Senate Bill No. 474

(By Senators Kessler (Acting President), Prezioso, Beach, Williams, Edgell, Palumbo, Plymale, Wills, D. Facemire, Klempa and Yost)

[Introduced February 9, 2011; referred to the Committee on the Judiciary.]

A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new section, designated §55-7-23a, relating to products' reliability claims that are based upon prescription drug manufacturer's alleged failure to warn.

Be it enacted by the Legislature of West Virginia:

That the Code of West Virginia, 1931, as amended, be amended by adding thereto a new section, designated §55-7-23a, to read as follows:

ARTICLE 7. ACTIONS FOR INJURIES.

§55-7-23a. Prescription drugs; claims based on inadequate warnings.

(a) A manufacturer of a prescription drug is not liable in a products liability action for failing to provide a warning or other instruction directly to a consumer if an adequate warning or instruction has been provided to the physician or other legally

authorized person who prescribes that prescription drug for the claimant and if the manufacturer has not done direct to consumer advertising regarding the prescription drug: *Provided,* That the provisions of this section do not apply if the United States Food and Drug Administration requires that direct consumer warnings or instructions accompany the product.

(b) If the warning or instruction given in connection with a prescription drug has been approved by the United States Food and Drug Administration under the Federal Food, Drug and Cosmetic Act, 21 U.S.C. §301, *et seq.* or the Public Health Service Act, 42 U.S.C. §201, *et seq.*, the warning or instruction is presumed to be adequate.

(c) For the purposes of this section, the term "drug" has the meaning defined in the Federal Food, Drug and Cosmetic Act.

NOTE: The purpose of this bill is to codify the learned intermediary doctrine, which recognizes:

(1) That prescribing physicians are in a superior position to impart drug warning to patients and provide independent medical decisions as to whether use of the drug is appropriate for treatment of a particular patient;

(2) That drug manufacturers lack effective means to communicate directly with each patient; and

(3) That imposing a duty to warn upon drug manufacturers would unduly interfere with the physician-patient relationship.

This section is new; therefore, strike-throughs and underscoring have been omitted.