²³² *Id.*

²³³ *Id.* at 922–23.

²³⁴ *Id.*

d. Cases Addressing Jurisdictional Issues

Each case will turn upon the specific facts related to the distribution and sale of the non-West Virginia defendant's product and whether the case is being litigated in state or federal court. In Syl. pt. 2, *Hill v. Showa Denko, K.K.*,²³⁵ the court found that it could exercise personal jurisdiction over a Japanese manufacturer of L-tryptophan, which distributed its product through a wholly owned American subsidiary.²³⁶ The court found that although the parent company did not solicit business in West Virginia, the American subsidiary did.²³⁷ The court further found that it was fairer for the parent company to be required to travel to West Virginia for litigation as opposed to making an individual litigant travel to Japan.²³⁸ It also found that the parent company benefitted from its contacts with West Virginia.²³⁹ In conclusion, the court held, "We conclude that personal jurisdiction 'premised on the placement of a product into the Stream of Commerce is consistent with the Due Process Clause,' and can be exercised without the need to show additional conduct by the defendant aimed at the forum state."²⁴⁰

In *State ex rel. CSR Ltd. v. MacQueen*,²⁴¹ the court determined that the circuit court properly exercised jurisdiction over an Australian sales agent (CSR Ltd.) that sold asbestos to Johns-Manville Corporation for resale in the United States.²⁴² The court relied upon the fact that the sales agent introduced its fibers into the stream of American commerce, knew that products containing fibers would be distributed throughout the United States, had an ongoing commercial relationship with the largest American manufacturer of asbestos products, and was actively engaged in development and introduction of products that contained its raw materials.²⁴³

In *Estes*,²⁴⁴ Judge Goodwin addressed the issue of whether a Missouri based manufacturer of an air tank sold in a "West Virginia Kmart or Wal-Mart"²⁴⁵ was subject to jurisdiction in the state. Judge Goodwin found that jurisdiction was appropriate:

²³⁵ 425 S.E.2d 609 (W. Va. 1992).

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.* at 616 (citing *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 117 (1987)).

²⁴¹ 441 S.E.2d 658 (W. Va. 1994).

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ 24 F. Supp. 2d at 621.

²⁴⁵ *Id.* at 622.

Although its manufacturing operations are based in Missouri, Midwest has structured its primary conduct so that its finished products will be purposefully and intentionally sold in the state of West Virginia. Its purpose and intent is revealed in the distribution scheme it has undertaken. Midwest does not merely relinquish it [sic] products into the stream of commerce. Rather, by selling its products to consumers in this state through national retailers, Midwest manifests its purpose and intent to sell its air tanks here. The Court **FINDS** that Midwest has purposefully availed itself of the benefits and protections of doing business in the state of West Virginia and has established minimum contacts with the state such that jurisdiction may be asserted without offending traditional notions of fair play and substantial justice.²⁴⁶

In *Jeffers*,²⁴⁷ Judge Chambers addressed a products case that presented a very interesting jurisdictional issue.²⁴⁸ The plaintiff, an employee of Wal-Mart, alleged that she was injured as a result of exposure to chemicals when she cleaned up broken bottles of pesticide that fell from a shelf.²⁴⁹ The bottles were distributed (and perhaps manufactured) by C. L. Smith, a Missouri corporation.²⁵⁰

Judge Chambers analyzed the jurisdictional issue and found that C. L. Smith had none of the traditional contacts with West Virginia.²⁵¹ However, the company did have a national presence that necessarily included West Virginia and which included features such as a world-wide web site that advertised its product; a nationwide, toll-free telephone number; and advertisements in at least one national trade journal.²⁵²

Obviously, C. L. Smith had placed its products in the stream of commerce. However, Judge Chambers found that C. L. Smith had designed a product for a *national market*, and therefore, could be said to have availed itself of “the entire nation as a market.”²⁵³

²⁴⁶ *Id.* at 622.

²⁴⁷ 152 F. Supp. 913 (S.D. W. Va. 2001).

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 916.

²⁵⁰ *Id.*

²⁵¹ *Id.* at 922. It had never incorporated or registered to do business in West Virginia; never owned or controlled any corporations, real property, or personal property in West Virginia; nor had it ever had any bank accounts, employees, or telephone listings in West Virginia. *Jeffers*, 152 F. Supp. at 916.

²⁵² *Id.* at 922.

²⁵³ *Id.* at 921–22 n.4. The Court states that there was

no evidence in this case that Defendant C.L. Smith’s product was specifically designed for the West Virginia market. Whether designing and/or manufac-

The court then found that there was no basis for specific jurisdiction, and that the existence of the website, nationwide, toll-free telephone number, and advertisement in a national trade journal did not convey general jurisdiction.²⁵⁴

e. No Controlling Principle in Jurisdictional Case

Unfortunately, it is difficult to discern any controlling principles in the jurisdictional cases. It is safe to say that state courts are more likely to find jurisdiction than the federal courts as a result of *Hill's* adoption of the stream of commerce analysis.²⁵⁵ Other than that, each case will turn on its particular facts.

2. Venue in Products Cases

a. Forum Non Conveniens

At common law, a defendant was permitted to move for a transfer of venue pursuant to the doctrine of forum non conveniens, in which a court, in the exercise of its sound discretion, could “decline to exercise jurisdiction to promote the convenience of witnesses and the ends of justice, even when jurisdiction and venue are authorized by the letter of a statute.”²⁵⁶ Although a preference was given to the plaintiff’s choice of forum, the “defendant may overcome this preference by demonstrating that the forum has only a slight nexus to the subject matter of the suit and that another available forum exists which would enable the case to be tried substantially more inexpensively and expeditiously.”²⁵⁷ The framework for the substantive forum non conveniens analysis is set forth in *Norfolk & Western Ry. Co. v. Tsapis*.²⁵⁸

turing a product in order to comply with *national* requirements (e.g., compliance with federal labeling, packaging, or trademark laws; use of American English labels; conformity with American consumer expectations as to package shape, size (in ounces, rather than liters), etc.), could be said to constitute purposeful availment of the *entire nation* as a market, and thereby of every state, while not decided by the Fourth Circuit, would seem to be inconsistent with the result reached by that court in *Lesnick*.

Id.

²⁵⁴

Id.

²⁵⁵ Hill v. Joseph T. Ryerson & Son, Inc., 268 S.E.2d 296 (W. Va. 1980).

²⁵⁶ Syl. pt. 1, Abbot v. Owens-Corning Fiberglas Corp., 444 S.E.2d 285 (W. Va. 1994).

²⁵⁷ Syl. pt. 2, *id.*

²⁵⁸ 400 S.E.2d 239 (W. Va. 1990).

b. Venue Statutes

1. Statutory Authority for Change of Venue

In Syl. pt. 1, *State ex rel. Riffle v. Ranson*,²⁵⁹ the West Virginia Supreme Court of Appeals abrogated the common law doctrine of forum non conveniens and held that the exclusive authority governing change of venue is West Virginia Code section 56-1-1(b), which states the following:

(b) Whenever a civil action or proceeding is brought in the county where the cause of action arose under the provisions of subsection (a) of this section, if no defendant resides in the county, a defendant to the action or proceeding may move the court before which the action is pending for a change of venue to a county where one or more of the defendants resides and upon a showing by the moving defendant that the county to which the proposed change of venue would be made would better afford convenience to the parties litigant and the witnesses likely to be called, and if the ends of justice would be better served by the change of venue, the court may grant the motion.²⁶⁰

Thus, under the terms of the statute, a motion for transfer of venue can be made only if no defendant resides in the forum county and if the other factors set forth in the statute (convenience of the litigants and the witnesses and better suited to the “ends of justice”) are met.²⁶¹ One curious, “Alice in Wonderland”-like interpretation of this statute is set forth in *State ex rel. Huffman v. Stephens*.²⁶² In *Huffman*, the Court found that, under the terms of the statute, a case could be transferred under West Virginia Code section 56-1-1(b) only if it was filed in the county in which the “cause of action arose.”²⁶³ This leads to the bizarre conclusion that if the case was filed in a county under which venue was present under the terms of the statute, but that was *not* where the cause of action arose, it could not be transferred from that county to the county where the cause of action *actually* did arise.²⁶⁴

²⁵⁹ 464 S.E.2d 763 (W. Va. 1995).

²⁶⁰ W. VA. CODE § 56-1-1(b) (2010).

²⁶¹ See Syl. pt. 1, *Riffle*, 464 S.E.2d at 764 (West Virginia Code § 56-1-1(b) is the exclusive authority for discretionary changes of venue). See also W. VA. CODE § 31D-1-140 (2010).

²⁶² 526 S.E.2d 23 (W. Va. 1999).

²⁶³ *Id.* at 27.

²⁶⁴ This odd “change of venue” analysis does not preclude dismissal of the case if venue is simply not present. W. VA. CODE § 56-1-1 (2005).

Under the venue-giving defendant principle, if venue is proper for one defendant, it will be deemed proper for all the defendants.²⁶⁵

2. Elimination of West Virginia Code Section 56-1-1(c)

In 2003, the Legislature adopted West Virginia Code section 56-1-1(c), which sought to address forum shopping into West Virginia courts by adding the provision that “a nonresident of the state may not bring an action in a court of this state unless all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state.”²⁶⁶ However, in 2007 the Legislature repealed subsection (c), thus removing the requirement that a substantial part of the action arose in West Virginia.

3. Service of Process on Foreign Entities

Because many manufacturers are foreign corporations, issues arise as to how these entities may be served. If a foreign defendant is from a country that is a signatory to the Hague Convention,²⁶⁷ then service of process against that defendant is governed by the Treaty’s terms.²⁶⁸ Pursuant to the Treaty, a party is required, among other things, to send the complaint to the country’s Central Authority, and the complaint must be translated into the defendant’s native language.²⁶⁹

Because the Hague Convention is a federal treaty, its terms preempt inconsistent provisions in West Virginia’s long arm statute permitting service of process by other methods.²⁷⁰ Additionally, a plaintiff may not achieve service

²⁶⁵ See *McGuire v. Fitzsimmons*, 475 S.E.2d 132, 137 (W. Va. 1996) (“This Court follows the venue-giving defendant principle, whereby, once venue is proper for one defendant, it is proper for all other defendants subject to process.”) (quoting Syl. pt. 1, *Staats v. Co-Operative Transit Co.*, 24 S.E.2d 916 (W. Va. 1943)); *Kenamond v. Warmuth*, 366 S.E.2d 738, 739–40 (W. Va. 1988); *McConaughy v. Bennett’s Executors*, 40 S.E. 540, 541 (W. Va. 1901).

²⁶⁶ W. VA. CODE § 56-1-1(c) (2005). See *Morris v. Crown Equipment Corp.*, 633 S.E.2d 292 (W. Va. 2006) (holding that subsection (c) did not apply to civil suits filed against West Virginia citizens and residents and that the venue statute did not require the plaintiff to establish venue against all defendants).

²⁶⁷ Hague Convention, 20 U.S.T. 361, T.I.A.S. No. 6638, reprinted in 28 U.S.C.A.; see also FED. R. CIV. P. 4, at 38 (West Supp. 2008).

²⁶⁸ *Id.*

²⁶⁹ *Id.* Typically, plaintiff’s counsel will either reach agreement with the foreign defendant to accept service in exchange for other concessions in the litigation such as extending the time to respond to discovery or will retain a third-party that specializes in service of process pursuant to the Hague Convention to effectuate proper service.

²⁷⁰ Syl. pt. 5, *Bowers v. Wurzburg*, 519 S.E.2d 148 (W. Va. 1999) (to the extent the service of process provisions of West Virginia’s Long Arm statutes conflict with the Hague Convention, they are preempted).

on the foreign defendant by serving its American subsidiary if the two corporations maintain separate corporate identities.²⁷¹

4. Service to Defunct Corporation through Insurance Carrier

In *State ex rel. U.S. Fidelity & Guaranty Co. v. Stone*,²⁷² the court addressed the issue of whether a defendant corporation, Earl B. Beach Company, could be served in a mass asbestos case by virtue of service of process upon its insurer, U.S. Fidelity & Guaranty.²⁷³ The court remanded the case for reconsideration²⁷⁴ in light of its opinion in *Robinson v. Cabell Huntington Hospital, Inc.*,²⁷⁵ in which the court held that in order for a liability insurer to receive service, it must be authorized to do so by statute or by agreement.²⁷⁶

C. Defense Related to the Time in Which Suit Can be Filed

1. Statute of Limitations

a. Background

A statute of limitations imposes a certain amount of time following an injury in which a plaintiff can file suit. For example, pursuant to the West Virginia Code section 55-2-12, a plaintiff can file a negligence suit up to two years following his or her injury. The rationale for a statute of limitations is “to require the institution of a cause of action within a reasonable time.”²⁷⁷

b. Analytical Framework for Determining when the Statute Begins to Run

In syl. pt. 5 of *Dunn v. Rockwell*,²⁷⁸ the West Virginia Supreme Court of Appeals established a five-step analysis that should be applied in order to determine whether a matter is time-barred by the statute of limitations.²⁷⁹ In most

²⁷¹ Knapp v. Yamaha Motor Corp., U.S.A., 60 F. Supp. 2d 566, 573 (S.D. W. Va. 1999) (service on “Yamaha USA” did not constitute service on “Yamaha Japan” since the two corporations maintained separate corporate identities).

²⁷² 509 S.E.2d 598 (W. Va. 1998).

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ 498 S.E.2d 27 (W. Va. 1997).

²⁷⁶ *Id.* at 33.

²⁷⁷ Syl. pt. 2, *Perdue v. Hess*, 484 S.E.2d 182 (W. Va. 1997).

²⁷⁸ 689 S.E.2d 255 (W. Va. 2009).

²⁷⁹ *Id.*

products cases, the statute begins to run on the date of injury.²⁸⁰ However, there may be cases in which the plaintiff is either unaware they have been injured or unaware of the identity of the party that caused the injury.²⁸¹

In *Hickman v. Grover*,²⁸² the court addressed a case in which the plaintiff was injured when an air tank exploded.²⁸³ Obviously, the plaintiff knew that he was injured at the time of the explosion and two days later he learned the identity of the manufacturer of the air tank.²⁸⁴ However, it was not until two years after the explosion that plaintiff learned *why* the explosion occurred, i.e., that the air tank was allegedly defective.²⁸⁵ Based upon these facts, the West Virginia Supreme Court of Appeals extended the discovery rule to products liability cases and established the following analytical framework for determining when the statute begins to run:

In products liability cases, the statute of limitations begins to run when the plaintiff knows, or by the exercise of reasonable diligence should know, (1) that he has been injured, (2) the identity of the maker of the product, and (3) that the product had a causal relation to his injury.²⁸⁶

c. The Statutes of Limitations Applicable to Product Liability Actions

1. Strict Liability/Negligence

There is no specific statute of limitations governing tort actions such as negligence or strict liability suits; therefore, these product liability actions are governed by the two year statute of limitations set forth in West Virginia Code section 55-2-12 (personal actions not otherwise provided for).²⁸⁷

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² 358 S.E.2d 810 (W. Va. 1987).

²⁸³ *Id.*

²⁸⁴ *Id.* at 811.

²⁸⁵ *Id.*

²⁸⁶ Syl. pt. 1, *Hickman*, 358 S.E.2d at 810; *see also* Chancellor v. Shannon, 488 S.E.2d 1 (W. Va. 1997).

²⁸⁷ W. VA. CODE § 55-2-12 (2002).

2. Warranty Actions

a. Personal Injury Damages

When a plaintiff sues for personal injuries damages based on a breach of express or implied warranty, the two-year tort statute of limitations is applied rather than the UCC's four-year statute.²⁸⁸

b. Damages to the Product Itself

If a plaintiff sues for property damage to the product itself, strict liability does not apply unless the damage is from a "sudden calamitous event."²⁸⁹ Therefore, most claims will be brought as a contract (five or ten-year statute of limitations) or warranty claim (UCC four-year statute of limitations).²⁹⁰

3. Misrepresentation Actions

Causes of action for negligent misrepresentation and intentional misrepresentation/fraud are also governed by the two-year statute of limitations set forth in West Virginia Code section 55-2-12.²⁹¹

d. Important Issues

1. Discovery Rule

The most significant statute of limitations issue typically litigated in products cases is the application of the discovery rule. As set forth above, the discovery rule addresses situations in which it is appropriate to excuse the plaintiff's failure to file within the statutory period.²⁹²

²⁸⁸ *Armor v. Michelin Tire Corp.*, 923 F. Supp. 103 (S.D. W. Va. 1996); *Taylor v. Ford Motor Co.*, 408 S.E.2d 270 (W. Va. 1991).

²⁸⁹ *Kaiser Aluminum & Chem. Corp. v. Westinghouse Electric Corp.*, 981 F.2d 136, 145 (4th Cir. 1993).

²⁹⁰ *Id.* at 136; *Star Furniture Co. v. Pulaski Furniture Co.*, 297 S.E.2d 854 (W. Va. 1982).

²⁹¹ *See* W. VA. CODE § 55-2-12; *Trafalgar House Constr., Inc. v. ZMM, Inc.*, 567 S.E.2d 294, 299 (W. Va. 2002) ("Under West Virginia law, claims in tort for negligence, professional negligence, and misrepresentation (fraudulent or negligent) are governed by a two-year statute of limitation."); *Brown v. Cmty. Moving and Storage*, 455 S.E.2d 545, 547 n.3 (W. Va. 1995) (per curiam).

²⁹² *See* *Bennett v. Asco Services, Inc.*, 621 S.E.2d 710 (W. Va. 2005). In *Bennett*, sixteen months before plaintiffs amended their products liability suit to add the defendant, they were given documents that identified the defendant as playing a role in the manufacture of the heat sensors at issue. *Id.* Plaintiffs' experts identified the vehicle's heat sensors as a potential source of plaintiffs' fire alarm malfunction. *Id.* Ultimately, the court found plaintiffs were not entitled to the protection of the discovery rule and their claims were time barred. *Id.*

2. Typically, the Date on Which the Statute Began to Run Will be an Issue for the Fact Finder

Typically, the time when the statute begins to run, i.e., when the party knew, or by the exercise of reasonable diligence should have known, the identity of the alleged tortfeasor, will be a jury issue.²⁹³ However, if there is no question of material fact regarding the plaintiff's failure to comply with the statute of limitations, summary judgment is appropriate.²⁹⁴

3. Tolling for Compliance with the Medical Professional Liability Act

Under the Medical Professional Liability Act (MPLA), actions must be brought within two years of injury *or* within two years of the date on which the patient discovers or with reasonable diligence should have discovered the injury.²⁹⁵ All actions must be brought within ten years.²⁹⁶ Under the MPLA, plaintiffs must serve a Notice of Claim and Certificate of Merit at least thirty days before filing suit.²⁹⁷ Compliance with this provision tolls the statute of limitations.²⁹⁸

Despite finding that West Virginia Code section 55-7B-6 is clear and unambiguous and requiring dismissal for noncompliance in *State ex rel. Miller v. Stone*,²⁹⁹ the West Virginia Supreme Court of Appeals has declined to enforce the statute in subsequent cases. In two cases in particular, the plaintiffs' failure to comply with the pre-filing requirements of the MPLA was impliedly allowed to toll the statute of limitations.³⁰⁰ In both *Blankenship v. Ethicon, Inc.* and *Gray v. Mena*, the plaintiffs failed to comply with these requirements, and their complaints were dismissed by the circuit courts.³⁰¹ Despite the noncompliance, the West Virginia Supreme Court of Appeals reversed and remanded the cases,

²⁹³ *Pauley v. Combustion Eng'g, Inc.*, 528 F. Supp. 759 (S.D. W. Va. 1981).

²⁹⁴ *See Workman v. Wal-Mart Stores, East, L.P.*, 2006 WL 1896609 (S.D. W. Va. July 10, 2006); *Sayre v. Gen. Nutrition Corp.*, 867 F. Supp. 431 (S.D. W. Va. 1994); *Goodwin v. Bayer Corp.*, 624 S.E.2d 562 (W. Va. 2005); *Cecil v. Airco, Inc.*, 416 S.E.2d 728 (W. Va. 1992) (in a case in which the name of the proper defendant was stamped upon the product at issue, summary judgment regarding plaintiff's failure to identify the appropriate party within the statutory period was appropriate).

²⁹⁵ W. VA. CODE § 55-7B-4(a) (2010).

²⁹⁶ *Id.*

²⁹⁷ *Id.* § 55-7B-6(b).

²⁹⁸ *Id.* § 55-7B-6(h).

²⁹⁹ 607 S.E.2d 485 (W. Va. 2004).

³⁰⁰ *Blankenship v. Ethicon, Inc.*, 656 S.E.2d 451 (W. Va. 2007); *Gray v. Mena*, 625 S.E.2d 326 (W. Va. 2005).

³⁰¹ *See Blankenship*, 656 S.E.2d at 459-60.

finding dismissal too harsh and directing the circuit courts to permit the plaintiffs time to comply with the MPLA's requirements, effectively ignoring the statute of limitations.³⁰²

At this time, it is impossible to state whether these two cases represent a rule because the court provides no explanation or principled legal basis for the decisions. In each case, the court explains that the requirements of the MPLA were relatively new, and it is possible that the cases simply represent an ad hoc exception to the statute that will no longer be applied now that the MPLA has been in place for a number of years.³⁰³ Perhaps these decisions simply reflect the court's reluctance to affirm dismissal of actions for failure to comply with West Virginia Code section 55-7B-6(b).³⁰⁴

4. Tolling Due to Fraudulent Concealment

West Virginia tolls the statute of limitations for fraudulent concealment. "Whenever a plaintiff is able to show that the defendant fraudulently concealed facts which prevented the plaintiff from discovering or pursuing the potential cause of action, the statute of limitation is tolled."³⁰⁵

5. Persons Under a Disability

a. Minors

Pursuant to West Virginia Code section 55-2-15,³⁰⁶ the statute of limitation is tolled for infancy and insanity.³⁰⁷ When a person is an infant or insane, he/she must file the lawsuit: (1) within two years after he/she has attained the age of majority or becomes sane; and (2) within twenty years of the date of the wrongful act and injury.³⁰⁸ "The general purpose of West Virginia Code section 55-2-15 (1923) is to toll the commencement of the running of the statute of limi-

³⁰² *Id.*; *Gray*, 625 S.E.2d at 332.

³⁰³ *See Blankenship*, 656 S.E.2d at 459–60; *Gray*, 625 S.E.2d at 332.

³⁰⁴ *See* W. VA. CODE § 55-7B-6(b) (2010); *Hinchman v. Gillette*, 618 S.E.2d 387 (W. Va. 2005) (holding that dismissal of complaint without an opportunity to remedy non compliance with W. Va. Code § 55-7B-6 was a "draconian remedy" not intended by the legislature). *See also* *Westmoreland v. Vaidya*, 664 S.E.2d 90 (W. Va. 2008); *Roy v. D'Amato*, 629 S.E.2d 751 (W. Va. 2006); *Boggs v. Camden Clark Memorial Hospital, Inc.*, 609 S.E.2d 917 (W. Va. 2004).

³⁰⁵ Syl. pt. 5, *Dunn v. Rockwell*, 689 S.E.2d 255 (W. Va. 2009).

³⁰⁶ W. VA. CODE § 55-2-15 (2010).

³⁰⁷ *Id.*

³⁰⁸ *Id.*; *see also* *Fugate v. Borg Textile Corp.*, 881 F.2d 1069 (4th Cir. 1989); *Albright v. White*, 503 S.E.2d 860 (W. Va. 1998); *Donley v. Bracken*, 452 S.E.2d 699 (W. Va. 1994) (discovery rule does not generally apply to extend the twenty-year limitation on cases brought by infants and incompetents under section 55-2-15).

tations so that the legal rights of infants and the mentally ill may be protected.”³⁰⁹

b. Insanity/Incompetency

As stated above, the statute of limitations is tolled for insanity by virtue of West Virginia Code section 55-2-15.³¹⁰

Although a determination of whether a person is a minor is relatively uncomplicated, the determination of sanity is more problematic. For purposes of defining “sanity,” the fact finder must use the definitions set forth in West Virginia Code section 2-2-10(n),³¹¹ which defines an insane person as follows: “[t]he words ‘insane person’ include everyone who has mental illness as defined in [] [W. Va. Code section 27-1-2].”³¹² “‘Mental illness’ means a manifestation in a person of significantly impaired capacity to maintain acceptable levels of functioning in the areas of intellect, emotion, and physical well-being.”³¹³ The court has further defined the term insane as encompassing “such a condition of mental derangement as actually to bar the sufferer from comprehending rights which he is otherwise bound to know.”³¹⁴

An additional issue is determining when the insanity arose. If the person was insane at the time the cause of action accrued, the determination is easy. The more difficult case arises when the person is sane at the time the tort occurs and subsequently goes insane. For example, in *Worley* the plaintiff was fully competent at the time of injury, but as a result of his injuries became incompetent several days later. The defendant moved to dismiss, claiming the plaintiff had missed the statute of limitations. At syl. pt. 4, the court found that the statute is tolled if the plaintiff can prove that “the interval between the tortious act and the resulting mental illness was so brief that the plaintiff, acting with diligence, could not reasonably have taken steps to enforce his or her legal rights during such interval.”³¹⁵

Finally, should a committee be appointed to handle the incompetent person’s affairs this will, as a technical matter, remove the disability and stop the tolling of the statute of limitations.³¹⁶ The timeliness of the committee’s

³⁰⁹ Syl. pt. 3, *Worley v. Beckley Mech., Inc.*, 648 S.E.2d 620 (W. Va. 2007).

³¹⁰ W. VA. CODE § 55-2-15. See also *Worley*, 648 S.E.2d at 620; *Cobb v. Nizami*, 851 F.2d 730 (4th Cir. 1988) (patient who was in and out of mental institutions did not meet the statutory definition of insanity); *Skeens v. Rebound, Inc.*, No. 3:05-0855, 2007 WL 2471605 (S.D. W. Va. Aug. 24, 2007); *Harper v. Walker Mfg., Co.*, 699 F. Supp. 85 (S.D. W. Va. 1988).

³¹¹ W. VA. CODE § 2-2-10(n) (2010).

³¹² *Worley*, 648 S.E.2d at 624, n.3 (citing W. VA. CODE § 2-2-10(n)).

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ Syl. pt. 4, *Worley*, 648 S.E.2d at 622 (citing W. VA. CODE § 55-2-15 (1923)).

³¹⁶ See *Dearing v. Dearing*, 646 F. Supp. 903 (S.D. W. Va. 1986).

actions will be judged based upon its reasonableness and diligence in discovering the wrong.³¹⁷

c. Imprisonment does not toll the Statute of Limitations

The statute of limitations is not tolled by virtue of the plaintiff's imprisonment.³¹⁸

6. Statutes of Limitations from Other Jurisdictions

The Uniform Statute of Limitations on Foreign Claims Act, West Virginia Code sections 55-2A-1 to -6, provides that the statute of limitations applicable to a cause of action "accruing outside of [West Virginia] shall be either that prescribed by the law of the place where the claim occurred or by the law of [West Virginia], whichever bars the claim."³¹⁹

7. Savings Statute

Pursuant to West Virginia Code section 55-2-18, if an action is dismissed for some reason other than a resolution on the merits, then the statute of limitations is tolled for one year to permit the case to be refiled.

Where a choice of law question arises whether the tolling provisions of West Virginia, W. Va. Code § 55-2-18 [1985] or of the place where the claim accrued should be applied, the circuit court should ordinarily apply West Virginia law, unless the place where the claim accrued has a more significant relationship to the transaction and the parties.³²⁰

The court has taken an expansive view of section 55-2-18. In *Davis v. Mound View Health Care, Inc.*,³²¹ it applied the "plain language" of West Virginia Code section 55-7B-6 (2003) to affirm dismissal of the complaint. How-

³¹⁷ *Id.* at 911.

³¹⁸ *See* *Tesack v. Waterford Park, Inc.*, 689 F. Supp. 604 (N.D. W. Va. 1988).

³¹⁹ Syl. pt. 2, *McKinney v. Fairchild Int'l, Inc.*, 487 S.E.2d 913, 915 (W. Va. 1997) (pursuant to W. Va. Code section 55-2A-2 (1959), the court applied Kentucky's one-year statute of limitations rather than West Virginia's two-year statute).

³²⁰ Syl. pt. 5, *id.* at 915; *see also* *Armor v. Michelin Tire Corp.*, 923 F. Supp. 103 (S.D. W. Va. 1996) (holding that Ohio savings statute did not apply because the accident occurred in West Virginia); *Weethee v. Holzer Clinic, Inc.*, 490 S.E.2d 19 (W. Va. 1997) (per curiam) (remanding case for determination of whether West Virginia or Ohio had more significant contacts for purposes of determining which savings clause should apply).

³²¹ 640 S.E.2d 91 (W. Va. 2006).

ever, because the dismissal order was *silent* as to whether it was with or without prejudice, the court found the dismissal was presumed to be without prejudice.³²² The court then applied West Virginia Code section 55-2-18 and held that because the dismissal was not *with prejudice*, the plaintiff had another year from the date of its opinion to comply with West Virginia Code section 55-7B-6 and refile the action.³²³

8. Mass or Class Litigation

As plaintiffs' counsel increasingly seek to file products liability cases in the form of mass litigation or class action litigation, issues will arise as to how (and if) the court can apply the statute of limitations on a mass or class-wide basis or whether the fact finder must make specific statute of limitations findings on behalf of each plaintiff. Analysis of that issue is beyond the scope of this article, but it is sufficient to say that serious constitutional issues arise that will typically preclude the treatment of statute of limitations issues on a class-wide basis.³²⁴ A case that addresses this issue in the mass setting is *In re Hearing Losses I*.³²⁵

2. Statute of Repose

A statute of repose is distinguished from a statute of limitations in that it sets an absolute time bar by which a suit must be filed, regardless of the reason for that delay.³²⁶ There is no general statute of repose that applies to products

³²² *Id.* at 95.

³²³ *Id.*

³²⁴ See *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 149 (3rd Cir. 1998) (holding class treatment inappropriate because of individual issues such as causation, contributory and comparative negligence and statute of limitations); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1081 (6th Cir. 1996); *Ardoin v. Stein Lumber Co.*, 220 F.R.D. 459, 465 (W.D. La. 2004) (finding plaintiffs failed to satisfy even the light commonality burden, where individual issues abounded, including issues of knowledge of risks of chromated copper arsenate treated wood); *Jacobs v. Osmose, Inc.*, 213 F.R.D. 607, 614–16 (S.D. Fla. 2003); *Badillo v. Am. Tobacco Co.*, 202 F.R.D. 261, 264 (D. Nev. 2001) (holding that individual issues about causation, comparative fault, assumption of risk, product identification, and statute of limitations prevented class certification); *Guillory v. Am. Tobacco Co.*, No. 97C8641, 2001 WL 290603 at *8 (N.D. Ill. March 19, 2001) (denying class certification because it is impossible to determine what each plaintiff's subjective knowledge was without mandating individual inquiry into each plaintiff's circumstances—denying defendants the opportunity to prepare a defense); *Church v. Gen. Elec. Co.*, 138 F. Supp. 2d 169, 181–82 (D. Mass. 2001) (holding that class treatment is inappropriate because of individual issues of proof of nuisance and trespass claims and possible defenses); *In re Ford Motor Vehicle Co. Paint Litig.*, 182 F.R.D. 214, 220 (E.D. La. 1998) (“There is also no escaping the reality that causation, reliance, damages and affirmative defenses relating to the state of the plaintiffs’ knowledge . . . require individualized determinations.”).

³²⁵ 539 S.E.2d 112 (W. Va. 2000).

³²⁶ OWEN, *supra* note 1, at 985–86.

liability actions in West Virginia. There are a number of idiosyncratic statutes of repose, including the architects' and builders' statute of repose,³²⁷ which bars actions filed more than ten years after an alleged defect in the planning, designing, surveying, or construction of a building;³²⁸ the tolling statute for infancy/insanity, which specifically states that no case may be brought more than twenty years after the cause of action accrues;³²⁹ the MPLA,³³⁰ which creates a ten-year statute of repose for all medical malpractice claims, regardless of the date of discovery, unless there is evidence of fraud concealment or misrepresentation of material facts by the health care provider.³³¹

3. Laches

The doctrine of laches is an equitable defense that applies when delay by the plaintiff would make it unfair or inequitable for the plaintiff to proceed.³³² The elements the defendant must prove are “(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.”³³³ Typically, a products suit is not an equitable act, and, therefore, laches will not apply. However, should a products suit seek equitable relief such as unjust enrichment, then laches potentially will apply to that claim.³³⁴

D. *Superseding and Intervening Cause*

Typically, if more than one person engages in conduct that is found to be the cause of the plaintiff's injuries, these persons are considered to be concurrent tortfeasors who are jointly and severally liable for the plaintiff's damages.³³⁵ However, there are some situations in which the conduct of the subsequent tortfeasor serves to break the causal chain, creating an “intervening and superseding cause,” thus relieving the first party from liability.

³²⁷ W. VA. CODE § 55-2-6a (2008).

³²⁸ See *St. Paul Fire & Marine Ins. Co., v. Emerson Network Power*, 695 F. Supp. 2d 308 (S.D. W. Va. 2010).

³²⁹ § 55-2-15; see also *Donley v. Bracken*, 452 S.E.2d 699 (W. Va. 1994) (upholding constitutionality of the twenty year cap as reasonably related to the legislative goal of preventing stale law suits); *Albright v. White*, 503 S.E.2d 860 (W. Va. 1998)(same).

³³⁰ § 55-7B-4.

³³¹ Syl. pt. 1, *Gaither v. City Hospital, Inc.*, 487 S.E.2d 901, 906–09 (W. Va. 1997).

³³² Syl. pt. 2, *Ballard v. Kitchen*, 36 S.E.2d 390 (W. Va. 1945).

³³³ *Bradford v. Ind. & Mich. Elec. Co.*, 588 F. Supp. 708, 714 (S.D. W. Va. 1984) (citations omitted); see also *Dunn v. Rockwell*, 689 S.E.2d 255, 267 (W. Va. 2009).

³³⁴ *Absure, Inc. v. Huffman*, 584 S.E.2d 507, 511 (W. Va. 2003).

³³⁵ Syl. pt. 5, *Kodym v. Frazier*, 412 S.E.2d 219, 220 (W. Va. 1991) (quoting syl. pt. 1, *Reilley v. Byard*, 119 S.E.2d 650, 650 (W. Va. 1961)).

In order for an intervening cause to relieve a party of liability, the wrongful act “must be a negligent act which constitutes a new effective cause and operates independently of any other act, making it and it only, the proximate cause of the injury.”³³⁶ The *Restatement (Second) of Torts* defines a superseding cause as “an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about.”³³⁷

There are numerous factors that may be considered in the determination of whether an act constitutes a superseding cause.³³⁸ The West Virginia Supreme Court of Appeals has identified foreseeability as the key factor in this inquiry.³³⁹ Ultimately, the question of whether an act was a superseding and intervening cause will be a question of fact for the jury “where the evidence is conflicting or when the facts, though disputed, are such that reasonable [persons] may draw different conclusions from them.”³⁴⁰ Although the doctrine of superseding cause originally arose in the context of negligence, it “appl[ies] equally to claims in strict products liability as well.”³⁴¹

³³⁶ *Sheetz, Inc. v. Bowles Rice McDavid Graff & Love, PLLC*, 547 S.E.2d 256, 270 (W. Va. 2001) (citing syl. pt. 3, *Wehner v. Weinstein*, 444 S.E.2d 27, 29 (W. Va. 1994)).

³³⁷ RESTATEMENT (SECOND) OF TORTS § 440 (1965); see also OWEN, *supra* note 1, at 816–30.

³³⁸ The *Restatement (Second) of Torts* states the following:

The following considerations are of importance in determining whether an intervening force is a superseding cause of harm to another:

- (a) The fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor’s negligence;
- (b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation;
- (c) the fact that the intervening force is operating independently of any situation created by the actor’s negligence, or, on the other hand, is or is not a normal result of such a situation;
- (d) the fact that the operation of the intervening force is due to a third person’s act or to his failure to act;
- (e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him;
- (f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.

RESTATEMENT (SECOND) OF TORTS § 442 (1965).

³³⁹ *Harbaugh v. Coffinbarger*, 543 S.E.2d 338, 345 (W. Va. 2000) (“[T]he test by which the negligent conduct of one is to be insulated as a matter of law by the independent negligent act of another, is reasonable unforeseeability on the part of the original actor of the subsequent intervening act and resultant injury.”).

³⁴⁰ *Sheetz*, 547 S.E.2d at 270 (quoting Syl. pt. 2, *Evans v. Farmer*, 133 S.E.2d 710, 711 (W. Va. 1963)).

³⁴¹ OWEN, *supra* note 1, at 819.

E. Defenses Related to Plaintiff Misconduct

In many products liability cases the defense contends that the plaintiff misused the product, thereby causing his or her injuries. This defense is expressly recognized in *Morningstar*, which states the following: “The issue of appropriate use of the product has as its counterpart the defense of abnormal use, which may at times carry companion defenses of contributory negligence and assumption of risk on the part of the user.”³⁴² Although there is obvious overlap in that these defenses focus on the conduct of the product user,

Contributory negligence and assumption of the risk are not identical. The essence of contributory negligence is carelessness; of assumption of risk, venturousness. Knowledge and appreciation of the danger are necessary elements of assumption of risk. Failure to use due care under the circumstances constitutes the element of contributory negligence.³⁴³

1. Comparative Fault

a. Background

At common law, the doctrine of contributory negligence was a complete defense. In *Bradley v. Appalachian Power Co.*,³⁴⁴ the West Virginia Supreme Court of Appeals modified the defense, holding that a party is not barred from recovery as long as his contributory negligence does not equal or exceed the combined negligence or fault of the other parties involved in the accident.³⁴⁵ “In mathematical terms, the plaintiff, in order to recover, cannot be more than 49 percent negligent.”³⁴⁶

b. Elements

The following are the elements necessary to show that the plaintiff bears comparative fault: (1) plaintiff owed himself/herself a duty of care, (2) plaintiff breached that duty, and (3) the breach was the proximate cause of the plaintiff’s injuries.

³⁴² *Morningstar v. Black & Decker Mfg. Co.*, 253 S.E.2d 666, 683 (W. Va. 1979).

³⁴³ *King v. Kayak Mfg. Co.*, 387 S.E.2d 511, 515–16 (W. Va. 1989) (quoting Syl. pt. 5, *Spurlin v. Nardo*, 114 S.E.2d 913, 915 (W. Va. 1960)).

³⁴⁴ 256 S.E.2d 879 (W. Va. 1979).

³⁴⁵ *Id.* at 885.

³⁴⁶ *Star Furniture Co. v. Pulaski Furniture Co.*, 297 S.E.2d 854, 861 (W. Va. 1982) (citing *Bradley*, 256 S.E.2d at 887 n.19)).

c. Important Issues

1. The Proper Scope of Comparative Fault

“Comparative negligence/fault is available as a defense . . . so long as the [alleged breach of care] is not a failure to discover a defect or guard against it.”³⁴⁷ This qualification was added because

to penalize a consumer for failing to discover defects or to guard against them places a burden on the consumers which strict liability was intended to remove Strict liability assumes that products which are placed in the stream of commerce are safe Thus, there is no reason why a consumer should be expected to inspect products for defects or to guard against them.³⁴⁸

Under West Virginia choice of law, contributory negligence is void against public policy.³⁴⁹ Therefore, if injury happens in a state that has some form of contributory negligence, under *lex loci delicti*, law of place of injury applies; however, contributory negligence will not apply as it is void against public policy.³⁵⁰

2. Impact of the Age of the Injured Party for Comparative Fault Analysis

The comparative fault analysis may be altered if the plaintiff is a minor under the age of fourteen. Pursuant to the “Rule of Sevens,” a child under the age of seven is conclusively presumed to be incapable of negligence;³⁵¹ children between the age of seven and fourteen are presumed to be incapable of negligence, but that presumption may be rebutted.³⁵² Children over the age of fourteen are presumed to be capable of negligence.³⁵³ The procedure, as explained by the court, is as follows:

In order to rebut the presumption that a child between the ages of seven and fourteen lacks the capacity to be negligent, evidence of the child’s intelligence, maturity, experience, and

³⁴⁷ Syl. pt. 5, *Star Furniture Co.*, 297 S.E.2d at 855.

³⁴⁸ *Id.* at 862.

³⁴⁹ Syl. pt. 3, *Mills v. Quality Supplier Trucking, Inc.*, 510 S.E.2d 280, 280 (W. Va. 1998).

³⁵⁰ *Id.* at 282–83.

³⁵¹ Syl. pt. 1, *Pino v. Szuch*, 408 S.E.2d 55, 56 (W. Va. 1991).

³⁵² Syl. pt. 2, *id.* at 56–57.

³⁵³ Syl. pts. 1–3, *id.* at 57.

judgmental capacity must be presented to the jury. It is also permissible to show that the child had been recently warned of the dangers associated with the activity that gave rise to his injury. The jury should be instructed about the rebuttable presumption and that it should consider the foregoing factors along with the entire chain of events leading up to the accident to determine whether the presumption has been rebutted.³⁵⁴

3. Assumption of the Risk

The rationale behind the defense of assumption of the risk is that if someone knowingly uses a product while apprised of a risk of injury, it would be unfair for that person to recover damages if he or she were injured. The crux of the issue is the venturousness of plaintiff's conduct.³⁵⁵ There are two elements to assumption of the risk: (1) the nature and extent of the risk were fully appreciated, and (2) the risk was voluntarily incurred.³⁵⁶

West Virginia has adopted modified comparative assumption of the risk. It does not act as a complete bar to plaintiff's recovery; rather the plaintiff's degree of fault is assessed by the jury and any damage award is diminished accordingly.³⁵⁷ Unless the plaintiff's comparative fault is determined to be fifty percent or more, there is no recovery.³⁵⁸

One issue that is frequently litigated in assumption of the risk cases is the precise risk that must be appreciated. The cases examining this issue have found that the key factor is whether the plaintiff was aware that there was a risk of injury, not that the plaintiff knew of the precise defect and the precise risk presented by that defect. For example, in *Desco Corp. v. Harry W. Trushel Construction Co.*,³⁵⁹ the court found that the dangerous condition was the storage of flammable materials in a warehouse with an inoperable sprinkler system.³⁶⁰ The court rejected the plaintiff's argument that it was not aware of the precise risk that caused the fire and held that "the precise cause of harm arising from the risk need not be anticipated by the parties."³⁶¹

An illustrative opinion in this regard is Circuit Court Judge Hoke's opinion in *Waller v. Ford Motor Co.*³⁶² In *Waller*, the decedent was driving while

³⁵⁴ Syl. pt. 4, *id.* at 57.

³⁵⁵ *Hunn v. Windsor Hotel Co.*, 193 S.E.2d 57 (W. Va. 1937); *see also* *King v. Kayak Mfg. Co.*, 387 S.E.2d 511, 515 (W. Va. 1989).

³⁵⁶ *King*, 387 S.E.2d at 517.

³⁵⁷ Syl. pt. 2-3, *id.* at 512.

³⁵⁸ *Id.*

³⁵⁹ 413 S.E.2d 85 (W. Va. 1991).

³⁶⁰ *Id.* at 92.

³⁶¹ *Id.* at 93.

³⁶² Civ. Action No. 03-C-67, slip op. (Apr. 28, 2008).

intoxicated from a large dose of prescription medication and was involved in an accident; his vehicle caught on fire, and he perished. The plaintiff sued arguing that the vehicle was uncrashworthy due to improper fire proofing and defects in the fuel system.³⁶³ The plaintiff argued that an assumption of the risk instruction should not have been given to the jury because there was no evidence that the plaintiff knew of the alleged defect,³⁶⁴ i.e., that the fuel system was allegedly uncrashworthy. Judge Hoke rejected this argument and found that the key issue was that the plaintiff voluntarily exposed himself to the risk of injury by operating a vehicle while intoxicated on prescription medication.³⁶⁵ The court stated the following: "At the trial of this case, there was evidence that Mr. Waller ventured out in his vehicle after having ingested an unusually large quantity of prescription medication. The danger and risk he assumed, in this negligence and strict liability case, was getting behind the wheel of a vehicle after doing so."³⁶⁶

In *In re Public Building Asbestos Litigation*,³⁶⁷ the court addressed a premises liability case in which there was evidence that the State of West Virginia had been aware for decades that asbestos was a hazardous substance, had adopted regulations setting threshold limits for exposure to asbestos, and knew that asbestos was in state buildings. However, the trial court refused (and the Court of Appeals affirmed) to give an assumption of the risk instruction because there was no finding that the state had actual knowledge that the asbestos limits in some of its buildings were above the threshold limits.³⁶⁸ When the premises owner is sued by an employee of the lessee,

the defense of assumption of risk is available to bar a claim based upon a breach of a duty imposed by a statutory safety scheme only where the defendant bears the burden of proving (1) that there was available to the wage earner an alternative to encountering the risk; (2) that the wage earner's choice between the risk and such alternative was fully voluntary; (3) that such alternative afforded the wage earner the safety mandated by statute, rule, or regulation; and (4) that the wage earner's determination to encounter the risk was, under the circumstances, made with willful, wanton, or reckless disregard for his own safety.³⁶⁹

³⁶³ *Id.*, slip op. at 2–3.

³⁶⁴ *Id.*, slip op. at 10.

³⁶⁵ *Id.*, slip op. at 10–12.

³⁶⁶ *Id.*, slip op. at 10.

³⁶⁷ 454 S.E.2d 413 (W. Va. 1994).

³⁶⁸ *Id.* at 424.

³⁶⁹ *Pack v. Van Meter*, 354 S.E.2d 581, 588 (W. Va. 1986) (quoting *Martin v. George Hyman Constr. Co.*, 395 A.2d 63, 74 (D.C. 1978)).

F. *Defenses Related to the Product Itself*

1. State of the Art

Morningstar establishes that the relevant inquiry is whether the manufacturer fulfilled its duty in light of what was economically and technologically feasible at the time the product was manufactured, and not whether the product could have been made better or safer at some later date.³⁷⁰ As long as the manufacturer's conduct was reasonable at the time of manufacture, a product is not defective solely because subsequent improvements would render the product safer.³⁷¹ The state of the art defense applies to both design and warnings claims.³⁷²

2. Inherently Dangerous Product

Some useful products are inherently dangerous and cannot be made safe for their intended and ordinary use. Such products are not defective simply because they are dangerous, so long as they are properly designed, manufactured, and accompanied by proper instructions and warnings. The concept of the inherently dangerous product has long been recognized in the *Restatement (Second) of Torts*, most prominently in comment k of section 402A.³⁷³ In *Smith v. Wyeth*

³⁷⁰ Syl. pt. 5, *Morningstar v. Black & Decker Mfg. Co.*, 253 S.E.2d 666, 667 (W. Va. 1979) (“The term ‘unsafe’ imparts a standard that the product is to be tested by what a reasonably prudent manufacturer would accomplish in regard to the safety of the product, having in mind the general state of the art of the manufacturing process, including design, labels and warnings, as it relates to economic costs at the time the product was made.”); *Id.* at 683 (“The standard of reasonable safeness is determined . . . by what a reasonably prudent manufacturer’s standards should have been at the time the product was made.”).

³⁷¹ See also *Church v. Wesson*, 385 S.E.2d 393, 396 (W. Va. 1989) (per curiam) (finding that the evidence showed that welding process at issue was state of the art at the time of manufacture); *Estep*, 672 S.E.2d at 356 (approving a state of the art jury instruction in the context of compliance with federal or state law); OWEN, *supra* note 1, at 706–40.

³⁷² *Church*, 385 S.E.2d at 396 (defendant entitled to judgment where the plaintiff’s alternative “was not feasible when the product was manufactured”).

³⁷³ The *Restatement (Second) of Torts* states the following:

There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper direction and warning, is not defective, nor is it *unreasonably* dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient

Laboratories, Inc.,³⁷⁴ Judge Copenhaver was faced with a products suit alleging that the DTP (diphtheria, pertussis, and tetanus) vaccine was dangerous. The court found that, although the product presented risks, these risks were known and inherent dangers of the product. Based upon this finding, the court predicted that the West Virginia Supreme Court of Appeals would adopt (or be influenced by) comment k.³⁷⁵ Examples of such products include firearms, cigarettes, alcohol, and numerous others.³⁷⁶

G. *Defenses Related to Preemption, Governmental Standards, or Governmental Involvement*

1. Preemption

a. Background

The doctrine of preemption arises from the Supremacy Clause of the United States Constitution which states the following:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.³⁷⁷

medical experience, there can be no assurance of safety, or perhaps even the purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with a qualification that they are properly prepared and marketed, and proper warning is given, when the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965) (emphasis added).

³⁷⁴ 1986 WL 720792 (S.D. W. Va. 1986).

³⁷⁵ *Id.* at § 4–5; *see also* Rohrbough v. Wyeth Labs, Inc., 719 F. Supp. 470, 477 n.1 (N.D. W. Va. 1989) (predicts that it is likely the Court of Appeals would apply comment k “where a product is proven to be unavoidably unsafe”) (citations omitted); *see also* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. d (1998) (“[C]ourts generally have concluded that legislatures and administrative agencies can, more appropriately than courts, consider the desirability of commercial distribution of some categories of widely used and consumed, but nevertheless dangerous, products”); OWEN, *supra* note 1, at 669–706.

³⁷⁶ *See* OWEN, *supra* note 1, at 676–706.

³⁷⁷ U.S. CONST. art. VI, cl. 2.

Consistent with that command, courts have long recognized that state laws that conflict with federal law are “without effect.”³⁷⁸ The theory behind preemption is that federal law must be supreme or it would be trumped by a myriad of state laws. An overview of preemption is far too large a subject for this article so we shall simply discuss the basics as they apply to products liability law.³⁷⁹

b. The Three Types of Preemption

There are three basic types of preemption: (1) express preemption, (2) implied conflict preemption, and (3) implied “occupation of the field” preemption.³⁸⁰ All federal laws are preemptive, regardless of whether they derive from the Constitution, federal statute, treaty, or administrative regulation.

Analytically, express preemption is the simplest. Pursuant to the Supremacy Clause, state law must give way when the federal government has expressed an intent to preempt state law.³⁸¹

Implied conflict preemption looks for an actual conflict between federal law and state law.³⁸² An actual conflict exists when either compliance with both federal and state law is impossible or when state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”³⁸³

Implied “occupation of the field” preemption occurs when there is a particular area in which Congress has made a determination that it is to be the sole regulator. As stated by Laurence Tribe, in *American Constitutional Law*,

For if Congress has validly decided to “occupy the field” for the federal government, state and local regulations within that field must be invalidated no matter how well they comport with substantive federal policies [But] federal occupation of a field will not be lightly inferred: “The principle to be derived from [the Supreme Court’s] decisions is that federal regulations of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no

³⁷⁸ *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

³⁷⁹ For an extensive analysis of preemption see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 6-28 to -33 (3d ed. 2000) [hereinafter “TRIBE”].

³⁸⁰ *Morgan*, 680 S.E.2d at 84.

³⁸¹ See TRIBE, *supra* note 379, at § 6-29.

³⁸² See *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299-300 (1988); *In re W. Va. Asbestos Litig.*, 592 S.E.2d 818, 822 (W. Va. 2003).

³⁸³ *Fidelity Fed. Sav. & Loan Assoc. v. de la Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

other conclusion, or that the Congress has unmistakably so ordained.”³⁸⁴

c. Significant Federal Cases

There are literally thousands of federal preemption cases so it would be impossible to exhaustively survey this area of the law. For our purposes we will discuss two cases that help show the interplay between preemption and products liability.

In *Geier v. American Honda Motor Co., Inc.*,³⁸⁵ Ms. Geier collided with a tree while driving a 1987 Honda Accord.³⁸⁶ Geier and her parents sued various Honda entities alleging that the subject Honda Accord was defective under District of Columbia tort law due to the absence of a driver side airbag.³⁸⁷

Honda moved for summary judgment, arguing that the *Geier*'s “no-airbag claim” was preempted by the applicable version of Federal Motor Vehicle Safety Standard 208 (“FMVSS 208”).³⁸⁸ FMVSS 208 permitted manufacturers to choose from various different types of restraint systems, including the use of airbags, to achieve compliance.³⁸⁹ Compliance with the FMVSS 208 did not require the use of airbags in any specific vehicle line.³⁹⁰ The parties agreed that the subject vehicle complied with FMVSS 208, notwithstanding its lack of a driver side airbag.

Honda asserted that the “no-airbag claim” was preempted either expressly by the National Traffic and Motor Vehicle Safety Act's (Safety Act's) stated preemption of state standards not identical to a Federal Motor Vehicle Safety Standard governing the same aspect of motor vehicle performance or equipment, or impliedly because a verdict in favor of the Geier family would conflict with the optional compliance framework of FMVSS 208.³⁹¹ The Geier family argued that the Safety Act's express preemption provision is limited to state statutes and regulations and that common law claims are expressly preserved by the Safety Act's savings clause, 15 U.S.C. § 1397(k),³⁹² which states, “[c]ompliance with any Federal motor vehicle safety standards . . . does not exempt any person from any liability under common law.”³⁹³

³⁸⁴ TRIBE, *supra* note 379, § 6–31, at 1205 (footnote omitted).

³⁸⁵ 529 U.S. 861 (2000).

³⁸⁶ *Id.* at 865.

³⁸⁷ *Id.*

³⁸⁸ *Id.* at 864–65.

³⁸⁹ See 49 C.F.R. § 571.208 (1984); 49 Fed. Reg. 28,962, 29,008–10 (July 17, 1984).

³⁹⁰ *Id.*

³⁹¹ See *Geier v. Am. Honda Motor Co., Inc.*, 166 F.3d 1236, 1238 (D.C. Cir. 1999).

³⁹² 15 U.S.C. § 1397(k) (1988) was recodified at 49 U.S.C. § 30103(e) (1994).

³⁹³ *Geier*, 166 F.3d at 1238 (quoting 15 U.S.C. § 1397(k) (1988)).

The trial court granted summary judgment for Honda, noting that the “no-airbag claim” sought to establish a de facto safety standard that was different than FMVSS 208—i.e., one that required the use of air bags—and was accordingly expressly preempted by 15 U.S.C. § 1392(d).³⁹⁴ The United States Court of Appeals for the District of Columbia affirmed summary judgment, but did so on the basis of implied preemption.³⁹⁵

Recognizing a clear split of authority between several federal courts of Appeal, all of which recognized preemption of “no-airbag claims” and a collection of state courts, all of which found no basis for preemption, the Supreme Court of the United States granted certiorari to resolve the conflict.³⁹⁶ Analyzing the issue of implied conflict preemption, the majority of the *Geier* court found that NHTSA “deliberately provided the manufacturer with a range of choices among different passive restraint devices.”³⁹⁷ The court noted that this optional compliance framework was intended to further the safety objectives of FMVSS 208 by permitting the introduction of different systems over time, thereby lowering costs, overcoming technical safety problems, and encouraging technological development.³⁹⁸

After reviewing the regulatory and judicial history of FMVSS 208, the court analyzed numerous important considerations taken into account by the applicable version of FMVSS 208. Specifically, the court discussed that while airbags addressed some of the risks posed by an occupant’s failure to use an available seat belt, it did not address all such risks.³⁹⁹ The court further recognized that airbags and other passive restraint systems pose their own unique disadvantages and safety risks.⁴⁰⁰ Finally the court noted both the increased costs that would be imposed by an airbag mandate and the related risk of public resistance.⁴⁰¹

The *Geier* court explained “FMVSS considered [the above] considerations in several ways. Most importantly, that standard deliberately sought variety—a mix of several different passive restraint systems.”⁴⁰² The means for achieving such desired variety was the establishment of a minimum performance requirement and “allowing manufacturers to choose among different

³⁹⁴ *Geier*, 529 U.S. at 865; see also *Geier*, 166 F.3d at 1238 (explaining rationale and precedent underlying trial court’s decision).

³⁹⁵ See *Geier*, 166 F.3d at 1240–41 (discussing concerns with finding of express preemption, but avoiding question due to clear presence of implied preemption); see also *Geier*, 529 U.S. at 865–66.

³⁹⁶ *Geier*, 529 U.S. at 866.

³⁹⁷ *Id.* at 875.

³⁹⁸ *Id.*

³⁹⁹ *Id.* at 877.

⁴⁰⁰ *Id.*

⁴⁰¹ *Geier*, 529 U.S. at 878.

⁴⁰² *Id.*

passive restraint mechanisms, such as airbags, automatic belts, or other passive restraint technologies to satisfy that requirement.”⁴⁰³ The *Geier* court noted that NHTSA had rejected a proposed standard that would mandate the use of airbags in all vehicles due to “safety concerns (perceived or real)”⁴⁰⁴ associated with their use. It also believed permitting a mix of devices would both facilitate the development of data on comparative effectiveness and allow industry to overcome safety concerns and high production costs.⁴⁰⁵ NHTSA hoped that the optional compliance framework of FMVSS 208 would lead to “the development of alternative, cheaper, and safer passive restraint systems.”⁴⁰⁶ In essence, FMVSS 208 reflected NHTSA’s policy judgment that safety would best be promoted “if manufacturers installed alternative protection systems in their fleets rather than one particular system in every car.”⁴⁰⁷

Turning to the “no-airbag claim” asserted by the Geier family, the *Geier* court reasoned that such a claim depended on the existence of a duty—i.e. a rule of state tort law—requiring automobile manufacturers to install airbags at the time the subject Honda Accord was manufactured.⁴⁰⁸ By its terms, such a duty would likewise have been applicable to manufacturers of all similar cars.⁴⁰⁹ By mandating the use of airbags in all vehicles, this state law duty would have frustrated the objectives of NHTSA and presented an obstacle to the variety and mix of devices deliberately sought by FMVSS 208.⁴¹⁰ For that reason, the court held the “no-airbag claim” to be preempted.⁴¹¹

Geier establishes a framework for analyzing the preemptive effect of Federal Motor Vehicle Safety Standards on state tort law claims. First, it clarifies the interplay of the Safety Act’s preemption provision and savings clause. In this respect, *Geier* rejects the argument that state tort law claims are subject to express preemption under the Safety Act; however, it equally holds that the Safety Act’s savings clause does not insulate all common law claims from preemption. Rather, traditional principles of implied conflict preemption apply. Preemption is neither favored nor disfavored under the Safety Act.⁴¹² *Geier* further instructs that the state of technology, comparative cost of alternatives

⁴⁰³ *Id.* (citing 49 Fed. Reg. 28,990, 28,996 (1984)).

⁴⁰⁴ *Id.* at 879.

⁴⁰⁵ *Id.* (citing 49 Fed. Reg. 28990, 29,001–02 (1984)).

⁴⁰⁶ *Geier*, 529 U.S. at 879.

⁴⁰⁷ *Id.* at 881.

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*

⁴¹¹ *Geier*, 529 U.S. at 881–82 (citing *Fidelity Fed. Sav. & Loan Assoc. v. de la Cuesta*, 458 U.S. 141, 156 (1982), for the proposition that conflict preemption arises where state law limits the availability of an option that a federal agency considers essential to ensure its ultimate objectives).

⁴¹² See *Geier*, 529 U.S. at 869–74 (holding that Safety Act reflects a “neutral policy” toward the application of preemption).

and real or perceived safety concerns are all legitimate agency considerations when formulating a Federal Motor Vehicle Safety Standard. When NHTSA determines that its legitimate concerns about safety, technological advancement, and cost can be best promoted by permitting manufacturers to choose from among expressly approved methods, its deliberate establishment and maintenance of such an optional compliance framework is a means-related objective found by the Supreme Court to be worthy of preemptive protection.

In *Moser v. Ford Motor Co.*,⁴¹³ Judge Keeley applied *Geier* to conclude that a plaintiff's suit challenging the type of seatbelt chosen by Ford in its 1990 Escort was similarly preempted.⁴¹⁴

In *Wyeth v. Levine*,⁴¹⁵ the U.S. Supreme Court examined whether a state law failure to warn claim was preempted by FDA regulations. In *Wyeth*, the plaintiff was injured when phenergan was improperly injected into one of her arteries.⁴¹⁶ She brought a state law failure to warn claim, alleging that the drug's warnings did not adequately warn of this risk.⁴¹⁷

In the preamble to a 2006 regulation governing the content and format of prescription drug labeling, the FDA had stated that federal law establishes the floor and ceiling of drug regulation and that "FDA approval of labeling . . . preempts conflicting or contrary State law."⁴¹⁸ "The regulation also declared that certain state-law actions, such as those involving failure-to-warn claims, 'threaten FDA's statutorily prescribed role as the expert Federal agency responsible for evaluating and regulating drugs.'"⁴¹⁹ The court refused to accept the FDA's statement that its regulation preempted contrary state law decisions regarding labeling and found that this was inconsistent with Congress's purposes as stated in the Act. The court further found that the manufacturer could comply with both federal and state law because it could strengthen the warnings on its products under "the changes being effected" provision of the FDA's regulations prior to obtaining FDA approval, 21 C.F.R. § 314.70(c)(6)(iii)(A), and that, therefore, the failure to warn claim was not preempted.⁴²⁰

d. State Court Cases Applying Federal Preemption

Although preemption is ultimately an issue of federal law, it may, and must, be raised in all state courts as well. Generally speaking, preemption is disfavored by the West Virginia Supreme Court of Appeals as expressed in *Syl.*

⁴¹³ 2001 WL 936346 (N.D. W. Va. 2001).

⁴¹⁴ *Id.* at *4.

⁴¹⁵ 129 S. Ct. 1187 (2009).

⁴¹⁶ *Id.* at 1191.

⁴¹⁷ *Id.*

⁴¹⁸ *Id.* at 1200 (quoting 71 Fed. Reg. 3922, 3934–35 (Jan. 24, 2006)).

⁴¹⁹ *Morgan*, 680 S.E.2d at 91 (quoting *Wyeth*, 129 S. Ct. at 1200).

⁴²⁰ *Wyeth*, 129 S. Ct. at 1196–97.

pt. 3 of *Morgan v. Ford Motor Co.*⁴²¹ “Our law has a general bias against preemption. Preemption of topics traditionally regulated by states—like health and safety—is greatly disfavored in the absence of convincing evidence that Congress intended for a federal law to displace a state law.”⁴²²

Morgan is the most recent significant products liability preemption decision from the West Virginia Supreme Court of Appeals. *Morgan* was involved in a rollover crash during which his “left hand and left arm were ejected through the broken tempered glass of the driver’s side-door window and pinched between the ground and the exterior of the door panel. Mr. Morgan suffered a severe de-gloving injury to his left arm and hand as a result.”⁴²³ *Morgan* sued, challenging the installation of tempered glass in the side windows of the vehicle.⁴²⁴ *Morgan*’s expert opined that “laminated glass, or some other ejection-resistant side window glass or glazing—which was technologically and economically feasible—should have been used, and would have prevented the ejection of *Morgan*’s arm through the driver’s side window.”⁴²⁵

The manufacturer filed a motion for summary judgment asserting, among other things, that *Morgan*’s glass-defect claims were “impliedly preempted by the Safety Act, and its implementing regulation pertaining to glass/glazing (‘FMVSS 205’).”⁴²⁶

The circuit court found that the appellant’s

claim of a glass/glazing defect in the subject vehicle relates solely to the choice of tempered glass over other permitted options, and not to any application or specific design or manufacturing defect in the glass/glazing present in the subject vehicle.’ The circuit court further found that FMVSS 205 ‘permits a motor vehicle manufacturer to use one of several options for the materials in side and rear windows, including glass-plastic, laminates, and tempered glass’ and found that Ford had used one of those optional glazing materials—tempered glass—in the side windows of the subject 1999 Ford Explorer.⁴²⁷

The circuit court interpreted *Geier* to mean that because FMVSS 208 was deliberately designed to provide manufacturers with safety options, a state court defect action that might compel a manufacturer to choose one of those

⁴²¹ 680 S.E.2d 77 (W. Va. 2009).

⁴²² Syl. pt. 3, *id.* at 80. Footnote 4 of *Morgan* lists numerous cases in which preemption was not found by the Supreme Court of Appeals. *Id.* at 83 n.4.

⁴²³ *Id.* at 81.

⁴²⁴ *Id.*

⁴²⁵ *Id.*

⁴²⁶ *Morgan*, 680 S.E.2d at 82.

⁴²⁷ *Id.*

safety options over the others available under the regulation frustrated the federal scheme and was, therefore, impliedly preempted by the federal regulation.⁴²⁸

“Applying this interpretation of FMVSS 208 in *Geier* to FMVSS 205 in the case below, the circuit court below determined that: ‘[B]ecause tempered glass is a permitted option for manufacturers to use in vehicle side windows under FMVSS 205, the imposition of state tort liability based on the exercise of such option would frustrate the full purposes and objectives of Congress.’”⁴²⁹

The West Virginia Supreme Court of Appeals affirmed the circuit court’s award of summary judgment and concluded that the state glazing claim was preempted because “the NHTSA gave manufacturers the option to choose to install either tempered glass or laminated glass in side windows of vehicles [pursuant to Federal Motor Vehicle Safety Standard (FMVSS)] 205, permitting the plaintiff to proceed with a state tort action would foreclose that choice and would interfere with federal policy.”⁴³⁰ The key to the *Morgan* implied conflict preemption analysis is its focus on product design choices or options that are sanctioned by the applicable regulatory agency. As Justice Ketchum wrote,

FMVSS 205 permits the manufacturer to make a choice between available safety options for side-window glass; a design defect claim would foreclose choosing one of those options. We understand that the instant case seeks to impose liability for only *one* of the options allowed by FMVSS 205. But actions in the courts of each of West Virginia’s 55 counties could theoretically, one-by-one, eliminate *all* of the options offered under FMVSS 205. In the worse case, regulation by juries could, in a piecemeal fashion, eviscerate the unitary federal regulation and leave manufacturers with no options for glazing materials in vehicle side windows.⁴³¹

2. Compliance with Governmental Standard

Morningstar holds that a manufacturer may present evidence that its product complied with federal, state, or industry safety standards as relevant to the issue of whether the manufacturer used due care and the state of the art at

⁴²⁸ *Id.*

⁴²⁹ *Id.*

⁴³⁰ *Id.* at 94–95.

⁴³¹ *Morgan*, 680 S.E.2d at 94. However, with a nod to Justice Thomas’ concurrence in *Wyeth v. Levine*, 129 S. Ct. at 1204, Justice Ketchum questions whether it is appropriate to find preemption based on an agency’s “musings” about preempting state tort law, rather than regulatory options that more clearly have the force of law. *Morgan*, 680 S.E.2d at 92.

the time of manufacture.⁴³² This evidence is not conclusive proof that the design was reasonable, but rather one factor the jury can consider.⁴³³

In *Johnson*,⁴³⁴ the defendant argued that its product was not defective because NHTSA did not require automobiles to be equipped with rear seat lap and shoulder belts in 1978.⁴³⁵ The court rejected that claim and instead held the following: “Therefore, in this case the federal motor vehicle safety standards were admissible as evidence of whether a manufacturer’s conduct was reasonable; however, the jury did not have to find the manufacturer’s conduct was reasonable merely because it followed the federal motor vehicle safety standards.”⁴³⁶ Similarly, in *Estep*,⁴³⁷ the court rejected the defendant’s argument that compliance with federal, state, or industry standard created a rebuttable presumption of reasonableness.⁴³⁸ The court instead found that, although such compliance is a factor for the jury to consider, it does not create a rebuttal presumption that the product is non-defective.⁴³⁹

3. Governmental Contractor Defense

a. Background

The governmental contractor defense applies to a manufacturer who is manufacturing a product pursuant to requirements established by the govern-

⁴³² *Morningstar v. Black & Decker Mfg Co.*, 253 S.E.2d 666, 682 (W. Va. 1979).

⁴³³ *Estep v. Mike Ferrell Ford Lincoln Mercury Inc.*, 672 S.E.2d 345, 357 (W. Va. 2008).

⁴³⁴ 438 S.E.2d 28 (W. Va. 1993).

⁴³⁵ *Id.* at 39.

⁴³⁶ *Id.* (footnote omitted).

⁴³⁷ 672 S.E.2d 345 (W. Va. 2008).

⁴³⁸ *Id.* at 357.

⁴³⁹ The instruction given by the lower court in *Estep* read as follows:

The Defendants in this case have asserted that their liability is determined in the light of whether the product was reasonably suited for the purpose for which it was intended in accordance with the generally accepted standards of the industry, having due regard for the existent state of technology and the state of art at the time the product was designed and manufactured. Industry standards are not conclusive as to ordinary care in design or manufacture but rather, are admissible evidence for your consideration.

Compliance by a manufacturer or seller with any federal or state statute or administrative regulation existing at the time a product was manufactured and prescribing standards for design, inspection, testing, manufacture, labeling or warning or instructions for use of a product may be considered by you when [sic] determining the issue of product defect.

Id.; see also *Doe v. Am. Nat. Red Cross*, 848 F. Supp. 1228, 1233 (S.D. W. Va. 1994) (holding that compliance with industry standards does not conclusively establish the absence of negligence).

ment. Basically, the doctrine insulates a manufacturer from a design claim if the design was pursuant to governmental specifications.

The leading case is *Boyle v. United Technologies Corp.*⁴⁴⁰ In *Boyle*, the pilot of a Marine helicopter was killed when his helicopter crashed and he was unable to escape from the helicopter after it landed in the ocean.⁴⁴¹ Suit was filed by the decedent's representative alleging that the helicopter's design was defective because the escape hatch opened out, rather than in, and thus was ineffective in a submerged craft due to the water pressure.⁴⁴² The jury agreed and awarded a substantial verdict which was subsequently overturned by the Fourth Circuit Court of Appeals.⁴⁴³

The U.S. Supreme Court held that a "unique federal interest" applied to the issue of whether civil liabilities could be imposed upon a contractor that was fulfilling a federal procurement contract because, if so, the contractor might "decline to manufacture the design specified by the Government, or it will raise its price. Either way, the interests of the United States will be directly affected."⁴⁴⁴ Ultimately, the court held that "state law which holds Government contractors liable for design defects in military equipment does in some circumstances present a 'significant conflict' with federal policy and must be displaced."⁴⁴⁵ The court further adopted the "scope of displacement" test and stated that

Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.⁴⁴⁶

In *Campbell v. Brook Trout Coal, LLC*,⁴⁴⁷ Explo Systems, Inc., a munitions decommissioner, was granted a contract to decommission munitions.⁴⁴⁸ Plaintiffs sued, alleging they were exposed to tetryl, a toxin found in the munitions. Explo removed under the federal officer removal statute⁴⁴⁹ and asserted

⁴⁴⁰ 487 U.S. 500 (1988).

⁴⁴¹ *Id.* at 502.

⁴⁴² *Id.* at 503.

⁴⁴³ *Id.*

⁴⁴⁴ *Id.* at 506–07.

⁴⁴⁵ *Id.* at 512 (citations omitted).

⁴⁴⁶ *Boyle*, 487 U.S. at 512.

⁴⁴⁷ 2008 WL 4415078 (S.D. W. Va. 2008).

⁴⁴⁸ *Id.* at *1.

⁴⁴⁹ 28 U.S.C. § 1442(a)(1) (2006).

the federal contractor defense.⁴⁵⁰ Judge Copenhaver held that the removal was proper based upon the assertion of the defense.⁴⁵¹

VII. DAMAGES RECOVERABLE IN WEST VIRGINIA PRODUCTS LIABILITY ACTIONS

The topic of damages that are available in a products liability action is too broad to fully address in this article. However, we will briefly address the different remedies offered by the theories discussed in this Article.

A. *Personal Injury Damages*

Typically, products liability claims are brought by plaintiffs seeking personal injury damages. All of the theories of products liability addressed in this Article can serve as a foundation for personal injury damages.⁴⁵²

A plaintiff is entitled to the past compensatory damages that he or she proves by a preponderance of evidence to a reasonable degree of probability.⁴⁵³ These damages may include reasonable and necessary medical bills, lost wages, pain and suffering, mental anguish, lost household services, and other damages flowing from the injury.

In order to recover future damages, the plaintiff must prove by a preponderance of evidence that (1) he has suffered a permanent injury,⁴⁵⁴ and (2) the damages must be proved to a reasonable degree of certainty.⁴⁵⁵ Future damages may include future medical bills, future lost wages, loss of earning capacity, future lost household services, and future pain and suffering, provided these elements are proved with the requisite certainty.

Damages may also be awarded for the loss of consortium of a spouse,⁴⁵⁶ parent,⁴⁵⁷ or child. Loss of consortium is a “derivative” claim, the scope of which “is defined by the injury done to the principal.”⁴⁵⁸ By their very nature, loss of consortium damages are hard to define. *Belcher* specifies that loss of

⁴⁵⁰ *Campbell v. Brook Trout Coal, LLC*, 2008 WL 4415078, *7 (S.D. W.Va. June 19, 2009).

⁴⁵¹ *Id.* In *Virden v. Altria Group, Inc.*, 304 F. Supp. 2d 832 (N.D. W. Va. 2004), and *Carter v. Monsanto Co.*, 635 F. Supp. 2d 479 (S.D. W. Va. 2009), the courts found that federal officer removal was not available under the facts of those cases.

⁴⁵² The exception is that there is no precedent permitting the recovery of personal injury damages pursuant to the WVCCPA, which is referenced but not addressed in this Article. See Part V.C.

⁴⁵³ *Jordan v. Bero*, 210 S.E.2d 618 (W. Va. 1974).

⁴⁵⁴ Permanency may be shown by the injury or its effects. See *Cook v. Cook*, 607 S.E.2d 459 (W. Va. 2004).

⁴⁵⁵ Syl. pt. 7, *Jordan*, 210 S.E.2d at 622–23.

⁴⁵⁶ *King v. Bittinger*, 231 S.E.2d 239, 243–44 (W. Va. 1976) (citing W. VA. CODE § 48-3-19a).

⁴⁵⁷ Syl. pt. 2, *Belcher v. Goins*, 400 S.E.2d 830 (W. Va. 1990).

⁴⁵⁸ *West Virginia Fire & Casualty Co. v. Stanley*, 602 S.E.2d 483, 497 (W. Va. 2004).

consortium includes the loss of: (1) services, (2) society, and (3) sexual relations.”⁴⁵⁹

B. Wrongful Death Damages

Wrongful death damages are created by statute and include the following:

The verdict of the jury shall include, but may not be limited to, damages for the following: (A) Sorrow, mental anguish, and solace which may include society, companionship, comfort, guidance, kindly offices and advice of the decedent; (B) compensation for reasonably expected loss of (i) income of the decedent, and (ii) services, protection, care and assistance provided by the decedent; (C) expenses for the care, treatment and hospitalization of the decedent incident to the injury resulting in death; and (D) reasonable funeral expenses.⁴⁶⁰

C. Economic Loss/Bad Bargain/Property Damage

Products liability claims can be brought to recover damage to property other than the defective product and for damage to the defective product which results from a “sudden calamitous event.” In *Star Furniture Co. v. Pulaski Furniture Co.*,⁴⁶¹ the court held that “property damage to defective products which results from a sudden and calamitous event is recoverable under a strict liability cause of action. Damages which result merely because of a ‘bad bargain’ are outside the scope of strict liability.” In *Roxalana Hills Ltd. v. Masonite Corp.*,⁴⁶² the court was faced with a case where a contractor sued suppliers and the manufacturer over siding which was allegedly defective. The plaintiff sought to pursue a strict liability claim but the court found that actions arising from “merely ineffective products are actionable only in contract.”⁴⁶³ In order to pursue a strict liability claim, the product must be dangerous and present a risk of injury. “Recoverable damages do not include the difference in value of the defective product and its purchase price”⁴⁶⁴

⁴⁵⁹ See *Belcher*, 400 S.E.2d at 830.

⁴⁶⁰ W. VA. CODE § 55-7-6(c)(1) (2010).

⁴⁶¹ Syl. pt. 3, 297 S.E.2d 854 (W. Va. 1982).

⁴⁶² 627 F. Supp. 1194 (S.D. W. Va.).

⁴⁶³ *Id.* at 1196.

⁴⁶⁴ *Star Furniture Co.*, 297 S.E.2d at 861; *Kaiser Aluminum & Chem. Corp.*, 981 F.2d at 136.

D. *Recovery of Damages by an Entity*

Damages may be recovered under strict liability by an entity or commercial enterprise.⁴⁶⁵ However, strict liability cannot be used to recover lost profits or consequential economic loss, or indirect loss resulting from the inability to make use of the defective products. Rather, recovery for lost profits must be pursued under a warranty or contract theory cause of action.⁴⁶⁶

E. *Punitive Damages*

Punitive damages may be recovered in a products liability tort action if the plaintiff proves that his injury was caused by conduct that evidences gross fraud; malice; oppression; wanton, willful or reckless conduct; or criminal indifference to civil obligations.⁴⁶⁷ Punitive damages may not be recovered in a breach of warranty action since it is founded on contract.⁴⁶⁸

In recent years, the United States Supreme Court has imposed a variety of important due process limitations on punitive damages.⁴⁶⁹ Examining these federal constitutional limitations and their application within West Virginia's court system is beyond the scope of this Article and will be the subject of substantial future litigation. Recently the West Virginia Supreme Court of Appeals recognized that the typical outer limit of the ratio of punitive to compensatory damages is 5 to 1.⁴⁷⁰

⁴⁶⁵ Syl. pt. 4, *Star Furniture Co.*, 297 S.E.2d at 854.

⁴⁶⁶ *Kaiser*, 981 F.2d at 136 (quoting *Star Furniture Co.*, 297 S.E.2d at 859–60).

⁴⁶⁷ Syl. pt. 4, *Mayer v. Frobe*, 22 S.E. 58 (W. Va. 1895); *Ilosky v. Michelin Tire Corp.*, 307 S.E. 2d 603, 619 (W. Va. 1983) (quoting *O'Brien v. Snodgrass*, 16 S.E.2d 621 (W. Va. 1941)); *Davis v. Celotex*, 420 S.E. 2d 557, 560 (W. Va. 1992).

⁴⁶⁸ The rule in West Virginia, as in most other jurisdictions, is that “punitive damages are generally unavailable in pure contract actions.” *Warden v. Bank of Mingo*, 341 S.E.2d 679, 684 (W. Va. 1986). However, there is a footnote in the 1986 *Warden* opinion stating that the general rule “does not apply in exceptional cases where the breach of contract amounts to an independent and willful tort.” *Id.* at 684 n.7 (citing *Goodstein v. Weinberg*, 245 S.E.2d 140 (Va. 1978)). As the *Warden* case explains, albeit somewhat obliquely, in those “exceptional cases where the breach of contract amounts to an independent and willful tort,” punitive damages are available only when the plaintiff “elect[s] . . . [to] proceed in tort” rather than “upon contract.” *Id.* at 684 n.7. This was the situation in the *Goodstein* case from Virginia cited by the West Virginia court as the source of its rule. See *Goodstein*, 245 S.E.2d at 143. Thus, the rule in West Virginia is the same as the rule in other jurisdictions. See RESTATEMENT (SECOND) CONTRACTS § 355 cmt a. Punitive damages may not be awarded to punish pure breaches of contract. If a breach of contract is so extreme and wanton that it actually constitutes an *independent tort*—i.e., the plaintiff asserts and proves a *separate* tort claim based on allegations of aggravated contractual breach—then punitive damages may be available. But where the cause of action is pure contract, there are no punitive damages. This rule derives from the familiar concept that “[t]he purpose[] of awarding contract damages is to compensate the injured party,” not to punish. *Id.*

⁴⁶⁹ See OWEN, *supra* note 1, at 1270.

⁴⁷⁰ Syl. pt. 21, *Peters v. Rivers Edge Mining, Inc.*, 680 S.E.2d 791, 821 n.6 (W. Va. 2009).

VIII. MISCELLANEOUS ISSUES

A. *Forms of Evidence that may be used to Prove Defect*

1. Is Expert Testimony Required to Establish Defect?

It is well established under West Virginia law that some issues are so far outside the ken of an average juror as to require expert testimony.⁴⁷¹ In *Watson v. Inco Alloys International*,⁴⁷² the court states the following: “We believe that questions involving the design of and appropriate warnings for lift trucks are not within the common knowledge and experience of a lay juror.”⁴⁷³ In fact, *Morningstar* states that

[i]n a product liability case, the expert witness is ordinarily the critical witness. [The expert] serves to set the applicable manufacturing, design, labeling and warning standards *based on his experience and expertise in a given product field*. Through his testimony the jury is able to evaluate the complex technical problems relating to product failure, safety devices, design alternatives, the adequacy of warnings and labels as they relate to economic costs. In effect, the expert explains to the jury the risk/utility standards and gives the jury reasons why the product does or does not meet such standards, which are essentially standards of product safeness.⁴⁷⁴

In a products case, the issue may arise whether in order to establish a prima facie case the plaintiff must introduce expert testimony on the issue of product defect or whether the plaintiff can forego the testimony of an expert witness and survive a motion for summary judgment by introducing circumstantial evidence that the product was defective. This issue may arise when a plaintiff contends that due to the destruction of the product the defect cannot be determined, or when for economic or strategic reasons the plaintiff chooses to forego disclosing an expert witness on the issue of defect.

⁴⁷¹ “It is the general rule that want of professional skill can be proved only by expert witnesses.” *Howell v. Biggart*, 152 S.E. 323, 323 (W. Va. 1930). “It is the general rule that in medical malpractice cases negligence or want of professional skill can be proved only by expert witnesses.” Syl. pt. 1, *Farley v. Meadows*, 404 S.E.2d 537 (W. Va. 1991) (citing *Roberts v. Gale*, 139 S.E.2d 807 (1965)).

⁴⁷² 545 S.E.2d 294 (W. Va. 2001).

⁴⁷³ *Id.* at 303. The West Virginia Supreme Court has also stated that “[w]e believe that a risk-utility analysis does have a place in a tort product liability case by setting the general contours of relevant expert testimony concerning the defectiveness of the product.” *Morningstar*, 253 S.E.2d at 687 (citing FRANKLIN D. CLECKLEY, HANDBOOK ON EVIDENCE FOR WEST VIRGINIA LAWYERS § 7-2(A)(2) at 32–34 (3d ed. 1994)).

⁴⁷⁴ 253 S.E.2d at 682.

There is no presumption that a plaintiff is entitled to recover simply because an accident occurred involving a product,⁴⁷⁵ because an accident, by itself, is not evidence of a defect or causation.⁴⁷⁶

In *Brady v. Deals on Wheels, Inc.*,⁴⁷⁷ the court held that the plaintiff had the burden to establish not only the existence of a defect, but also a burden “to link the defect to the accident by demonstrating that the defect was the proximate cause of the accident.”⁴⁷⁸ Two years later in *Beatty v. Ford Motor Company*,⁴⁷⁹ the court held that post-crash discovery of a fractured steering component was insufficient to create an inference of a product defect. In 2003, in *Mrotek v. Coal River Canoe Livery*,⁴⁸⁰ the court affirmed summary judgment for the defendant because the plaintiff’s self-serving testimony combined with that of an eyewitness was insufficient to meet the burden of proof to establish defect allegations in a product liability case where the product evidence had been discarded.⁴⁸¹

These three West Virginia cases help define logical boundaries regarding the evidence required to prove a defect in a product liability case. In *Brady* the court addressed proximate cause and the need to proximately link the alleged defect to the accident. In *Beatty*, the court affirmed that the law does not automatically presume a design or manufacturing defect when there is an accident. In *Mrotek*, the court combined elements of *Brady* and *Beatty* and, in addition, addressed the inherent weakness of bare testimonial evidence, especially in light of the absence of the product at issue in that case. *Mrotek* clearly sets forth the standard that a plaintiff needs more than her self-serving testimony, even when combined with that of an eyewitness, to withstand a motion for summary judgment in a product liability case.

In *Roney v. Gencorp*,⁴⁸² Judge Chambers addressed the issue of whether a plaintiff was required to rely on the testimony of an expert witness to show that based upon the state-of-the-art scientific knowledge, a reasonable supplier of vinyl chloride monomer would foresee a likely risk of harm to an end user of that chemical. Judge Chambers held the following:

Parsing evidence of state-of-the-art scientific knowledge, would
require interpretation of scientific publications and data then

⁴⁷⁵ See *Crane & Equip. Rental Co. v. Park Corporation*, 350 S.E.2d 692 (W. Va. 1986).

⁴⁷⁶ See *Walton v. Given*, 215 S.E.2d 647, 651 (W. Va. 1975) (injury or damages alone are insufficient to warrant recovery).

⁴⁷⁷ 542 S.E.2d 457 (W. Va. 2000).

⁴⁷⁸ *Id.* at 464.

⁴⁷⁹ 574 S.E.2d 803 (W. Va. 2002).

⁴⁸⁰ 590 S.E.2d. 683 (W. Va. 2003).

⁴⁸¹ See also *Wilkinson*, 575 S.E.2d at 341 (court required expert testimony in a pharmaceutical warnings case).

⁴⁸² Memorandum Opinion and Order, *Roney v. Gencorp*, Civ. Action No. 3:05-0788 (Sept. 18, 2009).

available to that supplier. Just as a jury is ill equipped to determine, on its own, whether the conduct of a physician met professional standards in the industry, it is ill equipped to analyze and compare scientific literature and data concerning the hazards of vinyl chloride monomer. The jury, therefore, cannot resolve factual questions surrounding the duty to inspect without the assistance of a qualified expert.⁴⁸³

It is important to note that while West Virginia has adopted *Daubert v. Merrell Dow Pharmaceuticals, Inc.*⁴⁸⁴ regarding scientific testimony, it has not adopted *Kumho Tire Co., Ltd. v. Carmichael*⁴⁸⁵ regarding technical testimony. The West Virginia Supreme Court of Appeals has specifically held that the gatekeeping standards set forth by the United States Supreme Court in *Daubert*, applies to the admission of an engineer's testimony only where the testimony deals with scientific knowledge.⁴⁸⁶ Of course, many experts in products liability matters, often depending on the product, will identify their testimony as scientific, or derived from the "scientific method." In that case a *Daubert/Wilt* analysis is required.⁴⁸⁷

Assuming the testimony is not "scientific," the trial court will apply a two-part inquiry under *Watson*. First, the court will ask whether the proposed expert meets the minimal educational or experiential qualifications in a field that is relevant to the subject under investigation, and whether the testimony assists the trier of fact. Second, the court will determine whether the expert's area of expertise covers the particular opinion as to which the expert seeks to testify.⁴⁸⁸

2. Circumstantial Evidence may be used to Show Defect under Certain Conditions

Although expert testimony will be generally required in a products case, in limited factual situations, a plaintiff may proceed on circumstantial evidence.⁴⁸⁹ This theory is sometimes referred to as the "malfunction" theory.

Circumstantial evidence may be sufficient to make a prima facie case in a strict liability action, even though the precise nature of the defect cannot be identified, so long as the evidence

⁴⁸³ *Id.*

⁴⁸⁴ 509 U.S. 579 (1993).

⁴⁸⁵ 526 U.S. 137 (1999).

⁴⁸⁶ See *Watson v. Inco Alloys, International, Inc.*, 545 S.E.2d 294 (W. Va. 2001).

⁴⁸⁷ See *Wilt v. Buracker*, 443 S.E.2d 196 (W. Va. 1993); *Gentry v. Mangum*, 466 S.E.2d 171 (W. Va. 1995).

⁴⁸⁸ Syl. pt. 4, *Watson*, 545 S.E.2d at 294.

⁴⁸⁹ See *Anderson v. Chrysler Corp.*, 403 S.E. 2d 189 (W. Va. 1991).

shows that a malfunction in the product occurred that would not ordinarily happen in the absence of a defect. Moreover, the plaintiff must show there was neither abnormal use of the product nor a reasonable secondary cause for the malfunction.⁴⁹⁰

An *Anderson*-type case has three specific elements. First, the plaintiffs must show that the malfunction in the product occurred that would not ordinarily happen in the absence of a defect. Second, the plaintiffs must show that no abnormal use of the product occurred. Third, the plaintiffs must rule out reasonable secondary causes for the malfunction.⁴⁹¹

The facts of *Anderson* are instructive. In *Anderson*, the vehicle was a “brand new” Chrysler less than four months old with less than 2500 miles on it.⁴⁹² The *Anderson* vehicle was a “lemon” and had been serviced six to eight times during that brief four month period for electrical and wiring defects (including replacing the wiring harness in the dashboard—exactly where the fire was observed to start).⁴⁹³ On the day the vehicle was picked up from the shop for repair for the same electrical defects, Ms. Anderson immediately noticed that the defects had not been fixed.⁴⁹⁴ Within hours of picking the vehicle up from the shop, Ms. Anderson noticed a burning odor, saw smoke from the dashboard, and flames quickly followed.⁴⁹⁵ The fire began while Ms. Anderson was in the car, with the engine running and with Ms. Anderson actually driving the car.⁴⁹⁶ There was no question as to when, where, and why the fire started.⁴⁹⁷

B. Contribution/Indemnity

1. Contribution/Indemnity

The concepts of contribution and indemnity are common in product litigation. Each doctrine arises from equitable considerations. The right to contribution arises when persons having a common obligation, either in contract or tort, are sued on that obligation and one party is forced to pay more than his pro tanto share of the obligation. One of the essential differences between indemnity and contribution is that contribution does not permit a full recovery of all

⁴⁹⁰ Syl. pt. 3, *id.*

⁴⁹¹ *Id.*

⁴⁹² *Id.* at 194.

⁴⁹³ *Id.* at 191.

⁴⁹⁴ *Id.*

⁴⁹⁵ *Anderson*, 403 S.E.2d at 191.

⁴⁹⁶ *Id.*

⁴⁹⁷ *Id.*; see also *Adkins v. K-Mart Corp.*, 511 S.E.2d 840 (W. Va. 1998) (per curiam); *Bennett v. Asco Serv., Inc.*, 621 S.E.2d 710 (W. Va. 2005) (per curiam) (both cases involve experts and circumstantial evidence).

damages paid by the party seeking contribution. Recovery can only be obtained for the excess that such party has paid over his own share.

Indemnity arises when the person seeking to assert implied indemnity—the indemnitee—has been required to pay damages caused by a third-party—the indemnitor. In the typical case, the indemnitee is made liable to the injured party because of some positive duty created by statute or the common law, but the actual cause of the injury was the act of the indemnitor.⁴⁹⁸ Although all of the entities in the chain of distribution may be liable for damages under a strict liability or warranty theory, a seller who has not contributed to the defect in a product may have an implied indemnity claim against the party that actually created the defect.⁴⁹⁹ In order to maintain an implied indemnity claim, the party must be completely fault-free.⁵⁰⁰ When and how to assert a claim for indemnity or contribution must be handled carefully, and with an emphasis on early notice and assertion of such rights. In *Haynes v. City of Nitro*,⁵⁰¹ the West Virginia Supreme Court extended a right of contribution to a tortfeasor to bring in as a third-party defendant a fellow joint tortfeasor to share by way of contribution on the verdict recovered by the plaintiff.⁵⁰²

With respect to contribution, the court has held that such right will be waived if not asserted in the underlying action.

A defendant may not pursue a separate cause of action against a joint tortfeasor for contribution after judgment has been rendered in the underlying case, when that joint tortfeasor was not a party in the underlying case and the defendant did not file a third-party claim pursuant to Rule 14(a) of the West Virginia Rules of Civil Procedure.⁵⁰³

Further,

[t]he inchoate right of contribution recognized by this state can only be asserted by means of third-party impleader in an action brought by the injured party against a tortfeasor. Consequently, a tortfeasor who negotiates and consummates a settlement with an injured party on behalf of itself before any lawsuit is filed

⁴⁹⁸ Syl. pt. 2, *Hill v. Joseph T. Ryerson & Son, Inc.*, 268 S.E.2d 296, 296 (W. Va. 1980); Syl. pt. 1, *Sydenstricker v. Unipunch Prod., Inc.*, 288 S.E.2d 511 (W. Va. 1982).

⁴⁹⁹ Syl. pt. 1, *Hill*, 268 S.E.2d at 296.

⁵⁰⁰ See Syl. pt. 4, *Harvest Capitol v. W. Va. Dep't of Energy*, 560 S.E.2d 509 (W. Va. 2002) (if a seller contributes in some way to the product's defect, the seller and manufacturer are jointly responsible for the damages caused by the product, and seller has no right to seek implied indemnity).

⁵⁰¹ 240 S.E.2d 544 (W. Va. 1977).

⁵⁰² *Id.* at 550.

⁵⁰³ Syl. pt. 5, *Howell v. Luckey*, 518 S.E.2d 873 (W. Va. 1999).

cannot subsequently bring an action seeking contribution from a tortfeasor who was not apprised of and not a party to the settlement negotiations and agreement.⁵⁰⁴

There will also be situations in product litigation where there is contractual indemnity. If a party wants to preserve its contractual rights for indemnity, it should put that company on “reasonable notice” of the pending suit and advise them of their right and opportunity to step in, indemnify, and defend, or otherwise be bound by any judgment rendered in the suit. As an additional step, the indemnitee will also want to consider bringing the indemnitor into the case absent an express agreement that that company will not refuse its contractual indemnity obligations in this case, should a verdict be rendered against the indemnitee. In addition, the indemnitor will need to be put on notice of any settlement negotiations between the plaintiff and indemnitee.⁵⁰⁵ Although *Vankirk* addresses contractual indemnity (rather than an inchoate right to contribution), it was decided prior to *Howell v. Luckey* and *CAMC v. Parke-Davis*, when the jurisprudential trend began to move toward requiring all the parties who contributed to the plaintiff’s injuries to be brought together in a single cause of action.

Because the concepts of contribution or indemnity are inchoate rights, there may be a natural hesitation to assert the same prior to such rights materializing. However, in light of the *Howell* decision, the party seeking contribution or indemnity should promptly assert that right by impleading the indemnitor or joint tortfeasor. Otherwise, and in the absence of an agreement to the contrary, such contribution or indemnity rights may be waived if they are not asserted in the underlying litigation.

2. Implied Indemnity Claims Cannot be Involuntarily Extinguished

A party in a civil action who has made a good faith settlement with the plaintiff prior to a judicial determination of liability is relieved from any liability for contribution.⁵⁰⁶ A defendant in a civil action has a right in advance of judgment to join a joint tortfeasor based on a cause of action for contribution. This is termed an “inchoate right to contribution” in order to distinguish it from the statutory right of contribution after a joint judgment conferred by West Virginia Code section 55-7-13 (1923).⁵⁰⁷

⁵⁰⁴ Syl. pt. 6, *Charleston Area Med. Ctr. v. Parke-Davis*, 614 S.E.2d 15 (W. Va. 2005).

⁵⁰⁵ Syl. pt. 6, *Vankirk v. Green Constr. Co.*, 466 S.E.2d 782 (W. Va. 1995) (“Where an indemnitor is given reasonable notice by the indemnitee of a claim that is covered by the indemnity agreement and is afforded an opportunity to defend the claim and fails to do so, the indemnitor is then bound by the judgment against the indemnitee if it was rendered without collusion on the part of the indemnitee.”).

⁵⁰⁶ Syl. pt. 6, *Bd. of Educ. of McDowell Cnty. v. Zando*, 390 S.E.2d 796 (W. Va. 1990).

⁵⁰⁷ Syl. pt. 2, *id.*

Additionally, although a good faith settlement extinguishes the contribution claims of a co-defendant, in the product liability context implied indemnity claims cannot be extinguished by a good faith settlement.

In a multiparty product liability lawsuit, a good faith settlement between the plaintiff(s) and the manufacturing defendant who is responsible for the defective product will not extinguish the right of a non-settling defendant to seek implied indemnification when the liability of the non-settling defendant is predicated not on its own independent fault or negligence, but on a theory of strict liability.⁵⁰⁸

As a result of the *Dunn* decision, a manufacturer will often obtain a release of innocent sellers or suppliers in the chain of distribution.

C. *Joint and Several Liability*

Traditionally, West Virginia was a pure joint and several liability jurisdiction, with no statutory dilution of the doctrine. As stated by the Supreme Court of Appeals: “This jurisdiction is committed to the concept of joint and several liability among joint tortfeasors. A plaintiff may elect to sue any or all of those responsible for his injuries and collect his damages from whomever is able to pay, irrespective of their percentage of fault.”⁵⁰⁹

However, in 2005 the Legislature modified the common law rule and enacted West Virginia Code section 55-7-24(a)(2), which stated that if a party was found by the jury to be “thirty percent or less at fault, then that defendant’s liability shall be several and not joint and he or she shall be liable only for the damages attributable to him or her, except as otherwise provided in this section.”⁵¹⁰ Significantly, one of the statutory exceptions also enacted at that time set forth in subsection (b)(4) was “[a]ny party strictly liable for the manufacturer and sale of a defective product.”⁵¹¹

⁵⁰⁸ Syl. pt. 6, *Dunn v. Kanawha Cnty. Bd. of Educ.*, 459 S.E.2d 151 (W. Va. 1995). Although this is the rule in products cases (because of the possibility that a party will have liability imposed upon it solely for being in the chain of distribution even if it bears no fault), this will not necessarily apply outside of the chain of distribution context. In *Hager v. Marshall*, the West Virginia Supreme Court stated “[i]n non-product liability multi-party civil actions, a good faith settlement between a plaintiff and a defendant will extinguish the right of a non-settling defendant to seek implied indemnity unless such non-settling defendant is without fault . . .” Syl. pt. 7, 505 S.E.2d 640 (W. Va. 1998). This quote suggests that *Dunn* is limited to its facts, and the chain of distribution in products cases. In *Woodrum v. Johnson*, 599 S.E.2d 908 (W. Va. 2001), the court suggested (a la *Dunn*) that where a principal is solely liable for an agent who settles, there may be a right of indemnity despite the settlement.

⁵⁰⁹ Syl. pt. 13, *Strahin v. Cleavenger*, 603 S.E.2d 197, 202 (W. Va. 2004).

⁵¹⁰ W. VA. CODE § 55-7-24(a)(2) (2010).

⁵¹¹ *Id.* § 55-7-24(b)(4).

Thus, under the current statutory scheme, the common law rule of joint and several liability applies to a manufacturer whose product is found to be defective pursuant to a strict liability theory and that manufacturer will be jointly and severally liable for all of the plaintiff's damages even if its fault is found to be only one percent. However, if the plaintiff is proceeding pursuant to a negligence or fraud/misrepresentation theory, then the manufacturer will only be jointly and severally liable if its fault is found to be greater than thirty percent.⁵¹²

D. *Product Liability Issues Arising in Vehicle Litigation*

1. Crashworthiness

One of the more complicated concepts in products liability litigation is the doctrine of crashworthiness.⁵¹³ Sometimes referred to as "second automotive collision" cases, they are more accurately described as "enhanced injury" cases. The theory against the manufacturer in a crashworthiness case is that the plaintiff suffered an additional or enhanced injury as a result of a defect in the product.⁵¹⁴ Under this theory of liability, a manufacturer must design its product to minimize foreseeable harm to the product's user that may occur in an accident.⁵¹⁵

The West Virginia Supreme Court of Appeals adopted the "crashworthiness doctrine" in *Blankenship v. General Motors Corp.*⁵¹⁶ The court revisited the doctrine in *Johnson*,⁵¹⁷ and then again in *Tracy*.⁵¹⁸ The court has defined a "crashworthiness" case as one "in which there are two collisions."⁵¹⁹ In the first phase of the accident, the plaintiff's automobile collides with another automobile or object. While this first collision is typically the injury producing event, under a crashworthiness theory, there is a second phase, or second collision, in which the occupants are injured as a result of the occupant's interaction with a defective condition in some part of the automobile. If the vehicle is defectively designed, the manufacturer will be liable for the plaintiff's injuries in the second

⁵¹² *Id.* § 55-7-24.

⁵¹³ There have been six West Virginia Supreme Court of Appeals cases addressing crashworthiness. See *Morgan v. Ford Motor Co.*, 680 S.E.2d 77 (W. Va. 2009); *Estep*, 672 S.E.2d at 345; *Tracy*, 524 S.E.2d at 879; *Louk v. Isuzu Motors, Inc.*, 479 S.E.2d 911 (W. Va. 1996); *Johnson v. Gen. Motors Corp.*, 438 S.E.2d 28 (W. Va. 1993); *Blankenship v. Gen. Motors Corp.*, 406 S.E.2d 781 (W. Va. 1991). See generally OWEN, *supra* note 1, at 1124.

⁵¹⁴ See also RESTATEMENT (THIRD) TORTS: PRODUCTS LIABILITY § 16.

⁵¹⁵ *Id.*

⁵¹⁶ 406 S.E.2d 781, 785-86 (W. Va. 1991).

⁵¹⁷ 438 S.E.2d 28, 32 (W. Va. 1993).

⁵¹⁸ 524 S.E.2d 879 (W. Va. 1999).

⁵¹⁹ *Id.* at 892.

collision only if the defective design of the automobile caused or exacerbated the plaintiff's injury.⁵²⁰

In defining West Virginia crashworthiness law, and quoting *Blankenship*, the *Johnson* court explained that "to recover on a theory of crashworthiness against the manufacturer of a motor vehicle, it is necessary only to show that a defect in the vehicle's design was a factor in causing some aspect of the plaintiff's harm."⁵²¹

The plaintiff always carries the burden of proving the threshold questions of defect and causation, and crashworthiness claims are no different. If the burden were not placed on the plaintiff, it would subject a manufacturer to "absolute liability" in violation of *Morningstar* and *Blankenship*. Rather, in a crashworthiness case, a plaintiff must prove that "a defect was a factor in causing some aspect of plaintiff's harm."⁵²² That threshold question of establishing a defect and causation is fundamental to a plaintiff's right to recover.

However, in a rare case there may be a situation where the defendant seeks to apportion damages, i.e., dividing the enhanced injuries from the injuries that would have naturally flowed from the crash itself. Accordingly, West Virginia crashworthiness case law also provides for apportionment, but when apportionment is sought by the defendant, the burden of proving apportionment (but not defect) shifts. In *Johnson*, the court stated that "[o]nce the plaintiff has made this prima facie showing, the manufacturer can then limit its liability if it can show that the plaintiff's injuries are capable of apportionment between the first and second collisions; therefore, the burden is upon the manufacturer to make the allocation."⁵²³

Johnson was a personal injury case where the jury was requested to and did apportion the enhanced injuries received from the defective seatbelt from the injuries received in the car accident. The case was complicated by the application of West Virginia law regarding joint and several liability and setoffs from prior settlements. The court held that

[w]hen a plaintiff seeks to recover damages on a theory of crashworthiness against the manufacturer of a motor vehicle, and the manufacturer requests that the jury apportion the dam-

⁵²⁰ An interesting point from *Blankenship*, is syl. pt. 3, stating "[i]n the litigation of vehicle crashworthiness cases under theories of product liability, whenever there is a split of authority in other jurisdictions on an issue about which this court has not yet spoken, the trial court should presume that we would adopt the rule most favorable to the plaintiff." 406 S.E.2d 781 (W. Va. 1991). This language, from the decision authored by former Justice Neely, suggested that West Virginia would abdicate its crashworthiness jurisprudence to even a single minority decision from another jurisdiction. However, as is clear from the decisions post-*Blankenship*, the Supreme Court of Appeals continues to address crashworthiness issues on the merits and has not abdicated its authority or suggestions in *Blankenship*.

⁵²¹ Syl. pt. 1, *Johnson*, 438 S.E.2d at 30.

⁵²² Syl. pt. 2, *Blankenship*, 406 S.E.2d at 781.

⁵²³ Syl. pt. 1, *Johnson*, 438 S.E.2d at 30.

ages between the first and second collisions, and the jury does so, the prior settlements between the plaintiff and the other defendants will not be setoff from the jury verdict.⁵²⁴

When apportionment is not sought, it follows that prior settlements between the plaintiff and the other defendants will be setoff from the jury verdict. This is consistent with West Virginia law regarding joint and several liability. As the court stated in *Johnson*, “we already have the jury apportion damages among joint tortfeasors in comparative negligence.”⁵²⁵

Johnson has been modified by *Tracy*,⁵²⁶ in the context of crashworthiness cases involving wrongful death. While the court in *Johnson* stated that it was the province of the jury, not the court, to determine whether damages were capable of apportionment in crashworthiness cases,⁵²⁷ *Tracy* modifies this rule when the accident results in death. In *Tracy*, the Court held that where the injury in a crashworthiness case was indivisible, i.e., death, a jury instruction allowing the jury to apportion injuries was reversible error.⁵²⁸ The *Tracy* court further found reversible error in a jury instruction that required the plaintiff’s estate to establish that the automobile’s design defect was “the” rather than “a” proximate cause of death.

In *Tracy*, the estate of a passenger killed in an automobile collision sued the manufacturer claiming that the passenger’s death resulted from a defective seat belt restraint system. The accident in *Tracy* occurred when the driver, traveling on a rain-slickened road, veered off the road and onto the berm, over-corrected the steering wheel in attempting to steer back onto the road and lost control of the vehicle resulting in a fatal collision with another vehicle. The plaintiff passenger had been wearing a lap and shoulder belt at the time of the accident and claimed that the restraint system was defective. On appeal from a jury verdict in favor of the manufacturer, the plaintiff claimed that the jury instructions erroneously allowed the jury to apportion injuries even though the injury—death—was indivisible.

Quoting the “second collision” rule, the court in *Tracy* stated that

under the crashworthiness doctrine, [a]ny design defect not causing the accident would not subject the manufacturer to liability for the entire damage, but the manufacturer should be liable for that portion of the damage or injury caused by the defective design over and above the damage or injury that probably

⁵²⁴ Syl. pt. 2, *id.*

⁵²⁵ *Id.* at 34.

⁵²⁶ 524 S.E.2d 879 (W. Va. 1999).

⁵²⁷ *Id.* at 887 n.4.

⁵²⁸ *Id.* at 897.

would have occurred as a result of the impact or collision absent the defective design.⁵²⁹

Discussing the split of authority on the burden of proof in establishing the extent of the injury caused by the defect, the court noted that it had earlier adopted the “more liberal rule” set forth in *Fox v. Ford Motor Co.*⁵³⁰ and its progeny that puts the burden on a defendant manufacturer to show that the plaintiff’s injuries are capable of apportionment between the first and second collisions and thereby limit its liability.⁵³¹

Applying the law of concurrent negligence to crashworthiness cases, the court in *Tracy* quoted the holding in *Mitchell v. Volkswagenwerk, AG*,⁵³² that

‘[i]f the manufacturer’s negligence is found to be a substantial factor in causing an indivisible injury such as . . . death, . . . then absent a reasonable basis to determine which wrongdoer actually caused the harm, the defendants should be treated as joint and several tortfeasors.’” The court in *Tracy* extended prior law, stating that “[w]ith due recognition for our prior acceptance of concurrent negligence concepts and our adoption of the crashworthiness doctrine, we take our jurisprudence in this field one step further by today holding that a defendant manufacturer seeking to apportion liability for the indivisible injury of death in a wrongful death crashworthiness cause of action must prove, by a preponderance of the evidence, that the defective product was not a factor in causing the decedent’s death. Absent such a showing, the defendant manufacturer is jointly and severally liable for all of the harm.⁵³³

Limiting its holding to crashworthiness cases involving fatal injuries, the *Tracy* court held that the question of whether or not the harm to the plaintiff is capable of apportionment among two or more causes is a question of law for the judge and not the jury to decide.⁵³⁴ The court concluded that

[i]n a wrongful death crashworthiness cause of action, the jury is charged with determining whether the vehicle’s design was defective. The ultimate issue of whether the resultant death can

⁵²⁹ *Id.* at 892.

⁵³⁰ 575 F.2d 774 (10th Cir. 1978).

⁵³¹ *Tracy*, 524 S.E.2d at 893 (citing *Blankenship v. Gen. Motors Corp.*, 406 S.E.2d 781, 781 (W. Va. 1991)).

⁵³² 669 F.2d 1199, 1206 (8th Cir. 1982).

⁵³³ *Tracy*, 524 S.E.2d at 897.

⁵³⁴ *Id.*

be apportioned among the multiple collisions is a question of law to be decided by the trial judge. If the trial judge concludes that the fatal injury can be apportioned, the jury then may determine the apportionment of the defendants' liability and the consequent damages for which they are responsible.⁵³⁵

From a practitioner's standpoint, the complexity of first-second collision apportionment law in West Virginia poses the possibility for jury confusion and distraction from the issue of whether the product is defective in the first place. Accordingly, at trial many cases focus purely on whether there is a defect and proximate cause, and the manufacturer typically does not seek apportionment.

While the concepts of apportionment of injury and apportionment among tortfeasors are distinct, they are often confused. The adoption of crashworthiness in West Virginia has not altered the principles of joint and several liability, except as to the burden shift on proving injury apportionment if, and only if, the manufacturer seeks apportionment of the injury.

Crashworthiness cases have also not altered the concept of comparative negligence. In West Virginia, "questions of negligence and [comparative] negligence are for the jury when the evidence is conflicting or when the facts, though undisputed, are such that reasonable men may draw different conclusions from them."⁵³⁶ *Louk* involved a crashworthiness case that also included issues of comparative negligence and negligent roadway design. The court held that evidence of comparative negligence and the evidence as to the cause of the collision was relevant.

Even though the fact is undisputed that Deborah Louk pulled out of the Wal-Mart parking lot into the path of an oncoming vehicle, we believe that jurors reasonably might reach differing conclusions as to whether the negligence of Wal-Mart, Gray Engineering, and the DOH, if any, was a greater contributing cause to the collision than was the negligence of Ms. Louk, if any. In this regard, they may consider a variety of factors shown by the evidence bearing on the cause or causes of the collision.⁵³⁷

The most on-point opinion from any court in West Virginia addressing the admissibility of comparative fault evidence in a crashworthiness case is Circuit Court Judge Hoke's opinion in *Waller*, discussed above in Part

⁵³⁵ *Id.*

⁵³⁶ Syl. pt. 10, *Louk v. Isuzu Motors, Inc.*, 479 S.E.2d 911 (W. Va. 1996) (citing Syl. pt. 3, *Davis v. Sargent*, 78 S.E.2d 217 (W. Va. 1953)).

⁵³⁷ *Louk*, 479 S.E.2d at 926-27.

VI(E)(1)(3).⁵³⁸ In *Waller*, the decedent was driving while intoxicated from a large dose of prescription medication and was involved in an accident.⁵³⁹ The plaintiff sued arguing that the vehicle was uncrashworthy due to improper fire proofing and defects in the fuel system.⁵⁴⁰ Judge Hoke addressed the precise issue of what evidence of the plaintiff's comparative fault could be admitted in a crashworthiness case and found that evidence of the plaintiff's drug use was directly relevant and admissible to the comparative fault determination.⁵⁴¹

2. Seatbelt Statute

a. Automobiles

Many states (through court decisions or legislation) have made public policy decisions limiting the introduction of the plaintiff's failure to wear seatbelts in motor vehicle accidents. Specifically in West Virginia, the mandatory use law limits seatbelt non-use evidence stating that "[a] violation of this section is not admissible as evidence of negligence or contributory negligence or comparative negligence in any civil action or proceeding for damages, and shall not be admissible in mitigation of damages"⁵⁴² In order to invoke the exclusionary rule (and a five percent reduction in damages), the plaintiff must stipulate to the reduction in damages and may not offer evidence of seatbelt use. The exclusionary rule has been held to apply in a crashworthiness case where the design of the airbag system in the vehicle is the sole issue in the case.⁵⁴³

One interesting issue that has yet to come before the court is whether the seatbelt statute will apply when the plaintiff alleges that the seatbelt itself is defective. In other words, can the plaintiff have her cake and eat it too, by alleging that the seatbelt is defective and simultaneously use the seatbelt statute to block evidence that the seatbelt was not worn? Logically, it would seem unlikely that the court would rule that a plaintiff could use the statute in this manner. First, by bringing a claim alleging a defective seat belt, the plaintiff would waive any objection to seatbelt-use evidence and open the door to such evidence. Second, application of the seatbelt statute in this context would violate *Morningstar*,⁵⁴⁴ which permits the manufacturer to defend based upon the plaintiff's misuse of the product and expressly disclaims that the manufacturer is an insurer or guarantor of its product. Third, application of the seatbelt statute to

⁵³⁸ *Waller v. Ford Motor Co.*, 2008 WL 8129681 (W. Va. Cir. Ct. 2008).

⁵³⁹ *Id.* at 6.

⁵⁴⁰ *Id.* at 2–3.

⁵⁴¹ *Id.* at 7.

⁵⁴² W. VA. CODE § 17C-15-49(d) (2010).

⁵⁴³ *See* *Estep v. v. Mike Ferrell Ford Lincoln Mercury Inc.*, 672 S.E.2d 345, 345 (W. Va. 2008).

⁵⁴⁴ 253 S.E.2d 666 (W. Va. 1979)

bar evidence that the plaintiff was not wearing the seatbelt would arguably violate both the state and federal constitutions.

The decision in *Bishop v. Takata Corp.*⁵⁴⁵ is instructive. In that case, the Oklahoma Supreme Court held that the Oklahoma seatbelt statute did not bar evidence of the use or nonuse of seatbelts where the plaintiff was bringing a seatbelt defect claim.⁵⁴⁶ In a subsequent decision, the Oklahoma Supreme Court reaffirmed its earlier ruling, and also held that it would be improper to allow the plaintiff to present her seat-belt-use evidence while barring the manufacturer's evidence: "However, [the plaintiff] cannot selectively eliminate evidence pertaining to certain components of the seat's occupant restraint system such as the lap belt, while offering evidence as to other elements, such as the shoulder belt, driver's seat, and seat bracket."⁵⁴⁷ To hold otherwise would be akin to imposing absolute liability for an allegedly defective seatbelt, regardless of whether the injured plaintiff was properly using the seatbelt at the time of the accident.

b. Non-Automobiles

Another interesting issue arises in litigation involving non-automotive vehicles that have seatbelts, including off-road vehicles, boats, etc. In these cases the seat belt statute should not apply, and thus the defendant should be able to introduce evidence of failure to wear a seatbelt. As Justice Benjamin's dissent in *Estep* notes, Rule 402 of the West Virginia Rules of Evidence would have permitted introduction of the plaintiff's failure to wear a seatbelt in the absence of West Virginia Code section 17C-15-49(d).⁵⁴⁸ The code section applies only to "passenger vehicles," defined as

a motor vehicle which is designed for transporting ten passengers or less, including the driver, except that such term does not include a motorcycle, a trailer, or any motor vehicle which is not required on the date of the enactment of this section under a federal motor vehicle safety standard to be equipped with a belt system.⁵⁴⁹

Because these non-automobiles are not "motor vehicles" subject to FMVSS,⁵⁵⁰ the seat belt statute should be inapplicable. To date there are no rulings from the West Virginia Supreme Court of Appeals that address this issue.

⁵⁴⁵ 12 P.3d 459 (Okla. 2000).

⁵⁴⁶ *Id.* at 466.

⁵⁴⁷ *Clark v. Mazda Motor Corp.*, 68 P.3d 207, 209 (Okla. 2003).

⁵⁴⁸ *Estep*, 672 S.E.2d at 358 (Benjamin, J., dissenting).

⁵⁴⁹ W. VA. CODE § 17-C-15-49(a) (2010).

⁵⁵⁰ *See* 49 U.S.C. § 30102 (2006) (defining motor vehicle as "a vehicle driven or drawn by mechanical power and manufactured primarily for use on public streets, roads, and highways").

E. Spoliation of Evidence

There is no substitute for examining physical evidence in a product liability action. “The expert witness is ordinarily the critical witness,” but that expert needs to be able to inspect the relevant evidence to evaluate the complex technical problems relating to the product.⁵⁵¹ Typically, the product itself is the best witness about conditions at the time of the accident. Often physical forces such as stress, shear, or friction leave telltale signs on physical objects that can be understood by people who have the appropriate education and training. Where the allegedly defective product is destroyed before a party and its experts have an opportunity to inspect the product, the party may suffer prejudice.⁵⁵² Product liability cases may be dismissed on summary judgment when evidence has not been preserved.⁵⁵³

“It is a fundamental principal of law that a party who reasonably anticipates litigation has an affirmative duty to preserve relevant evidence.”⁵⁵⁴ The authority to impose sanctions for the destruction of relevant evidence is recognized under product liability law.⁵⁵⁵ Courts have the inherent power to issue sanctions in order to “manage their own affairs so as to achieve the orderly and expeditious disposition of cases.”⁵⁵⁶ The West Virginia Supreme Court of Appeals has addressed spoliation of evidence and has authorized the imposition of sanctions.⁵⁵⁷ To be certain, a vast panoply of sanctions has been ratified by numerous courts throughout the country. West Virginia’s courts have recognized the sanctioning of “an offending party by an outright dismissal of claims, the exclusion of countervailing evidence, or a negative inference jury instruction on spoliation.”⁵⁵⁸

⁵⁵¹ See *Morningstar v. Black & Decker Mfg. Co.*, 253 S.E.2d 666, 682 (W. Va. 1979).

⁵⁵² “[T]he precise condition [of the evidence] immediately after an accident may be far more instructive, and persuasive to a jury than oral or photographic descriptions of them.” *Nally v. Volkswagen of Am., Inc.*, 539 N.E.2d 1017, 1021 (Mass. 1989). See also *Dillon v. Nissan Motor Co., Ltd.*, 986 F.2d 263 (8th Cir. 1993).

⁵⁵³ See *Vedder v. Zakaib*, 618 S.E.2d 537 (W. Va. 2005).

⁵⁵⁴ *Tracy v. Cottrell*, 524 S.E.2d 879, 887 (W. Va. 1999) (citing *Baliotis v. McNeal*, 870 F. Supp. 1285, 1290 (M.D. Pa. 1994)).

⁵⁵⁵ *Baliotis*, 870 F. Supp. at 1289.

⁵⁵⁶ *Id.* (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991)). The *Baliotis* court also stated that “sanctions for loss of evidence is ‘part of a district court’s inherent powers . . . to make discovery and evidentiary rulings conducive to the conduct of a ‘fair and orderly trial.’” *Id.* (quoting *Uniguard Sec. Ins Co. v. Lakewood Eng’g & Mfg. Corp.*, 982 F.2d 363, 368 (9th Cir. 1992)).

⁵⁵⁷ See Syl. pt. 2, *Tracy*, 524 S.E.2d at 879. See also *Hannah v. Heeter*, 584 S.E.2d 560 (2003) (recognizing an independent cause of action for negligent and intentional spoliation of evidence).

⁵⁵⁸ *Tracy*, 524 S.E.2d at 887.

F. *Actions Against Firearm & Ammunition Manufacturer*

The Legislature has limited suits against firearm manufacturers brought in the name of cities or municipalities:

The authority to bring suit and the right to recover against any firearms or ammunition manufacturer, seller, trade association or dealer of firearms by or on behalf of any county or municipality in this state for damages, abatement or injunctive relief resulting from or relating to the design, manufacture, marketing, or sale of firearms or ammunition to the public is reserved exclusively to the state: *Provided*, That nothing contained in this article may prohibit a county or municipality from bringing an action for breach of contract or warranty as to firearms or ammunition purchased by the county or municipality.⁵⁵⁹

G. *Drug and Medical Device Suits Against Hospitals, Physicians, and Pharmacies*

Drug and medical device cases are one of the most critical pieces of the products liability landscape in West Virginia. For the most part, we have addressed issues pertinent to these cases throughout the article (examples include warnings causation, “fraud on the FDA,” *Restatement* comment k (inherently dangerous products), learned intermediary, preemption, etc.). However, these cases are often treated differently than other products cases and require very specialized knowledge. Although cursory, we do want to identify some issues that either apply exclusively or more frequently in drug and medical device cases.

1. General and Specific Causation

In typical products litigation the causation inquiry is treated as a single issue: Was the alleged defect a proximate cause of this plaintiff’s injury? This unified analysis makes sense in classic products litigation. For example, it is obvious that a chain saw could injure a person, the issue is whether the particular chain saw is defective and whether that defect proximately caused the plaintiff’s injuries in that case (or whether a different warning would have prevented the injury, etc.).

However, in pharmaceutical (and toxic tort) litigation there often is a real issue as to whether the product is capable of causing the alleged injury (general causation) and whether it did, in fact, cause the injuries to this particu-

⁵⁵⁹ See W. VA. CODE § 55-18-2 (2010).

lar plaintiff (specific causation).⁵⁶⁰ Thus, for example, in a failure-to-warn pharmaceutical case the plaintiff “must show three things: (1) the drug is capable of causing the injury [general causation], (2) the drug did in fact cause the injury [specific causation], and (3) a different warning would have avoided the injury [proximate causation].”⁵⁶¹ Typically, all of these causation inquiries will focus on scientific testimony.⁵⁶²

2. Is the Implantation a Sale?

In the drug and medical device context, an issue that may arise is whether a particular product was “sold” or “distributed” by the hospital or physician, or rather was provided as an incident to the services rendered to the patient. For example, in *Foster v. Memorial Hospital Ass’n*,⁵⁶³ the court found that a hospital’s supplying blood to a patient was a not a “sale” but rather the performance of a service rendered to the patient. The *Foster* court described the nature of the contractual relationship between a doctor and a patient stating:

[s]uch a contract is clearly one for services, and, just as clearly, it is not divisible. Concepts of purchase and sale cannot separately be attached to the healing materials—such as medicines, drugs, or indeed, blood—supplied by the physician for a price as part of medical services it offers. That the property or title to certain items of medical material may be transferred, so to speak, from the physician to the patient during the course of medical treatment does not serve to make each such transaction a sale.⁵⁶⁴

In *Lester*, then-Circuit Court Judge Irene Berger reached a similar conclusion and found that the insertion of a cervical spine locking plate during a medical procedure “did not constitute a ‘sale’ as contemplated by West Virginia products liability law, but was incidental to the provision of medical services to a patient.” As a result, Judge Berger dismissed the products liability claims

⁵⁶⁰ “General causation is whether a *substance* is capable of causing a particular injury or condition in the general population, while specific causation is whether a substance caused a particular individual’s injury.” *Meade v. Parsley*, 2010 WL 4909435 (S.D. W. Va. 2010) (Copenhaver, J.) (quoting *In re Rezulin Prods. Liab. Litig.*, 369 F.Supp 2d. 398, 402 (S.D.N.Y 2005)).

⁵⁶¹ *Id.* at *14; *see also Bourne v. E. I DuPont de Nemours & Co.*, 189 F. Supp. 2d 482, 485 (S.D. W. Va. 2002).

⁵⁶² *Meade*, 2010 WL 4909435, at *13–27 (general causation inquiry will typically focus on a review of the scientific and medical literature that exposure to a substance can cause a particular disease).

⁵⁶³ 219 S.E.2d 916 (1975).

⁵⁶⁴ *Id.* at 919 (quoting *Perlmutter v. Beth David Hosp.*, 123 N.E.2d 792, 794 (N.Y. 1954)).

against the hospital.⁵⁶⁵ Judge Reed reached an identical conclusion finding that St. Josephs Hospital was not a merchant, seller, or vendor of a guidewire at issue and therefore claims for products liability and breach of warranty could not be maintained against the hospital.⁵⁶⁶

However, in the breast implant litigation, Kanawha County Circuit Court Judge King found that hospitals and doctors could be sued under products liability theories for defective breast implants under the theory that the patient was in fact, purchasing the implants and not the surgery to implant them.⁵⁶⁷ Judge King based his ruling on his analysis of “the essence of the transaction,” harkening back to the “incident to the services” concept from *Foster*. Judge King’s order was appealed as a certified question to the Supreme Court of Appeals, which declined to docket the appeal.

The Supreme Court of Appeals again had the opportunity to address this issue in *Blankenship v. Ethicon*,⁵⁶⁸ which involved a medical device case brought against several hospitals and the manufacturer alleging that patients incurred surgical infections as a result of the implantation of allegedly contaminated sutures.⁵⁶⁹ However, the court chose not to address products liability issues and instead decided the appeal on the issue of whether the plaintiff was required to comply with the MPLA in regard to the suit against the hospitals. Despite this second opportunity to address Judge King’s analysis, the majority left it untouched. Justice Starcher writing separately in a concurrence/dissent considered this issue on the merits and would have permitted these entities to be sued in a products liability suit.⁵⁷⁰

3. Off-Label Use Issues

An off-label claim involves the allegation that a manufacturer received FDA approval for one use of the product, yet is marketing the product for another use not specified in the approved label, i.e., an off-label use. At this time, we are not aware of any published opinions from West Virginia courts dealing with the merits of off-label use issues. Cases that tangentially cite off-

⁵⁶⁵ See Order, *Lester v. Appalachian Reg. Healthcare, Inc.*, Cir. Ct. of Kanawha County, Civil Action No. 01-C-534 (Jan. 16, 2003, Berger, J.).

⁵⁶⁶ See Order Regarding St. Joseph Hosp. Motion for Partial Summary Judgment and Motion to Compel, *Chancellor v. Shannon*, Cir. Ct. of Wood County, Civil Action No. 93-C-1103 (July 31, 1995, Reed, J.).

⁵⁶⁷ See Order Regarding *In re: Implants I*, Cir. Ct. of Kanawha County, Civil Action No. 93-C-9595 (Dec. 6, 1994, King, J.).

⁵⁶⁸ 656 S.E.2d 451 (W. Va. 2007).

⁵⁶⁹ *Id.* Judge King was the trial judge in *Blankenship*, and used the same “essence of the transaction” analysis, but reached a different result.

⁵⁷⁰ See *id.* at 461–64 (Starcher, J., concurring in part, dissenting in part).

label issues include Justice Starcher's concurrence in *Karl* and Chief Judge Harden's preemption ruling in *McCallister*.⁵⁷¹

4. Pharmacies

By statute "the manufacturer," and not a dispensing pharmacist, is "responsible" for drugs "sold in or dispensed unchanged from the original retail package of the manufacturer."⁵⁷² This statute has been held to immunize pharmacies from suits relating to the product itself.⁵⁷³

5. FDA Warning Letters

If the FDA disagrees with the contents of a drug's label it has the authority to issue an informal warning letter to the manufacturer to that effect. An issue had arisen as to whether an informal warning letter constituted an administrative finding by the FDA that the drug's label was inaccurate that was entitled to preclusive effect. In a suit brought by the State Attorney General pursuant to the WVCCPA regarding the labeling of Risperdal and Duragesic, the Circuit Court of Brooke County ruled that the FDA's informal warning letters were preclusive, and therefore, barred the manufacturer from contending that the drugs' labels were accurate. In *State ex rel. McGraw v. Johnson & Johnson*,⁵⁷⁴ the Supreme Court of Appeals held that the FDA's decision to send such a letter did not constitute a final determination by the Agency that the label was false; therefore, the warning letter could not be used as an administrative finding entitled to preclusive effect in subsequent civil litigation.⁵⁷⁵

6. Counterfeit Products

No court in West Virginia has recognized a duty to design more counterfeit resistant product and packaging.⁵⁷⁶

⁵⁷¹ *Karl*, 647 S.E.2d at 484; *McCallister v. Purdue Pharma L.P.*, 164 F. Supp. 783 (S.D. W. Va. 2001).

⁵⁷² W. VA. CODE §30-5-12(a) (2010).

⁵⁷³ *Thomas v. Wyeth*, 2005 WL 3754203, at *3 (S.D. W. Va. June 16, 2005); *In re Rezulin Products Liability Litigation*, 133 F.Supp.2d 272, 294 (S.D.N.Y. 2001) (applying West Virginia law); *but see Walker v. Rite Aid of W. Va., Inc.*, 2003 WL 24215831, at *5 (S.D. W. Va. Oct. 14, 2003) (immunity limited to "quality" of product; statute does not immunize warning claims).

⁵⁷⁴ No. 35500, ___ S.E.2d ___, 2010 WL 4709084 (W. Va. Nov. 18, 2010) (per curiam).

⁵⁷⁵ *Id.*

⁵⁷⁶ *See Ashworth v. Albers*, 410 F. Supp. 2d 471 (S.D. W. Va. 2005) (finding no duty to design more counterfeit resistant product and packaging).

7. The WVCCPA does not Apply to Actions Brought by Consumers in Regard to Prescription Drug Purchases

In *White v. Wyeth*⁵⁷⁷, the court faced a certified question regarding whether a plaintiff was required to prove reliance as part of a WVCCPA claim. The court, in an opinion authored by Justice McHugh, found that “when the alleged deceptive conduct or practice involves affirmative misrepresentations, reliance on such misrepresentations must be proven in order to satisfy the requisite causal connection.”⁵⁷⁸ As part of that analysis, the court also found that “[t]he private cause of action afforded consumers under [West Virginia Code section] 46A-6-106(a) (2005) does not extend to prescription drug purchases.”⁵⁷⁹ The basis for the court’s finding that prescription drug cases were not encompassed within the statute was the following: (a) consumers are protected by the intervention of the physician in the “decision-making process necessitated by his or her exercise of judgment whether or not to prescribe a particular medication[, which] protects consumers in ways respecting efficacy that are lacking in advertising campaigns for other products”⁵⁸⁰; and (b) regulation by the FDA of drugs “attenuates the effect product marketing has on a “consumer’s prescriptive drug purchasing decision.”⁵⁸¹

Obviously, it’s hard to square the logic of *Karl*⁵⁸² (that direct-to-consumer advertising has so altered the traditional doctor patient relationship that it is inappropriate to apply the learned intermediary doctrine) and *White* (that the traditional doctor patient relationship protects the consumer from fraudulent and deceptive false statements in advertising of prescription medications to such a degree that the WVCCPA does not apply).⁵⁸³ However, it is clear that *White* was seen by the court as not overruling *Karl*, as the court’s opinion cites *Karl* as defining the standard in products liability cases as opposed to cases brought pursuant to the WVCCPA.⁵⁸⁴

8. Inappropriateness for Class Certification

Frequently, plaintiff’s counsel choose to file drug and medical device cases in the form of class actions pursuant to West Virginia Rule of Civil Procedure 23. Although the permutations of these cases are beyond the scope of this

⁵⁷⁷ No. 35296, __ S.E.2d __, 2010 WL 5140048 (W. Va. Dec. 17, 2010).

⁵⁷⁸ Syl. pt. 5, *id.*

⁵⁷⁹ Syl. pt. 6, *id.*

⁵⁸⁰ *Id.* (quoting *New Jersey Citizen Action v. Schering-Plough Corp.*, 842 A.2d 174 (N.J. Super. 2003), *cert. denied*, 837 A.2d 1092 (N.J. 2003)).

⁵⁸¹ *Id.*

⁵⁸² *State ex rel Johnson & Johnson Corp. v. Karl*, 647 S.E.2d 899, 899 (W. Va. 2007).

⁵⁸³ No. 35296, __ S.E.2d __, 2010 WL 5140048 (W. Va. Dec. 17, 2010).

⁵⁸⁴ *Id.*

Article (and frequently involve issues related to medical monitoring), it is established law in most jurisdictions that the personal injury component of such cases will almost never be appropriate for class certification.

Although there are no dispositive cases on this issue from the Supreme Court of Appeals, there are opinions from the circuit courts addressing this precise issue. In *Johnson v. Ethicon*, Kanawha County Circuit Court Judge Kaufman confronted the issue of whether a class could be certified regarding injuries alleged to derive from recalled surgical sutures.⁵⁸⁵ Judge Kaufman held that such cases could not be certified: “Traditionally, class certification of claims for personal injury is extremely rare and many courts and commentators conclude that class certification in personal injury products liability cases, is almost never appropriate.”⁵⁸⁶ This is the overwhelming majority position and in the few cases that hold otherwise, there is usually some issue specific to that litigation that differentiates that case.⁵⁸⁷

Generally, a plaintiff cannot force a defendant to translate documents, such as design documents, from a different language into English. That is not to say that the defendant may not want the documents translated for purposes of their defense. Given the often broad scope and cost of discovery, the question is often whether to impose the cost of translation upon the defendant.

⁵⁸⁵ *Johnson v. Ethicon, et al.*, 2005 WL 3968820 (Kan. Cnty. Cir. Ct. 2005).

⁵⁸⁶ *Id.* See ROBERT H. KLONOFF, *KLONOFF'S CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION IN A NUTSHELL* 75-76 (3d ed. 2007) (collecting cases); FED. R. CIV. P. 23(b)(3) advisory committee's note (1966) (cautioning that mass accidents do not lend themselves to class certification). See also *Castano v. Am. Tobacco Co.*, 84 F.3d 737 (5th Cir. 1996); *Am. Med. Sys., Inc.*, 75 F.3d 1069 (6th Cir. 1996); *Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995); *Blyden v. Mancusi*, 186 F.3d 252, 270 (2d Cir. 1999) (observing that the U.S. Supreme Court's analysis in [*Amchem*] “sharply curtailed the ability to certify a class action pursuant to Rule 23(b)(3) in the mass tort context”); *Valentina v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1230 (9th Cir. 1996) (“The history of class action certifications and products liability cases in this circuit and elsewhere has not been luminous.”); *Neeley v. Ethicon*, 2001 WL 1090204, at *10 (2001) (“In medical devise [sic] products liability litigation, individual factual and legal issues often differ dramatically because there is no common cause of injury.”).

⁵⁸⁷ An example of a case in which certification of claims for personal injury resulting from the use of a medical device was found appropriate was *Telectronics*. In *Telectronics*, the court faced allegedly defective pace makers with a signature defect “a broken ‘J’-lead.” The *Telectronics* court observed that the high rate of failure of the leads—12% to 25%—showed that physician error or other alternative causes were unlikely to affect many claims. *In re Teletronics Pacing Systems, Inc.*, 172 F.R.D. 271, 288–90 (S.D. Ohio 1997). Another unique characteristic of the *Telectronics* litigation was that the type of injury for which plaintiffs sought recovery—injury from a broken pacemaker lead—was readily apparent, not likely to have been caused by anything else, and identifiable with a simple screening procedure. *Id.* The *Telectronics* court noted that these circumstances set that case apart from other medical products liability actions’ “The ‘J’ lead controversy appears to be the exception to the general rule that medical products liability actions require extensive proof of individualized issue.” *Telectronics*, 172 F.R.D. at 288 (emphasis added).

West Virginia typically follows the American Rule, under which each side bears its own costs of litigation.⁵⁸⁸ In the leading case dealing with the cost of translation, the First Circuit, applying the American Rule, granted mandamus and reversed an order compelling two parties that did business in foreign languages (Japanese and Spanish) to translate their documents into English for the benefit of opposing counsel.⁵⁸⁹ The only published case that finds that a foreign corporation must translate its documents into English is *Stapleton v. Kawasaki Heavy Industries Ltd.*⁵⁹⁰

Indeed, the United States District Court for the Southern District of West Virginia, in comparing the reasoning of *Stapleton* with that of *Puerto Rico Electric*, held that “[t]he better-reasoned view . . . is that the Plaintiffs must bear [the translation] expense” at the pretrial stage of litigation.⁵⁹¹ In *Cook*, the plaintiffs were not West Virginians and the German company at issue was a foreign corporation not doing business in the United States.⁵⁹² Volkswagen was brought into the litigation via the Hague Convention.⁵⁹³ Plaintiffs were attempting to avoid the considerable expense of having documents produced by Volkswagen and in the German language translated to the English language.⁵⁹⁴

⁵⁸⁸ *But see* Syl. pt. 4, *Bowling v. Ansted Chrysler-Plymouth-Dodge, Inc.*, 425 S.E.2d 144 (W. Va. 1992) (exception for cases involving fraudulent conduct).

⁵⁸⁹ *In re Puerto Rico Elec. Power Auth.*, 687 F.2d 501, 506 (1st Cir. 1982). *See also* *Contreras v. Isuzu Motors*, No. Civ.SA-98-CA-442-JWP, 1999 WL 33290667, at *1 (W.D. Tex. Apr. 2, 1999) (“[T]here is no authority for compelling the defendants to translate discovery documents”); *Soto v. McLean*, Nos. 7:96CV134BR2, 7:96CV135BR2, 1998 WL 1110688, at *2 (E.D.N.C. Jan. 30, 1998) (same rule as to translations of deposition transcripts); *East Boston Ecumenical Comty. Council, Inc. v. Mastroiello*, 124 F.R.D. 14, 15 (D. Mass. 1989) (same rule as to foreign language interpreters at depositions); *Howes v. Med. Components, Inc.*, 698 F. Supp. 574, 580 (E.D. Pa. 1988) (parties “cannot be compelled to translate foreign language documents for the benefit of their adversary”); *Bills v. Kennecott Corp.*, 108 F.R.D. 459, 463 (D. Utah 1985) (the “Federal Rules make no provision for lingual translations”); *Lear v. N.Y. Helicopter Corp.*, 597 N.Y.S.2d 411, 413–14 (N.Y. App. Div. 1993) (“[A] party may not be compelled to procure a translation of a foreign-language document which it discloses during discovery”); *Krygier v. Airweld, Inc.*, 520 N.Y.S.2d 475, 477 (N.Y. App. Div. 1987) (“[A] party cannot be compelled to translate a discoverable document and that it is sufficient to produce the original untranslated document”); *In re Fialuridne (FIAU) Prods. Liab. Litig.*, 163 F.R.D. 386, 387 (D. D.C. 1995) (“[A] party cannot impose the cost of translating documents that exist in a foreign language on the producing party”); JAMES W. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 34.14[5] (3d ed. 2007) (“If a document that is required to be produced is in a foreign language and no English version exists, the producing party should not be required to translate the document into English at its own expense.”); *AMERICAN LAW OF PRODUCT LIABILITY* § 53:102, at 210 (3d ed. 2008) (“[A] court is without authority to compel a party to provide translated documents in the first instance.”).

⁵⁹⁰ 69 F.R.D. 489 (N.D. Ga. 1975).

⁵⁹¹ *Cook v. Volkswagen of Am., Inc.*, 101 F.R.D. 92, 92 (S.D. W. Va. 1984).

⁵⁹² *Id.*

⁵⁹³ *Id.*

⁵⁹⁴ *Id.* (quotations omitted).

H. *Other Similar Incident (OSI) Evidence*

Often times, a party, usually a plaintiff, will seek to introduce “other similar incidents” in product liability trials. West Virginia recognizes this type of evidence, but limits such evidence consistent with West Virginia Rule of Evidence 404(b), the requirement of “substantial similarity”⁵⁹⁵ and the discretion afforded the trial judge pursuant to West Virginia Rule of Evidence 403.⁵⁹⁶ While the substantial similarity requirement limits other incident evidence, the court will first look to the purpose of the evidence under Rule 404(b).⁵⁹⁷

Rule 404(b) is a strict exclusionary rule, and it states that evidence of other alleged acts or wrongs is not admissible to prove character or propensity to perform an action. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.⁵⁹⁸

The court will make inquiry to insure that this type of evidence is not being introduced for an improper purpose. In the products liability context, it is typically only the “notice” or “knowledge” exception to Rule 404(b) that permits a substantially similar incident to be introduced into evidence. Accordingly, to be evidence of notice or knowledge of a defect, the OSI will need to be an incident that occurred prior to both the accident in question and the manufacture date of the product.

Typically, a court will require reasonable advance notice of the intent to use such evidence and will conduct a separate hearing to consider the admissibility of the evidence. Courts also are wary that other incident evidence may create a “mini-trial” about that other incident, which can confuse and distract the jury from the matter about which they are to decide. Evidence of other acts is not only excluded because it lacks probative value, but also as a precaution “against inciting undue prejudice and permitting the introduction of pointless collateral issues.”⁵⁹⁹

⁵⁹⁵ Syl. pt. 3, *Gable v. Kroger*, 410 S.E.2d 701 (1991) (“Evidence of injuries occurring under different circumstances or conditions is not admissible”) The *Gable* formulation of “substantial similarity” is also very narrow. In *Gable*, the court found the prior slip and fall accidents that Mr. Gable wished to introduce were not substantially similar to the subject accident, as one occurred over two years before the subject accident, and the other was in a different part of the store and was caused by an overflow of water from malfunctioning equipment. On the other hand, the subject accident was a slip and fall caused by some spilled cottage cheese. *Id.*

⁵⁹⁶ See syl. pt. 4, *Id.*

⁵⁹⁷ See *id.* at 704.

⁵⁹⁸ *Id.*; W.VA. R. OF EVID. 404(b).

⁵⁹⁹ FRANKLIN D. CLECKLEY, HANDBOOK ON EVIDENCE FOR WEST VIRGINIA LAWYERS § 4-5(A) at 141 (4th ed. 2000); W. VA. R. OF EVID. 404(b); see also *TXO Production v. Alliance Resources*, 419 S.E.2d 870, 882–83 (1992).

I. *Economic Loss Doctrine*

West Virginia does recognize the economic loss doctrine except in cases involving a sudden calamitous event. Damages which result from a “bad bargain” are outside the scope of strict liability and the purchaser’s remedy is through the UCC.⁶⁰⁰ However, “property damage to a defective product which results from a sudden “calamitous event” is recoverable under a strict liability cause of action.”⁶⁰¹

IX. CONCLUSION

In the three decades since *Morningstar*, the West Virginia Supreme Court of Appeals has addressed many issues relating to the substantive products liability law in West Virginia. Despite the importance of this area of the law and the prolific number of products suits filed every year, *Morningstar* remains the single most important products liability case and its interpretation and application are fought over on a daily basis throughout our court system.

It is our hope that this Article will provide the bench and bar in our State with a reliable starting point for navigating this complex and rapidly evolving field of law. If any lawyers practicing in this area of the law want to discuss any aspect of this article or offer any suggestions for how it can be improved in future iterations, please contact us.

⁶⁰⁰ Syl. pt. 1, *Capitol Fuels Inc. v. Clark Equip.*, 382 S.E.2d 311 (W. Va. 1982) (citing syl. pt. 3, *Star Furniture Co. v. Pulaski Furniture Co.*, 297 S.E.2d 854, 854 (W. Va. 1982)).

⁶⁰¹ Syl. pt. 3, *Star Furniture Co.*, 297 S.E.2d at 854.