Should We Keep this Court?

An Economic Examination of Recent Decisions Made by the West Virginia Supreme Court of Appeals

by Kristen M. Leddy, Russell S. Sobel & Matthew T. Yanni

WV OCTOBER 2008

ABOUT THE FEDERALIST SOCIETY

The Federalist Society for Law and Public Policy Studies is an organization of 40,000 lawyers, law students, scholars, and other individuals, located in every state and law school in the nation, who are interested in the current state of the legal order. The Federalist Society takes no position on particular legal or public policy questions, but is founded on the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be.

The Federalist Society takes seriously its responsibility as a non-partisan institution engaged in fostering a serious dialogue about legal issues in the public square. We occasionally produce "white papers" on timely and contentious issues in the legal or public policy world, in an effort to widen understanding of the facts and principles involved, and to continue that dialogue.

Positions taken on specific issues in publications, however, are those of the author, and not reflective of an organization stance. This paper presents a number of important issues, and is part of an ongoing conversation. We invite readers to share their responses, thoughts and criticisms by writing to us at info@fed-soc.org, and, if requested, we will consider posting or airing those perspectives as well.

For more information about The Federalist Society,
please visit our website: www.fed-soc.org.

Should We Keep this Court?

An Economic Examination of Recent Decisions Made by the West Virginia Supreme Court of Appeals

Kristen M. Leddy, Russell S. Sobel & Matthew T. Yanni

Should We Keep this Court?

An Economic Examination of Recent Decisions Made by the West Virginia Supreme Court of Appeals

Kristen M. Leddy, Russell S. Sobel & Matthew T. Yanni

There has been much discussion lately about whether West Virginia's economy could be bolstered by adopting various initiatives aimed at improving its business climate.[1] While people tend to associate a state's business climate with factors such as corporate taxes and regulations, the legal and judicial system is also an important element in determining the relative attractiveness of a state to business location and growth. State court rulings have significant effects not only on the cost of doing business in a state, but also on the predictability and risk associated with operating a business. The state's business climate directly affects the decisions of companies whether to create new jobs here or somewhere else. In this study we examine some of the most important cases that have confronted the current West Virginia Supreme Court of Appeals, whose membership has been in place since 2005.

At the outset, it is important to discuss the proper role of the court system in a market-based economy, such as we have in the United States. In a system of free markets, individuals are allowed to be secure in their persons and property, and are afforded the ability to make decisions over the resources under their control. The only limits on the scope of individual action relate to instances in which an individual violates or infringes on the rights of others. It is in these cases in which a properly functioning legal system fairly and consistently settles disputes between parties. Court decisions, in effect, set the price (or cost) imposed for infringements on the rights of others. It is critical that courts do this not only in a predictable manner, but also in a manner that sets these 'prices' fairly. Punishments that are too lenient will not provide the correct incentive for future parties to avoid these infringements on others, while punishments that are too severe will result in an abundance of lawsuits and discourage activities that would have created economic growth. Striking this balance is the key to the court properly serving its role of arbitrating the cases in which individual rights are in conflict within a market-based economy.

Economists frequently use an analogy of the board game Monopoly™ to explain the important role of the legal system, and the courts, in an economy. While the government's proper role is not to be an active player in the game, it should, and does, have the role of setting and enforcing the rules of the game under which the players operate. For the economic game to run smoothly, the rules must be clear, predictable, and enforced fairly. Generally, the state's legislature determines these rules, the state's executive branch enforces them, and the state's judiciary interprets them. Sometimes, however, judges depart from the interpretive.

Arthur Schlesinger coined the term "judicial activism" in the late 1940s, but Schlesinger did not provide a definition of the term that scholars readily accepted.[2] While there has been little consensus among scholars, critics, law students, law bloggers and reporters on the meaning of the term,[3] a review of the scholarly examination of judicial activism yields the following common explanations of its meaning: 1) judicial conduct that exceeds the power constitutionally granted to the judiciary; 2) judicial decisions that ignore past precedent; 3) judicial decisions which "legislate from the bench;" 4) the judicial exercise of broad remedial powers; and 5) judicial decisions according to the judge's personal political preferences.[4] The scholarly analysis of this term creates a framework to begin this discussion. In an effort to clarify the meaning of judicial activism as it relates to West Virginia, we rely on the definitions provided by the justices themselves.

** Russell S. Sobel, Ph.D., is Professor of Economics and holder of the James Clark Coffman Distinguished Chair in Entrepreneurial Studies at West Virginia University. He has published over 150 books and articles on economic policy, including a nationally-best-selling collegiate Principles of Economics textbook. Kristen Leddy is a 2007 graduate of West Virginia University College of Law and has worked as a judicial clerk for the Honorable John S. Kennedy of the York County Court of Common Pleas, York, Pennsylvania. Matthew T. Yanni holds a master's degree in economics and is pursuing his second year of law school at West Virginia University. He is a student fellow of the American Institute for Economic Research.*

The Justices of the Supreme Court of Appeals of West Virginia used the phrase "judicial activism" a total of four times during the period from 2005 through 2008. The term does not appear in any majority opinion; rather it appears in concurrences and in dissents. According to the various justices, "judicial activism," occurs when a court encroaches upon the authority of the legislature to bar negligent claims by employees against their employers,[5] or when a court arrogates to itself the task of seeking out and deciding an issue that no one has brought before it or argued,[6] or when a court exceeds its proper constitutional role by effectively amending a statutory provision to remedy what it believes to be a policy inadequacy in legislative judgment,[7] or even when a court would improperly emasculate the intent and purpose of a rule of civil procedure.[8] Importantly, the justices use the term to accuse each other of judicial missteps, and to urge the other justices to refrain from activist decision-making.

The court's admonishment against judicial activism seems more than just empty rhetoric. While the court emerged as a significant entity in state policymaking since the 1960s and 1970s, the general choice of the justices is stasis.[9] Brisbin's comprehensive 1993 study of the West Virginia judiciary evaluated the court's activism, finding it most likely to engage in doctrinal changes in the areas of tort law and product liability.[10] The court significantly altered the state's policies regarding the workers' compensation system, forced the state to reconstruct its prison system, established alcohol treatment programs, and provided emergency care to the state's homeless population.[11] The court revolutionized the family law system, including child custody law and prenuptial agreements.[12] Despite the court's willingness to act aggressively at the state level, it does show deference to federal court rulings, to U.S. Supreme Court rulings, and to the U.S. Constitution.[13]

In the fifteen years since Professor Brisbin's study, the state legislature has made some noteworthy changes in the area of tort law, such as lower caps on medical malpractice damages, limits on joint and several liability, venue restrictions, and the elimination of third-party bad faith claims against insurance companies.[14] In the past three years, the West Virginia Supreme Court invalidated the revised venue statute, discarded a common law modification of a product manufacturer's duty to warn, upheld the imposition of a tax that may prove to violate the Commerce Clause, and refused to grant appellate review to some exorbitant punitive damages awards in commercial cases. However, it has generally upheld workers' compensation reforms, consumer protection and family court system reforms. Thus, in some instances, the West Virginia Supreme Court of Appeals has played a very activist role, while in others it has not. In this study, we examine some of these important cases heard by the current court, and attempt to describe how these decisions impact the economic climate in West Virginia.

The cases examined here create additional costs on companies doing (or thinking of doing) business in West Virginia. They also create cost uncertainty for businesses, which can lower the attractiveness of investing in the state. To the extent that these cases are won by the lawyers who pursue them, and their clients, this may increase the number of cases filed in the future. This draws resources away from investment and instead involves devoting resources toward litigation costs and potential wealth transfers through settlements or judgments. What follows is an examination of the important cases heard in West Virginia courts in the years 2006 through 2008, corresponding to the years of the current court's membership.

The 2008 Case: *Caperton v. Massey*

The glare of a national spotlight shines on West Virginia's highest court, as many observers carefully watch whether the U.S. Supreme Court will review the state court's ruling in *Caperton v. A.T. Massey Coal Co., Inc.*[15] Justice Elliott Maynard recused himself from the case after vacation photographs appeared in the media linking him with Massey CEO Don Blankenship.[16] Justice Larry Starcher similarly recused himself from the case, after comments he made about Blankenship appeared to create an impermissible bias.[17] Justice Brent Benjamin, however, did not disqualify himself from the case, even though Blankenship may have contributed to the justice's campaign. In sparsely populated states, such as West Virginia, it is especially critical that judges fairly apply the law, given the personal relationships judges often have with case parties. As such, several high-profile legal groups, including the American Bar Association, have submitted amicus briefs asking[18]

the U.S. Supreme Court to review this case for its significance regarding recusal standards.[19]

The 2007 Cases: *Tawney, Du Pont, Wheeling Pittsburgh Steel, and Johnson & Johnson v. Karl*

West Virginia circuit courts awarded three of the nation's top ten largest plaintiffs' verdicts in 2007.[20] All three of these were lawsuits against businesses. The Circuit Court of Roane County awarded the plaintiffs $404 million in their breach of contract claim against Columbia Natural Resources, L.L.C.,[21] the Circuit Court of Harrison County awarded the plaintiffs $251 million in their toxic tort claim against E.I. DuPont De Nemours & Co.,[22] and the Circuit Court of Brooke County awarded the plaintiff Wheeling Pittsburgh Steel Corp. $220 million in a breach of contract claim against the Central West Virginia Energy Co.[23]

A business generally faces two distinct types of risk, either of which may subject it to financial ruin. The first is economic risk, characterized by efficiency, management, and market effects. The second is legal risk, characterized by corporate exposure to lawsuits. Inefficiency and poor management risk only the businesses assets invested in the venture. The worst-case scenario is that the firm may lose all of its investment in that particular operation if it were to go out of business. The limit on economic risk for a business is then just the business assets involved or invested in that location. Legal liability, however, can impose verdicts that far exceed the amount of the investment in the state, forcing the company to close or dispose of other assets and operations from other states (that had no part in the case in question) to settle the lawsuit. Thus, in cases such as those discussed here, a large national corporation conducting business in West Virginia could face not just the loss of the investment made in the state, but also the risk of a potential lawsuit that results in a verdict that reaches into the total assets of the company. To avoid such exposure, a firm may choose not to have a business presence in West Virginia.

All but one of the 2007 cases featured here included large punitive damage awards designed to punish the businesses involved. These awards are not related to the amount of damage the defendant party caused, and are instead related to the jury's interpretation of the 'badness' of the defendant party's behavior. It is much easier for jurors to internalize injuries that plaintiffs present in jury trials than it is for jurors to internalize the damage a large punitive damage award may have on the state's business climate, their future employment prospects, and their incomes. Rulings such as these can reduce the willingness of businesses to invest and/or locate in West Virginia.

Rules that operate in derogation of the common law also can make West Virginia's legal climate less attractive to business development.[24] We now examine each of these cases in more detail.

Estate of Tawney v. Columbia Natural Resources

In *Estate of Tawney v. Columbia Natural Resources*, the West Virginia Supreme Court of Appeals determined the appropriate reading of the contract at issue, sent by the Circuit Court of Roane County as a certified question.[25] The approximately 8,000 plaintiffs in the case had oil and gas leases of varying forms and types with Columbia Natural Resources ("CRN"), a subsidiary of NiSource, or a predecessor in interest.[26] The oil and gas leases provided that the plaintiffs would receive payments of 1/8 of the royalty to be calculated "'at the well,' 'at the wellhead' or similar language, or that the royalty is 'an amount equal to 1/8 of the price, net of all costs beyond the wellhead,' or 'less all taxes, assessments, and adjustments.'"[27] "In light of fact that West Virginia recognizes that a lessee to an oil and gas lease must bear all costs incurred in marketing and transporting the product to the point of sale unless the oil and gas lease provides otherwise,"[28] the supreme court held that

> language in an oil and gas lease that provides that the lessor's 1/8 royalty (as in this case) is to be calculated "at the well," "at the wellhead," or similar language, or that the royalty is "an amount equal to 1/8 of the price, net all costs beyond the wellhead," or "less all taxes, assessments, and adjustments" is ambiguous and, accordingly, is not effective to permit the lessee to deduct from the lessor's 1/8 royalty any portion of the costs incurred between the wellhead and the point of sale.[29]

The canon of construction that courts construe ambiguous language against the drafter supports the court's position.[30]

The interesting part of this case was the West Virginia Supreme Court's decision to refuse to hear an appeal of the $404 million verdict, the third largest

in the nation for 2007, of which $270 million were punitive damages.[31] Instead, the West Virginia Supreme Court "granted NiSource's request for a stay of the judgment, pending action by the U.S. Supreme Court on a petition for a writ of certiorari, which NiSource plans to file in late August."[32] Injured plaintiffs generally cannot recover punitive damages in a breach of contract action because a goal of contract law is to compensate the injured party, not to punish the breaching party.[33] The punitive damages awarded in this case represent a major departure from the standard principles of contract law.

Lenora Perrine, et al. v. E.I. DuPont de Nemours & Co., et al.

While the Supreme Court of Appeals is currently on summer hiatus, it has announced its motion docket for some dates in September 2008.[34] The court will hear argument in the plaintiffs' appeal of partial summary judgment in favor of the defendant in *Lenora Perrine, et al. v. E.I. DuPont de Nemours & Co., et al.* (*DuPont)*, No. 080721.[35]

> Plaintiffs assert that there were material questions of fact as to whether the contamination and injuries/damages due to the operation of a zinc smelter were contemplated by the original landowners and whether certain releases and easements executed in the 1920's provide immunity for those claims. Plaintiffs seek a reversal of the circuit court's order granting partial summary judgment in favor of defendants on the Property Class members' claims and request a remand for reinstatement and adjudication of those claims upon their merits.[36]

The court is willing to hear argument in the plaintiff's appeal of partial summary judgment, but it has not yet decided if it will entertain DuPont's appeal of the approximately $252 million verdict.[37]

In *DuPont*, attorneys presented the Harrison County Circuit Court jury with the history of a plant built in 1911 under the ownership of Grasselli Chemical Co., Inc.[38] DuPont purchased the plant in 1928, and disposed zinc ore waste into a pile at the facility, which smoldered at high temperatures and released "toxic heavy metals into the surrounding communities."[39] In 1950, DuPont sold the plant to Meadowbrook Corp.[40] T.L. Diamond & Co., Inc. "ran the plant from 1984 until approximately 2001, when DuPont regained operation."[41] After repurchasing the plant, DuPont "began smoothing the waste pile and covered it with a synthetic membrane to grow vegetation, which [DuPont] completed in 2004."[42] Approximately 8,000 residents sued E.I. DuPont De Nemours and Co., Meadowbrook Corp., Matthiessen & Hegeler Zinc Co. Inc., Nuzum Trucking Co., T.L. Diamond & Co. Inc., and Joseph Paushel claiming "wanton, willful, and reckless conduct."[43] At trial,

> [P]laintiffs' experts testified that the claimants were at a higher risk to cancer (skin, lung, bladder, stomach and kidney cancer) and non-cancer impairments, including decreased renal function, renal failure, plumbism (lead poisoning) and neurocognitive injury. The plaintiffs' experts opined that the class members lived in different identified zones (Zone 1A, Zone 1B, Zone 2 and Zone 3) and that each zone was at a different risk of contracting cancer. Claimants in Zone 1A had a one in 1,000 incremental increased risk of cancer; Zone 1B residents had a 5 in 10,0000 increased risk; Zone 2 had a one in 10,000 risk; and Zone 3 had a five in 100,000 risk…. [Plaintiffs' expert] Brown testified that it would cost $56 million to remove and replace the contaminated soils and clean affected zones. In Zone 1A, the top six inches of the soil would be scraped and replaced on 20 properties, while anything that acted as a dust trap in the homes (i.e. insulation, air conditioner, carpet) would be removed and cleansed. In the remaining zones, the cleanup would be less invasive, as homes' ventilation systems would be cleaned….[44]

On the other hand,

> Defense counsel contended that the smelter did not present a public health problem, and that any risk to cancer or any other alleged diseases was nonexistent. This opinion was reiterated by Peter Valberg, the defense comparative risk expert, who said that it was more dangerous to smoke cigarettes and drive a car while talking on phone than to live in the Spelter area.[45]

In October of 2007, a Harrison County jury awarded the plaintiffs $196.2 million in punitive damages, $33.3 million to clean up soil and residences, $2.8 million to clean up mobile homes, $1.0 million to clean up commercial structures, and $18.4 million in lost profits.[46] This case presents a $251.7 million dollar award to plaintiffs who have at most "a one in 1,000 incremental increased risk of cancer."[47] Whether this value is an appropriate award is subject to debate;

a site owned by multiple companies over a 100-year period has yielded plaintiffs a punitive damage award three times that of the amount needed to compensate the plaintiffs for their increased risk of injury.

Pittsburgh Steel Corp. v. Central West Virginia Energy Co.

In a breach of contract dispute, the Brooke County Circuit Court awarded the Wheeling-Pittsburgh Steel Corp. (Wheeling-Pitt) $219.8 million in damages arising out of Central West Virginia Energy Company's "fail[ure] to deliver 104,000 tons of metallurgical grade coal per month as required under a contract that extended to 2010."[48] Central West Virginia Energy Co. (Central West Virginia Energy) is a subsidiary of Massey Energy (Massey).[49] Wheeling-Pitt had a long-term contract with Central West Virginia Energy Co. for the provision of coal which would allow Wheeling-Pitt to operate its coke ovens nonstop.[50]

The terms of the contract included a "force majeure," or "greater forces" clause,[51] which allowed a party to breach the contract for limited amounts of time if an event occurred outside the party's control. Problems arose between Wheeling-Pitt and Central West Virginia Energy in late 2003, when "steel-making coal prices skyrocketed."[52] "Coal that had been selling for $40 a ton was going for $125 a ton or more."[53] Massey asserted that "transportation challenges...a variety of geological problems, poor roof conditions, and flooding at its Southern West Virginia mines" caused the company to fail to deliver the coal to Wheeling-Pitt,[54] and that Massey and Central West Virginia Energy were protected from a breach of contract action arising under circumstances that were beyond the control of Massey and Central West Virginia Energy. Central West Virginia Energy accused Massey of "selling its steel making coal at prices far greater than its contract with Wheeling-Pitt allowed."[55]

Wheeling-Pitt sued Central West Virginia Energy and Massey for the damage their coke oven sustained in its intermittent operation, and for replacement coal purchases.[56] At the end of the trial, the Brooke County jurors awarded Wheeling-Pitt $119.8 million in compensatory damages and $50 million in punitive damages from both Central West Virginia Energy and Massey.[57] Because the West Supreme Court of Appeals declined to hear an appeal of the verdict, Massey is appealing the case to the U.S. Supreme Court.[58]

This case provides an example of how the West Virginia courts have abandoned the concept of efficient breach of contract. Under an efficient breach, society is made better off by one party breaching an existing contract, reaping the benefits of that breach, and then compensating the injured party. Society is made better off because the breaching party creates wealth, and the innocent, non-breaching party is made whole. If the "force majeure" clause did not apply, as the jury found, then Central West Virginia Energy did owe Wheeling-Pitt an amount equal to the foreseeable damage Wheeling-Pitt sustained as a result of Central West Virginia Energy's breach. It may be that $119.8 million is a reasonable figure for this breach of contract, but the relevant question is whether punitive damages have a place in contract law, and the West Virginia Supreme Court denied an appeal of this case to address that issue. Given the potentially large economic consequences of these large awards, the extent to which the court shows a willingness to hear the appeals would have an effect on the nation's view of the West Virginia business climate.

State ex rel. Johnson & Johnson v. Karl

Under the learned intermediary doctrine, drug manufacturers have no duty to warn consumers about the risks of taking prescription drugs because the manufacturers can rely on prescribing physicians to do so.[59] In a 3-2 decision from 2007 in *State ex rel. Johnson & Johnson v. Karl,*[60] West Virginia became the only jurisdiction in the country to reject the learned intermediary doctrine in prescription medical product cases.[61]

In *Karl*, a drug manufacturer asked the Supreme Court of Appeals to issue a writ of prohibition, preventing the trial court, the Circuit Court of Marshall County, from refusing to apply the learned intermediary doctrine, in a case brought by the estate of a woman who died suddenly three days after she began taking a prescription drug made by the drug manufacturer.[62] The majority opinion cites justifications from a variety of jurisdictions which adhere to the doctrine as "largely outdated and unpersuasive,"[63] even though the rule continues to be routinely applied.[64] The court reasons that the "Norman Rockwell" depiction of physician-patient relations no longer exists, managed care systems

have reduced the amount of time doctors spend with their patients, drug manufacturers have a wealth of advertising money at their disposal to speak directly to patients, and the State's existing law of comparative contribution among joint tortfeasors adequately addresses issues of liability among doctors and drug companies where patients sue for injuries related to prescription drug use.[65]

On the other hand, the dissent argues that the issue of adequate product warnings on prescription drugs largely depends on the unique facts of each case, and the majority opinion downplays the "continuing and vital" role a physician plays in the decision to prescribe particular medications to particular individuals, based on that individual's specific needs.[66] Further, commentators suggest that the ruling may have potentially damaging effects on other doctrines, such as product identification, remote causation, and burden of proof in pharmaceutical products liability cases.[67] The results of the case arguably amount to an absolute liability on pharmaceutical manufacturers.

The 2006 Cases: *MBNA* and *Ryan v. Clonch*

The 2006 cases highlighted here present examples of the West Virginia Supreme Court's willingness to increase tax revenue,[68] and the court's willingness to leave the bounds of the worker's compensation system to levy additional punishments on employers.[69] Both decisions decrease the predictability of West Virginia's legal system because they present sudden changes to established rules.

MBNA

In the area of constitutional and tax law, the court reviewed a case in which a Delaware credit card company sought a refund of the West Virginia business franchise tax and corporate net income tax.[70] In *MBNA*, the credit card company had no real or tangible personal property or employees in the state during two the relevant two-year period, 1998 and 1999.[71] The company's business in the state included issuing and servicing credit cards, extending unsecured credit to card users, and promoting its business through mail and telephone solicitation.[72] The issue in this case was whether the imposition of West Virginia's business franchise and corporate net income taxes on MBNA violated the Commerce Clause of the U.S. Constitution.[73] The court held that the Commerce Clause was not violated by the tax scheme, reasoning that the company had a substantial economic presence in the state, sufficiently meeting the substantial nexus required to impose these taxes. [74]

On the other hand, the dissent argues that taxing a business incorporated in a foreign state, when that business has no physical presence in West Virginia, is an impermissible burden on interstate commerce, is lacking in precedential support at both the state and federal levels, and is based upon thinly-veiled state tax agendas and inaccurate readings of Supreme Court precedent.[75] West Virginia's Chief Justice Davis defends the majority opinion in her concurrence. She states that she sees no reason why "mom and pop" businesses in the state with relatively small gross receipts should have to pay the business franchise tax and the corporate net income tax due to their physical presence in the state, when much larger corporations, such as MBNA, that make millions of dollars doing business in the state, should not simply because they lack a physical presence.[76] As of November 30, 2006, West Virginia became the third state to use the "significant economic presence" doctrine constitutional under the Commerce Clause.[77] In June 2007, the U.S. Supreme Court declined to review the case.[78] The economic ramifications of this decision are substantial as they relate to the potential costs (in terms of the tax burden) associated with companies doing business in West Virginia. Rightly or wrongly, this decision increases the taxes associated with doing business in the state.

Joseph E. Ryan v. Clonch Industries

When an individual appeals an administrative decision on a workers' compensation issue, the appeal goes directly to the West Virginia Supreme Court of Appeals for disposition. Only five other states in the United States utilize a similar system of worker's compensation review. According to the court's statistical report for 2007,[79] seventy-three percent of the new cases filed with the supreme court were workers' compensation cases. The court disposes of most of the compensation cases it decides to review by memorandum order, as opposed to written opinion, its primary means of disposing of non-compensation cases.[80]

Detractors of the court's workers' compensation jurisprudence, including members of the court, criticize some of its decisions as liberalizing benefit distributions

beyond the legislature's original intent, consequently driving up the cost of the system.[81] In *Ryan v. Clonch*, the court expanded an exception to a discovery rule, which one attorney referred to as the "narrow exception you could drive a truck through."[82] In this case, a lumber worker performing banding duties was injured when a piece of metal banding material struck him in the left eye. The employee, Mr. Ryan, filed a claim under the deliberate intent statute, which provides immunity from suit to employers unless the employee can sufficiently prove five statutory requirements, including whether the unsafe working condition violated an industry standard applicable to the process, and whether the employer had a subjective realization and appreciation of the hazardous working condition and the high degree of risk associated with it.[83] The court reasoned that even though the employer's actual subjective knowledge of the unsafe working condition was lacking, it held that the employer unconscionably violated a mandatory duty to perform a hazard evaluation pursuant to an OSHA regulation.[84] The dissent argued that the majority contravened legislative intent by using a general safety regulation to "satisfy the statutory specificity requirement of a deliberate intent cause of action."[85]

CONCLUSION

A fair and balanced legal system that enforces contracts and property rights is an essential foundation for a healthy and prosperous market based economy. In this study, we have examined some of the cases with the largest potential ramifications for West Virginia's business climate that have faced the current members of West Virginia's Supreme Court of Appeals. The decisions made (or refused to be made) on these cases have the potential to affect economic growth and job creation. In the end, West Virginia is in competition with the other 49 states to attract and grow businesses that create jobs and income. The cost of litigation certainly will have an impact on the State's standing.

In the end, West Virginia is in competition with the other 49 states to attract entities that will create jobs and income. Thus, it is critical to examine how individuals and businesses are treated in West Virginia's court system relative to the way they would be treated in other states. If the West Virginia court system imposes more costs and uncertainty than would be present in other states, it will detract from West Virginia's ability to sustain economic growth and prosperity. To grow, West Virginia's legal system must be competitive with other states.

Endnotes

1 *See*, *e.g.*, Unleashing Capitalism: Why Prosperity Stops at the West Virginia Border and How to Fix It, Russell S. Sobel (Public Policy Foundation of West Virginia ed., 2007).

2 *See* Keenan Kmiec, *The Origin and Current Meanings of 'Judicial Activism*,' 92 Cal. L. Rev. 1441, 1443 (2004) (referring to Arthur Schlesinger's use of "judicial activism" in a *Fortune* magazine article on the U.S. Supreme Court in January 1947 as the first official usage of the term).

3 *See* Caprice Roberts, *In Search of Judicial Activism: The Dangers of Quantifying the Qualitative*, 74 Tenn. L. Rev. 567, 570 (2007).

4 *See* Kmiec, *supra* note 2, 1464-1476; Roberts, *supra* note 3, 581-600; Vincent Martin Bonventre, *Judicial Activism, Judges' Speech, and Merit Selection: Conventional Wisdom and Nonsense,* 68 Alb. L. Rev. 557, 564-575 (2005); and Frank Cross and Stefanie Lindquist, *The Scientific Study of Judicial Activism,* 91 Minn. L. Rev. 1752, 1762-1764 (2007).

5 Bias v. Eastern Associated Coal Corporation, 220 W.Va. 190, 209, 640 S.E.2d 540, 559 (2006) (Davis, C.J., concurring).

6 Fairmont General Hospital, Inc. v. United Hospital Center, Inc., 218 W.Va. 360, 377, 624 S.E.2d 797, 814 (2005) (Starcher, J., dissenting).

7 Worley v. Beckley Mechanical, Inc., 220 W.Va. 633, 643, 648 S.E.2d 620, 630 (2007) (Benjamin, J., dissenting).

8 Riggs v. West Virginia University Hospitals, Inc., 221 W.Va. 646, 668, 656 S.E.2d 91, 113 (2007) (Davis, C.J., concurring).

9 *See* Richard A. Brisbin, Jr., West Virginia State Government: The Legislative, Executive, and Judicial Branches, *The West Virginia Judiciary* (Institute for Public Affairs, West Virginia University, 1993). *See also* Charles Lopeman, The Activist Advocate (Praeger Publishing, 1999) (discussing the conservative history of the State's Supreme Court of Appeals prior to the 1980s).

10 Brisbin, *supra* note 9, at 31.

11 *Id*. at 32.

12 *Id*. at 33.

13 *Id*. at 33-34.

14 Elizabeth Thornburg, *Judicial Hellholes, Lawsuit Climates and Bad Social Science: Lessons from West Virginia,* W.Va. L. Rev. (forthcoming 2008) (debunking myths about West Virginia's tort system).

15 Not reported in S.E.2d, 2008 WL 918444, 2007 W.Va. LEXIS 119 (W.Va., Nov. 21, 2007).

16 Ken Ward, *Maynard recuses himself for the third time,* Charleston Gazette, February 8, 2008.

17 Paul Nyden, *Starcher recuses himself from the Massey case*, Charleston Gazette, February 16, 2008; *see also* Justice Starcher's recusal statement, *available at* http://www.state.wv.us/wvsca/press/feb15b_08.htm.

18 The Brief of the American Bar Association as Amicus Curiae in this case, *available at* http://www.abanet.org/judind/pdf/caperton_brief.pdf.

19 *See* Lawrence Messina, *Legal Groups blast W.Va. Justice in Massey Case,* Associated Press, August 5, 2008.

20 When ranked by the dollar value of the award. *See* VerdictSearch, *Top 100 Verdicts of 2007*, *available at* http://www.verdictsearch.com/index.jsp?do=top100.

21 *See* Estate of Tawney v. Columbia Natural Resources, L.L.C. (2007).

22 *See* Perrine v. E.I. DuPont De Nemours & Co. (2007).

23 *See* Wheeling Pittsburgh Steel Corp. v. Central West Virginia Energy Co. (2007).

24 Paul H. Rubin, *Why is the Common Law Efficient?*, 6 J. Legal Stud. 51 (1977); *see, e.g.,* State ex rel. Johnson & Johnson v. Karl (2007).

25 219 W.Va. 266, 633 S.E.2d 22 (2006).

26 *Id*. at 269, 25.

27 *Id*. at 268, 24.

28 *Id*.

29 *Id*. at 274, 30.

30 Robert A. Hillman, Principles of Contract Law 249 (West 2004).

31 NiSource Reports Second Quarter Earnings, *available at* http://www.foxbusiness.com/story.markets/industries/energy/nisource-reports-second-quarter-earnings/.

32 *Id*.

33 Hillman, *supra* note 32, at 134.

34 *See* the Supreme Court of Appeals docket calendar, *available at* http://www.state.wv.us/wvsca/calendar/sept08.htm.

35 *See* Motion docket for September 9, 2008, *available at* http://www.state.wv.us/wvsca/calendar/sept08.htm.

36 *Id*.

37 Dan Turner, *DuPont files an appeal with West Virginia Supreme Court on Spelter Lawsuit Decision*, Reuters PRNewswire-FirstCall, June 24, 2008.

38 Lenora Perrine, et al. v. E.I. DuPont de Nemours & Co., et al, No. 04-C-296,; *see* VerdictSearch, *Top 100 Verdicts of 2007*.

39 *Id.*

40 *Id*.

41 *Id*.

42 *Id*.

43 *Id*.

44 *Id*.

45 *Id*.

46 *Id*.

47 *Id*.

48 Associated Press, *Judge Orders Massey to Pay Wheeling-Pitt*, Charleston Daily Mail, July 3, 2007 at C2.

49 *Id*.

50 *Id*.

51 Ken Ward, Jr., *Massey Likely to Appeal Wheeling-Pitt Coal Verdict*, Charleston Gazette, July 4, 2007, at A2.

52 *Id*.

53 *Id*.

54 *Id*.

55 *Id.*

56 *Id*.

57 *Id*.

58 Maria Guzzo, *Massey Vows to Battle W-P to the Last,* American Metal Market, May 26, 2008.

59 *See* John A. Day, *Learned Intermediary Doctrine,* August 29, 2007, *available at* http://www.dayontorts.com/products-liability-learned-intermediary-doctrine.html.

60 220 W.Va. 463, 647 S.E.2d 899 (2007).

61 *See* James M. Beck and Mark Hermann, *Headcount: Who's adopted the Learned Intermediary Rule,* July 5, 2007, *available at* http://druganddevicelaw.blogspot.com/2007/07/headcount-whos-adopted-learned.html.

62 220 W.Va. 463, 465, 647 S.E.2d 899, 901.

63 *Id*. at 470, 906.

64 *See* Ted Frank and James Beck's article, *West Virginia Supreme Court Strikes Down the Learned Intermediary Rule,* November 15, 2007, available at http://www.aei.org/publications/filter.all,pubID.27111/pub_detail.asp (*citing* the following cases as examples of jurisdictions that recently applied the learned intermediary rule: *E.g.*, Ethicon Endo-Surgery, Inc. v. Meyer, ___ S.W.3d ___, 2007 WL 1095552, at *2 (Tex. App. April 12, 2007); Bodie v. Purdue Pharma LP, ___F.3d ___, 2007 WL 1577964, at *5-6, 11 (11th Cir. June 1, 2007) (applying Alabama law); Stilwell v. Smith & Nephew, Inc., 482 F.3d 1187, 1194 (9th Cir. 2007) (applying Arizona law); In re Zyprexa Prods. Liab. Litig. v. Eli Lilly & Co., ___ F. Supp. 2d ___, 2007 WL 1678078, at *28

(E.D.N.Y. June 11, 2007) (applying Pennsylvania, North Carolina and Florida law); Soufflas v. Zimmer, Inc., 474 F. Supp.2d 737, 751 (E.D. Pa. 2007); Madsen v. American Home Prodts. Corp., 477 F. Supp.2d 1025, 1033 (E.D. Mo. 2007) (applying Iowa law); Cowley v. Abbott Laboratories, 476 F. Supp.2d 1053, 1060 (W.D. Wis. 2007) (applying North Carolina law); Hill v. Wyeth, Inc., 2007 WL 674251, at *3-4 (E.D. Mo. Feb. 28, 2007); Saraney v. Tap Pharm. Prods., 2007 WL 148845, at *6 (N.D. Ohio Jan. 16, 2007); Paparo v. Ortho McNeil Pharm., 2007 WL 121149, at *3 (S.D. Fla. Jan. 10, 2007)).

65 220 W.Va. at 477, 647 S.E.2d at 912.

66 *Id.* at 481, 917.

67 *See* Frank and Beck, *supra* note 69.

68 *See* Tax Commissioner of State v. MBNA America Bank, N.A., 220 W.Va. 163, 640 S.E.2d 226 (2006).

69 *See* Joseph E. Ryan v. Clonch Industries, Inc., 219 W.Va. 664, 639 S.E.2d 756 (2006).

70 *Id*.

71 *Id*. at 164, 227.

72 *Id*.

73 *Id*. at 164, 229.

74 *Id*. at 173, 236.

75 *Id*. at 173, 237 (Benjamin, J., dissenting).

76 *Id*. at 180, 243 (Davis, C.J., concurring).

77 *See* Ryan, Inc., *West Virginia Supreme Court Finds 'Significant Economic Presence' Constitutional Under Commerce Clause in MBNA America Bank,* November 30, 2006, *available at* http://www.johnbernardllc.com/develop/West_Virginia_Supreme_Court_Finds_Significant_Economic_Presence_Constitutional.aspx. The other two states are South Carolina and New Jersey. *Id.*

78 *See TEI urges Supreme Court to clarify nexus standard: argues in MBNA case for clear-cut physical presence standard,* Tax Executive, May-June 2007, *available at* http://findarticles.com/p/articles/mi_m6552/is_3_59/ai_n25378288.

79 *Available at* http://www.state.wv.us/wvsca/clerk/statistics/2007StatRept.pdf.

80 *Id*.

81 *See* William Wayne Repass v. Workers' Compensation Division and USX Corporation/U.S. Steel Mining Company, Inc., unpublished memorandum disposition (2002) (Maynard, J., dissenting), *available at* http://www.state.wv.us/wvsca/docs/spring02/29645d.htm.

82 *See* Ryan v. Clonch Industries, Inc., 219 W.Va. 664; s*ee also* Brian Peterson, *Deliberate Intent: the narrow exception you could drive a truck through*" December 27, 2005, *available at* http://legalweblog.blogspot.com/2006/12/deliberate-intent-narrow-exception-you.html.

83 *Id.* at 669-673, 761-765.

84 *Id*. at 673, 765.

85 *Id*. at 675, 767.

The Federalist Society for Law & Public Policy Studies
1015 18th Street, N.W., Suite 425 • Washington, D.C. 20036