

1 **Senate Bill No. 113**

2 (By Senators M. Hall, Jenkins, Barnes, Blair and Carmichael)

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5 [Introduced February 13, 2013; referred to the Committee on the
6 Judiciary; and then to the Committee on Finance.]
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**FISCAL
NOTE**

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9
10 A BILL to amend the Code of West Virginia, 1931, as amended, by
11 adding thereto a new chapter, designated §55A-1-1, §55A-1-2,
12 §55A-1-3, §55A-1-4, §55A-2-1, §55A-2-2, §55A-2-3, §55A-2-4,
13 §55A-2-5, §55A-2-6, §55A-2-7, §55A-2-8, §55A-2-9, §55A-3-1,
14 §55A-3-2, §55A-4-1, §55A-4-2, §55A-4-3, §55A-4-4, §55A-4-5,
15 §55A-4-6, §55A-5-1, §55A-5-2, §55A-5-3, §55A-5-4, §55A-5-5,
16 §55A-5-6, §55A-5-7, §55A-5-8, §55A-6-1, §55A-6-2, §55A-6-3,
17 §55A-6-4, §55A-6-5, §55A-7-1, §55A-7-2, §55A-7-3, §55A-7-4,
18 §55A-7-5, §55A-7-6, §55A-7-7, §55A-7-8, §55A-8-1, §55A-8-2,
19 §55A-9-1, §55A-9-2, §55A-10-1, §55A-10-2, §55A-10-3,
20 §55A-11-1, §55A-11-2, §55A-11-3, §55A-11-4, §55A-11-5,
21 §55A-11-6, §55A-11-7, §55A-11-8, §55A-11-9, §55A-11-10,
22 §55A-11-11, §55A-11-12, §55A-12-1, §55A-12-2, §55A-12-3,
23 §55A-12-4, §55A-12-5 and §55A-12-6, all relating to reforming

1 the civil justice system; limiting the amount of recoverable
2 damages; authorizing a new court to be known as the
3 Intermediate Court of Appeals; requiring the court to be
4 operational by January 1, 2015; establishing northern and
5 southern districts; providing three judges for each district;
6 providing a short title; stating legislative findings;
7 excepting certain actions; defining terms; establishing
8 qualifications for judges; establishing jurisdiction of the
9 court; providing for review; providing that Supreme Court will
10 either keep the appeal or transfer it to the Intermediate
11 Court; providing that appeals in certain administrative cases
12 are discretionary; authorizing appeals from Intermediate Court
13 to the Supreme Court; authorizing Governor to make initial
14 appointments by July 1, 2014; creating staggered terms;
15 providing for elections for ten-year terms after initial
16 appointments; authorizing a Chief Judge of the Intermediate
17 Court; authorizing staff for the court and the judges;
18 providing for compensation and expenses of judges and staff;
19 providing for temporary assignment of circuit court judges;
20 authorizing the Supreme Court to provide the facilities,
21 furniture, fixtures and equipment for the Intermediate Court;
22 establishing precedential effect of Intermediate Court orders
23 and decisions; providing that the budget of the Intermediate

1 Court will be part of the Supreme Court budget; prohibiting
2 medical monitoring relief absent manifest present injury or
3 disease caused by a defendant; providing for venue reform;
4 relating to the application of the doctrine of *forum non*
5 *conveniens* when civil actions have both a resident and
6 nonresident plaintiff; providing for parties to make a motion
7 that a case would more properly be heard in a forum outside
8 this state; providing for statute of limitations expiring in
9 the alternative forum while the claim is pending in this
10 state; providing for proper dismissal of an action for *forum*
11 *non conveniens* purposes; providing for application to class
12 representatives; requiring courts granting motions to stay or
13 dismissal actions for *forum non conveniens* purposes to set
14 forth specific findings of fact and conclusions of law;
15 providing standards to determine the competency of expert
16 witnesses; providing standards for opinion testimony by lay
17 witnesses; providing standards of admission for expert witness
18 testimony; requiring a basis for expert witness testimony;
19 barring certain types of expert witness testimony; mandating
20 pretrial hearings and disclosures of expert testimony;
21 providing for the interpretation of the competency of expert
22 witnesses; establishing a standard of review; establishing
23 when punitive damages may be recovered; providing maximum

1 amounts which may be awarded on multiple punitive damages
2 awards for the same course of conduct; providing for the
3 bifurcation of a civil action in which punitive damages are
4 sought when requested by a defendant; stating the conditions
5 under which punitive damages may be assessed against a
6 principal or employer for an act of an agent or employee and
7 against an association, limited liability entity or
8 partnership for the acts of a member or partner; predicating
9 actions for damages upon principles of comparative fault;
10 establishing the comparative fault standard; abolishing joint
11 liability and implementing several liability; establishing how
12 to consider the fault of nonparties; establishing how to
13 consider the fault of, and the amounts paid by, settling
14 parties; providing for the use of special interrogatories;
15 clarifying fault may be imputed to another person who was
16 acting as an agent or servant of another; allowing the
17 assessment of a percentage of fault for failing to take
18 reasonable precautionary measures that were available;
19 precluding the allocation of fault to a person such as a
20 seller, distributor or installer on a strict product liability
21 theory where that person did not contribute to the alleged
22 defect; providing for the burden of proof and limitations;
23 providing for immunity of premises owners from civil liability

1 in certain circumstances; reducing damage awards by collateral
2 source payments; providing how damage reductions shall be
3 determined; stating the effects of such determinations upon
4 the trial; providing a "losers pay" provision; providing a
5 statute of repose; establishing a general eighteen-year
6 warranty for products' liability actions and an exception for
7 cases where there is an express warranty for more than
8 eighteen years; providing that noneconomic damages are
9 recoverable in actions where damages were authorized at the
10 time this bill became law; providing maximum amounts that may
11 be recovered for noneconomic losses based on physical injury
12 and nonphysical injury; providing for costs by a nonprevailing
13 party; establishing a procedure for recovery of attorney's
14 fees; providing courts may take judicial notice of the usual
15 and customary attorney's fees; providing for the liability of
16 attorneys; providing for the applicability of other law;
17 requiring the West Virginia Supreme Court adopt rules to
18 implement this chapter; providing for repeal of conflicting
19 laws; providing for applicability and severability of this
20 chapter; clarifying no additional cause of action is created
21 by this chapter; and providing this chapter becomes effective
22 immediately upon passage by the Legislature and approval by
23 the Governor.

1 *Be it enacted by the Legislature of West Virginia:*

2 That the Code of West Virginia, 1931, as amended, be amended
 3 by adding thereto a new chapter, designated §55A-1-1, §55A-1-2,
 4 §55A-1-3, §55A-1-4, §55A-2-1, §55A-2-2, §55A-2-3, §55A-2-4,
 5 §55A-2-5, §55A-2-6, §55A-2-7, §55A-2-8, §55A-2-9, §55A-3-1,
 6 §55A-3-2, §55A-4-1, §55A-4-2, §55A-4-3, §55A-4-4, §55A-4-5,
 7 §55A-4-6, §55A-5-1, §55A-5-2, §55A-5-3, §55A-5-4, §55A-5-5,
 8 §55A-5-6, §55A-5-7, §55A-5-8, §55A-6-1, §55A-6-2, §55A-6-3,
 9 §55A-6-4, §55A-6-5, §55A-7-1, §55A-7-2, §55A-7-3, §55A-7-4,
 10 §55A-7-5, §55A-7-6, §55A-7-7, §55A-7-8, §55A-8-1, §55A-8-2,
 11 §55A-9-1, §55A-9-2, §55A-10-1, §55A-10-2, §55A-10-3, §55A-11-1,
 12 §55A-11-2, §55A-11-3, §55A-11-4, §55A-11-5, §55A-11-6, §55A-11-7,
 13 §55A-11-8, §55A-11-9, §55A-11-10, §55A-11-11, §55A-11-12,
 14 §55A-12-1, §55A-12-2, §55A-12-3, §55A-12-4, §55A-12-5 and
 15 §55A-12-6, all to read as follows:

16 **CHAPTER 55A. CIVIL JUSTICE REFORM.**

17 **ARTICLE 1. SHORT TITLE; LEGISLATIVE FINDINGS AND DECLARATION OF**
 18 **PURPOSES; CHAPTER NOT APPLICABLE TO CERTAIN**
 19 **ACTIONS; AND DEFINITIONS.**

20 **§55A-1-1. Short title.**

21 This chapter shall be known as and may be cited as the "Civil
 22 Justice Reform Act of 2013."

1 **§55A-1-2. Legislative findings and declaration of purposes.**

2 (a) The Legislature finds and declares that:

3 (1) The citizens of this state are entitled to a fair civil
4 justice system which provides adequate and reasonable compensation
5 for those persons suffering injury under the state's civil
6 liability law;

7 (2) It is the duty and responsibility of the Legislature to
8 also ensure that the state's civil liability law is not abusive or
9 unfair to those it is supposed to serve;

10 (3) In recent years, West Virginia's civil liability system
11 has regularly ranked as one of the worst in the nation for legal
12 fairness;

13 (4) Since 2007, West Virginia has been home to several of the
14 nation's largest lawsuit verdicts, despite the state's relatively
15 small population;

16 (5) The current civil liability law of the state has actually
17 resulted, and may continue to result, in excessive, unpredictable,
18 and often arbitrary damage awards and unfair allocations of
19 liability that:

20 (A) Adversely affect the ability of the state to retain jobs
21 and attract new employers;

22 (B) Cause the withdrawal of products, producers, services, and
23 service providers from the marketplace and result in excessive

1 liability costs that are passed on to consumers through higher
2 prices;

3 (C) Cause defendants, including boards of education and other
4 governmental agencies, to settle cases out of fear of large
5 verdicts rendered pursuant to the civil liability laws and in order
6 to avoid the high costs, inconvenience and uncertainty of
7 litigation;

8 (D) Jeopardize the financial well-being and security of many
9 individuals, small businesses, and even entire industries, and
10 adversely affect government and taxpayers;

11 (E) Undermine the ability of companies in West Virginia to
12 compete nationally and internationally, and decrease the number of
13 jobs and the amount of production capital in the state's economy;

14 (F) Cause citizens and small businesses to live in fear of
15 lawsuits against them where they may be bankrupted or driven out of
16 business by legal fees and expenses in defending them and by
17 exorbitant settlements extorted by threat of trials that have taken
18 on the characteristics of a lottery; and

19 (G) Add to the high cost of liability insurance, making it
20 difficult for individuals, producers, consumers, volunteers and
21 nonprofit organizations to protect themselves with any degree of
22 confidence at a reasonable cost.

23 (b) The Legislature, therefore, declares it to be in the best

1 interests of its citizens to reform the civil liability law of the
2 state in order to curtail or eliminate clear social and economic
3 problems that:

4 (1) Deny citizens a meaningful right of appeal;

5 (2) Allow plaintiffs to recover damages in cases where there
6 is no actual proof of injury;

7 (3) Allow out-of-state plaintiffs to take advantage of West
8 Virginia courts when a more convenient venue exists elsewhere;

9 (4) Allow the admission of expert testimony from witnesses who
10 are not properly qualified as experts;

11 (5) Allow excessive amounts to be awarded in punitive damages;

12 (6) Can unjustly and unfairly hold one defendant jointly
13 liable for the total damages assessed against multiple defendants
14 even though that one defendant may have been as little as one
15 percent at fault in causing plaintiff's injuries;

16 (7) Deny any reduction in damage awards for compensatory
17 payments received from collateral sources, such as workers'
18 compensation and employer disability programs;

19 (8) Allow lawsuits to be brought for a claimed defective
20 product made twenty, thirty or more years ago;

21 (9) Allow excessive amounts to be awarded for noneconomic
22 losses based on physical injury and actions other than those based
23 on physical injury; and

1 (10) Require prevailing parties to bear substantial legal fees
2 defending against meritless filings.

3 (c) The Legislature further finds and declares that there
4 exists, for the foregoing reasons, clear social and economic
5 problems associated with our civil justice system and a need to
6 correct those problems by restoring rationality, certainty, and
7 fairness to the civil justice system through the enactment of the
8 Civil Justice Reform Act of 2013.

9 **§55A-1-3. Chapter not applicable to certain actions.**

10 This chapter is not applicable to:

11 (1) Those causes of action where a defendant's conduct
12 constitutes driving a vehicle under the influence of alcohol, a
13 controlled substance, or any other drug, or any combination
14 thereof, as described in section two, article five, chapter
15 seventeen-c of this code and is the proximate cause of the damages
16 suffered by the plaintiff;

17 (2) Those causes of action where a defendant's actions
18 constitute criminal conduct which is the proximate cause of the
19 damages suffered by the plaintiff;

20 (3) Those causes of action where a defendant's conduct
21 constitutes an illegal disposal of hazardous waste, as described in
22 section three, article eighteen, chapter twenty-two of this code
23 and is the proximate cause of the damages suffered by the

1 plaintiff.

2 **§55A-1-4. Definitions.**

3 As used in this chapter:

4 "Abusive civil action" means a civil action that a reasonable
5 person would conclude is a misuse of the civil justice process.

6 "Actual malice" means specific intent to cause personal
7 injury, death, or damage to the property or the reputation of
8 another.

9 "Agent" means a person who is authorized to act for another
10 through employment by contract or apparent authority.

11 "Claim" means a request for monetary damages filed in a civil
12 action, other than a request for reimbursement of attorney's fees
13 or other costs of litigation in a civil action, if the request is
14 for:

15 (A) Damages for alleged personal injury, property damage,
16 breach of contract, or death, regardless of the legal theories or
17 statutes on the basis of which recovery is sought; or

18 (B) Damages other than for alleged personal injury, property
19 damage, or death allegedly resulting from any tortious conduct,
20 regardless of the legal theories or statutes on the basis of which
21 recovery is sought.

22 "Clear and convincing evidence" means that the evidence
23 presented by a party during the trial is more highly probable to be

1 true than not and the jury or judge has a firm belief or conviction
2 the evidence proves the issue for which it is asserted.

3 "Collateral source" means the United States Social Security
4 Act; any state or federal disability, workers' compensation, or
5 other act designed to provide income replacement, medical, or other
6 benefits; any accident, health or sickness, income or wage
7 replacement insurance, income disability insurance, casualty or
8 property insurance including automobile and homeowners' insurance,
9 or any other insurance except life insurance; any contract or
10 agreement of any group, organization, partnership, or corporation
11 to provide, pay for, or reimburse the cost of medical, hospital,
12 dental, or other health care services or provide similar benefits;
13 or any contractual or voluntary wage continuation plan provided by
14 an employer or otherwise, or any other system intended to provide
15 wages during a period of disability.

16 "Collateral source payments" means money paid or payable by
17 collateral sources for losses or expenses, including, but not
18 limited to, property damage, wage loss, medical costs,
19 rehabilitation costs, services, and other costs incurred by or on
20 behalf of a plaintiff for which that plaintiff is claiming recovery
21 through a tort action commenced in any of the courts in this state.

22 "Comparative fault" means the degree to which the fault of a
23 person was a proximate cause of an alleged personal injury or death

1 or damage to property, expressed as a percentage.

2 "Compensatory damages" means money awarded to compensate a
3 plaintiff for economic and noneconomic loss.

4 "Conscious, reckless, and outrageous indifference to the
5 health, safety, and welfare of others" means an act or omission
6 which when viewed objectively from the standpoint of the defendant
7 at the time of its occurrence involves an extreme degree of risk,
8 considering the probability and magnitude of the potential harm to
9 others, and of which the defendant has actual, subjective awareness
10 of the risk involved, but nevertheless proceeds with conscious
11 disregard of the rights, safety or welfare of others.

12 "Damage" or "damages" means all claims under common law or
13 statutory and equitable causes of action for actual damages,
14 including economic and noneconomic damages, and additional damages,
15 including knowing damages, punitive damages, treble damages,
16 penalties, prejudgment interest, postjudgment interest, attorney's
17 fees, litigation costs, costs of court, and all other damages of
18 any kind.

19 "Defendant" means, for purposes of determining an obligation
20 to pay money to another under this chapter, any person against whom
21 a claim is asserted by a plaintiff including a counterdefendant,
22 cross-defendant or third-party defendant.

23 "Durable good" means any product, or any component of any such

1 product, which:

2 (A) Either has a normal life expectancy of three or more
3 years, or is of a character subject to allowance for depreciation
4 under the Internal Revenue Code of 1986;

5 (B) Is either used in a trade or business, held for the
6 production of income, or sold or donated to a governmental or
7 private entity for the production of goods, training, demonstration
8 or any other similar purpose; and

9 (C) Is used in a workplace, and is alleged to have caused harm
10 that is covered under chapter twenty-three of this code.

11 "Economic loss" means objectively verifiable monetary losses,
12 such as medical expenses, loss of earnings and earning capacity,
13 cost of replacement services, loss of income stream due to death,
14 burial costs, loss of business or employment opportunities, lost
15 profits, and loss due to property destruction or damage, to the
16 extent recovery for that monetary loss is allowed under any present
17 applicable state law.

18 "Employer" means a person who controls and directs a worker
19 under an express or implied contract of employment and pays, or is
20 obligated to pay, him or her salary or wages in compensation.
21 Employer includes, but is not limited to, a parent, subsidiary,
22 affiliate, division, or department of the employer. If the
23 employer is an individual, the individual shall be considered an

1 employer under this chapter only if the subject of the tort action
2 is related to the individual's capacity as an employer.

3 "Fault" means an act or omission of a person which is a
4 proximate cause of injury or death to another person or persons,
5 damage to property, or economic injury, including, but not limited
6 to, negligence, malpractice, medical professional liability, strict
7 product liability, absolute liability, liability under section two,
8 article four, chapter twenty-three of this code, or assumption of
9 the risk.

10 "Financial interest" means a financial interest held by an
11 attorney under an agreement between the attorney and a plaintiff or
12 defendant in which the amount or the payment of the fee for the
13 attorney's legal services is contingent wholly or partly on the
14 outcome of the civil action.

15 "Large employer" means an employer who employs more than
16 twenty-five persons on a full-time permanent basis, or its
17 equivalent, or has annual revenues of more than \$5 million.

18 "Legal resident" means an individual who is a resident of West
19 Virginia at the time the cause of action arose or at the time the
20 action is filed without regard to the individual's country of
21 citizenship or national origin. The term does not include an
22 individual who adopts a residence in this state in bad faith for
23 purposes of avoiding the application of this chapter.

1 "Natural person" means a human being that has the capacity for
2 rights and duties.

3 "Noneconomic loss" means subjective, nonmonetary losses, such
4 as pain, suffering, inconvenience, mental anguish, emotional
5 distress, loss of enjoyment of life, loss of society and
6 companionship, loss of consortium, injury to reputation, and
7 humiliation, to the extent recovery for any nonmonetary loss is
8 allowed under any present, applicable state law.

9 "Person" means any individual, corporation, trust, company,
10 incorporated or unincorporated association, firm, partnership,
11 society, joint stock company, business entity, and any agency, unit
12 or instrumentality of federal, state or local government.

13 "Physical injury" means an actual injury to the body
14 proximately caused by the act complained of and does not include
15 physical symptoms of the mental anguish or emotional distress for
16 which recovery is sought when the symptoms are caused by, rather
17 than the cause of, the pain, distress, or other mental suffering.

18 "Plaintiff" means, for purposes of determining a right to
19 recover under this chapter, any person asserting a claim.

20 "Product" means any object, substance, mixture, or raw
21 material in a gaseous, liquid, or solid state: (A) Which is capable
22 of delivery itself or as an assembled whole, in a mixed or combined
23 state, or as a component part or ingredient; (B) which is produced

1 for introduction into trade or commerce; (C) which has intrinsic
2 economic value; and (D) which is intended for sale or lease for
3 commercial or personal use.

4 The term "product" does not include: (A) Human tissue, human
5 organs, human blood, and human blood products; (B) electricity,
6 water delivered by a utility, natural gas or steam; or (C)
7 intellectual property, including computer software.

8 "Product liability action" means a civil action brought
9 against any defendant, including defendants who did not manufacture
10 or sell a product, on any theory for damage caused by a product.

11 **ARTICLE 2. THE WEST VIRGINIA INTERMEDIATE COURT OF APPEALS.**

12 **§55A-2-1. The West Virginia Intermediate Court of Appeals**
13 **established; location.**

14 (a) In accordance with Article VIII, Section one of the West
15 Virginia Constitution, the "West Virginia Intermediate Court of
16 Appeals" is created. The court shall be established and operable
17 on or before January 1, 2015. The West Virginia Intermediate Court
18 of Appeals "Intermediate Court" shall be divided into two
19 districts. The two intermediate courts of appeals shall be
20 designated as "Intermediate Court, Northern District" or "Northern
21 District" and "Intermediate Court, Southern District" or "Southern
22 District." Each court shall be located in the district it serves.
23 The Intermediate Court is a court of record and shall issue, as

1 appropriate in each appeal, written opinions, orders and decisions.

2 (b) The Northern District is comprised of the following
3 judicial circuits: first, second, third, fourth, fifth, fifteenth,
4 sixteenth, seventeenth, eighteenth, nineteenth, twentieth,
5 twenty-first, twenty-second, twenty-third, and twenty-sixth.

6 (c) The Southern District is comprised of the following
7 judicial circuits: sixth, seventh, eighth, ninth, tenth, eleventh,
8 twelfth, thirteenth, fourteenth, twenty-fourth, twenty-fifth,
9 twenty-seventh, twenty-eighth, twenty-ninth, thirtieth, and
10 thirty-first.

11 (d) The Intermediate Court may be located in the seat of state
12 government, any county seat for the purpose of hearing oral
13 argument, or may be located in a fixed location.

14 **§55A-2-2. Judges; qualifications.**

15 (a) The Intermediate Court shall consist of six judges, three
16 judges in each district, initially appointed by the Governor in
17 accordance with section four of this article.

18 (b) An Intermediate Court judge must be a resident of the
19 district where he or she will preside, a member in good standing of
20 the West Virginia State Bar and admitted to practice law in this
21 state for at least ten years prior to appointment or election.

22 (c) An Intermediate Court judge may not engage in any other
23 business, occupation or employment inconsistent with the

1 expeditious, proper and impartial performance of his or her duties
2 as a judicial officer. An Intermediate Court justice is not
3 permitted to engage in the outside practice of law and shall devote
4 full time to his or her duties as a judicial officer.

5 **§55A-2-3. Jurisdiction; deflection of rights of the West Virginia**
6 **Supreme Court of Appeals; discretionary appeals.**

7 (a) The Intermediate Court shall not have original
8 jurisdiction.

9 (b) Petitions for appeal shall be filed with the West Virginia
10 Supreme Court of Appeals ("Supreme Court"). Those cases for which
11 the Supreme Court elects not to grant petitions for appeal shall be
12 transferred to the Intermediate Court.

13 (c) The Intermediate Court has jurisdiction to hear appeals
14 from final judgments or orders entered by a circuit court in any
15 civil or criminal case, appeals from the Workers' Compensation
16 Board of Review and the Public Service Commission.

17 (d) All appeals shall be reviewed and a written decision on
18 the merits issued by either the Supreme Court or Intermediate Court
19 as a matter of right except for the following appeals, which shall
20 be discretionary with the courts:

21 (1) Appeals from the Workers' Compensation Board of Review
22 established by section eleven, article five, chapter twenty-three
23 of this code;

1 (2) Appeals from orders of the Public Service Commission
2 established by article one, chapter twenty-four of this code;

3 (3) Appeals from decisions of circuit courts of administrative
4 appeals of an agency as defined in article one, chapter
5 twenty-nine-a of this code; and

6 (4) Appeals of misdemeanor convictions.

7 (e) Within thirty days after a decision by the Intermediate
8 Court, any aggrieved party may petition the Supreme Court by
9 petition for writ of certiorari as provided by the West Virginia
10 Rules of Appellate Procedure.

11 **§55A-2-4. Number of Intermediate Court judges; initial**
12 **appointment; election; term of office; vacancy;**
13 **chief judge.**

14 (a) There shall be three judges for each district of the
15 Intermediate Court. The Governor shall, on or before July 1, 2014,
16 appoint the initial judges from names submitted by the Judicial
17 Vacancy Advisory Committee established pursuant to section three-a,
18 article ten, chapter three of the West Virginia Code. The
19 committee shall recommend three qualified nominees for each
20 position for Intermediate Court judge. If the Governor does not
21 select a nominee for the position of judge from the names provided
22 by the committee, he or she shall notify the committee of that
23 circumstance and the committee shall provide additional names for

1 consideration by the Governor.

2 (b) The committee is responsible for reviewing and evaluating
3 candidates for possible appointment to the Intermediate Court by
4 the Governor. In reviewing candidates, the committee may accept
5 applications from any attorney who believes himself or herself
6 qualified for the judgeships. The committee may accept comments
7 from and request information from any person or source.

8 (c) Of the initial appointments for each district, one judge
9 shall be appointed for a term of four years, one judge shall be
10 appointed for a term of six years and one judge shall be appointed
11 for a term of eight years. Upon the expiration of each term, the
12 judge's position shall be filled by election, for a ten-year term,
13 in the same manner as with the Supreme Court.

14 (d) After the initial appointments are made, vacancies in
15 office shall be filled in the same manner as vacancies on the
16 Supreme Court.

17 (e) One judge of the Intermediate Court shall be chosen chief
18 judge of the Intermediate Court. The manner of choosing the chief
19 judge and providing for periodic rotation of the position of chief
20 judge shall be determined by rules to be established by the Supreme
21 Court.

22 **§55A-2-5. Compensation and expenses of Intermediate Court judges**
23 **and staffs.**

1 (a) The annual salary of an Intermediate Court judge shall be
2 \$118,000. Reimbursement for expenses shall be at a rate
3 established by the Supreme Court.

4 (b) Each judge of the Intermediate Court may employ two law
5 clerks and one secretary. The Intermediate Court may employ a
6 clerk and the necessary staff to carry out the administrative
7 duties of the court or, with the permission of the Supreme Court,
8 the administrative and other support staff of the Supreme Court may
9 carry out the administrative duties of both courts. The
10 compensation of the staff of the Intermediate Court shall be
11 established by the judges of the Intermediate Court with the
12 approval of the Supreme Court.

13 **§55A-2-6. Temporary assignment of circuit court judges.**

14 Upon the occurrence of a vacancy in the office of Intermediate
15 Court judge, the disqualification of an Intermediate Court judge or
16 the inability of an Intermediate Court judge to attend to his or
17 her duties because of illness, temporary absence, or any other
18 reason, the Chief Justice of the Supreme Court may assign any
19 senior status circuit judge or circuit judge of any judicial
20 circuit that is not from the same circuit as the appeal before the
21 Intermediate Court to hear and determine any and all matters then
22 or thereafter pending in the Intermediate Court to which the absent
23 Intermediate Court judge is assigned.

1 **§55A-2-7. Facilities.**

2 (a) The Administrative Director of the Supreme Court shall
3 provide the necessary physical facilities, furniture, fixtures and
4 equipment necessary for the efficient operation of the Intermediate
5 Court.

6 (b) In order to minimize costs, the director may: (1) Contract
7 with the Department of Administration, county commissions and
8 private parties to provide for space that is suitable for the
9 Intermediate Court; and (2) shall make existing courtrooms
10 throughout the state available for use by the Intermediate Court at
11 times convenient both to the Intermediate Court and the local
12 court.

13 **§55A-2-8. Precedential effect of court and decisions.**

14 Unless stated by the court to be *per curiam* or unpublished,
15 all court orders and decisions shall have precedential effect.

16 **§55A-2-9. Budget.**

17 The budget for the payment of the salaries and benefits for
18 the Intermediate Court judges and staff, facilities, furniture,
19 fixtures and equipment shall be included in the appropriation for
20 the Supreme Court. To the extent possible, the Supreme Court shall
21 designate existing facilities and existing staff members for use by
22 the Intermediate Court to minimize costs for establishing and
23 operating the Intermediate Court.

1 **ARTICLE 3. MEDICAL MONITORING.**

2 **§55A-3-1. Claims for medical monitoring.**

3 Notwithstanding the decision of the Supreme Court in *Bower v.*
4 *Westinghouse*, 522 S.E.2d 424 (W. Va. 1999), in any civil action in
5 which an individual seeks relief of any kind including damages and
6 equitable relief for the wrongful or tortious acts of any person,
7 relief may not include future medical monitoring, testing,
8 treatment, services, surveillance, or procedures of any kind,
9 including the costs and expenses associated therewith, unless the
10 future medical monitoring, testing, examination, treatment,
11 services, surveillance or procedures are directly related to a
12 present manifest physical injury or disease which was caused by or
13 directly related to tortious or wrongful acts and which was found
14 to have caused present physical impairment.

15 **§55A-3-2. Overruling *Bower v. Westinghouse*, 522 S.E. 2d 424 (W.Va.**
16 **1999) .**

17 It is the intent of the Legislature that this legislation
18 overrules the decision of the Supreme Court in *Bower v.*
19 *Westinghouse*, 522 S.E.2d 424 (W. Va. 1999).

20 **ARTICLE 4. VENUE.**

21 **§55A-4-1. *Forum nonconveniens*.**

22 In any civil action if a court of this state, upon a timely

1 written motion of a party, finds that in the interest of justice and
2 for the convenience of the parties a claim or action would be more
3 properly heard in a forum outside this state, the court shall
4 decline to exercise jurisdiction under the doctrine of *forum non*
5 *conveniens* and shall stay or dismiss the claim or action or dismiss
6 any plaintiff. The plaintiff's choice of a forum is entitled to
7 great deference but this preference may be diminished when the
8 plaintiff is a nonresident and the cause of action did not arise in
9 this state. In determining whether to grant a motion to stay or
10 dismiss an action or dismiss a plaintiff under the doctrine of *forum*
11 *nonconveniens*, the court shall consider:

12 (1) Whether an alternate forum exists in which the claim or
13 action may be tried;

14 (2) Whether maintenance of the claim or action in the courts
15 of this state would work a substantial injustice to the moving
16 party;

17 (3) Whether the alternate forum, as a result of the submission
18 of the parties or otherwise, can exercise jurisdiction over all the
19 defendants properly joined to the plaintiff's claim;

20 (4) The state in which the plaintiff(s) reside;

21 (5) The state in which the cause of action accrued;

22 (6) Whether the balance of the private interests of the parties
23 and the public interest of the state predominate in favor of the

1 claim or action being brought in an alternate forum, which shall
2 include consideration of the extent to which an injury or death
3 resulted from acts or omissions that occurred in this state. Factors
4 relevant to the private interests of the parties include, but are
5 not limited to, the relative ease of access to sources of proof;
6 availability of compulsory process for attendance of unwilling
7 witnesses; the cost of obtaining attendance of willing witnesses;
8 possibility of a view of the premises, if a view would be
9 appropriate to the action; and all other practical problems that
10 make trial of a case easy, expeditious and inexpensive. Factors
11 relevant to the public interest of the state include, but are not
12 limited to, the administrative difficulties flowing from court
13 congestion; the interest in having localized controversies decided
14 within the state; the avoidance of unnecessary problems in conflict
15 of laws or in the application of foreign law; and the unfairness of
16 burdening citizens in an unrelated forum with jury duty;

17 (7) Whether not granting the stay or dismissal would result in
18 unreasonable duplication or proliferation of litigation; and

19 (8) Whether the alternate forum provides a remedy.

20 **§55A-4-2. Timely motion.**

21 A motion pursuant to section one of this article is timely if
22 it is filed either concurrently or prior to the filing of either a
23 motion pursuant to Rule 12 of the West Virginia Rules of Civil

1 Procedure or a responsive pleading to the first complaint that gives
2 rise to the grounds for such a motion. A court may, for good cause
3 shown, extend the period for the filing of such a motion.

4 **§55A-4-3. Statute of limitations.**

5 If the statute of limitations in the alternative forum expires
6 while the claim is pending in a court of this state, the court shall
7 grant a dismissal under this article only if each defendant waives
8 the right to assert a statute of limitation defense in the
9 alternative forum. The court may further condition a dismissal
10 under this article to allow for the reinstatement of the same cause
11 of action in the same forum in the event a suit on the same cause
12 of action or on any cause of action arising out of the same
13 transaction or occurrence is commenced in an appropriate alternative
14 forum within sixty days after the dismissal under this article and
15 such alternative forum declines jurisdiction.

16 **§55A-4-4. Proper dismissal.**

17 Except as provided in section two of this article, if an action
18 involves both legal resident and nonresident plaintiffs, the court
19 may not stay or dismiss the action under section one of this article
20 if the plaintiffs who are legal residents of this state are properly
21 joined in the action and the action arose out of a single
22 occurrence. The court shall dismiss a claim under section one of
23 this article if the court finds by a preponderance of the evidence

1 that a party was joined solely for the purpose of obtaining or
2 maintaining jurisdiction in this state and the party's claim would
3 be more properly heard in a forum outside this state.

4 **§55A-4-5. Class representative(s).**

5 In class actions filed pursuant to Rule 23 of the West Virginia
6 Rules of Civil Procedure, this article applies only to the class
7 representative(s).

8 **§55A-4-6. Stay or dismissal specific findings of fact and**
9 **conclusions of law.**

10 A court that grants a motion to stay or dismiss an action
11 pursuant to this article shall set forth specific findings of fact
12 and conclusions of law.

13 **ARTICLE 5. COMPETENCY OF EXPERT WITNESSES.**

14 **§55A-5-1. Opinion testimony by lay witnesses.**

15 If a witness is not testifying as an expert, the testimony of
16 that witness in the forms of opinions or inferences is limited to
17 those opinions or inferences that are: (1) Rationally based on the
18 perception of the witness; (2) helpful to a clear understanding of
19 the witness' testimony or the determination of a fact in issue; and
20 (3) not based on scientific, technical or other specialized
21 knowledge within the scope of section two of this article.

22 **§55A-5-2. Testimony by experts.**

1 If scientific, technical or other specialized knowledge will
2 assist the trier of fact to understand the evidence or to determine
3 a fact in issue, a witness qualified as an expert by knowledge,
4 skill, experience, training or education may testify in the form of
5 an opinion or otherwise, if: (1) The testimony is based upon
6 sufficient facts or data; (2) the testimony is the product of
7 reliable principles and methods; and (3) the witness has applied the
8 principles and methods reliably to the facts of the case.

9 **§55A-5-3. Basis of expert opinion testimony.**

10 The facts or data in the particular case upon which an expert
11 bases an opinion or inference may be those perceived by or made
12 known to the expert at or before the hearing. If of a type
13 reasonably relied upon by experts in the particular field in forming
14 opinions or inferences upon the subject, the facts or data need not
15 be admissible in evidence in order for the opinion or inference to
16 be admitted. Facts or data that are otherwise inadmissible shall
17 not be disclosed to the jury by the proponent of the opinion or
18 inference unless the court determines that their probative value in
19 assisting the jury to evaluate the expert's opinion substantially
20 outweighs their prejudicial effect.

21 **§55A-5-4. Bars to expert testimony.**

22 (a) A witness qualified as an expert by knowledge, skill,
23 experience, training or education may only offer expert testimony

1 with respect to a particular field in which the expert is qualified.

2 (b) An expert witness may receive a reasonable and customary
3 fee for the rendering of professional services provided that the
4 testimony of an expert witness may not be admitted if any the
5 compensation is contingent on the outcome of any claim or case with
6 respect to which the testimony is being offered.

7 **§55A-5-5. Mandatory pretrial hearing.**

8 If the witness is testifying as an expert, then upon motion of
9 a party, the court shall hold a pretrial hearing to determine
10 whether the witness qualifies as an expert and whether the expert's
11 testimony satisfies the requirements of sections two, three and four
12 of this article. The court shall allow sufficient time for a
13 hearing and shall rule on the qualifications of the witness to
14 testify as an expert and whether or not the testimony satisfies the
15 requirements of sections two, three and four of this article. The
16 hearing and ruling shall be completed no later than the final
17 pretrial conference pursuant to Rule 16(d) of the West Virginia
18 Rules of Civil Procedure. The trial court's ruling shall set forth
19 the findings of fact and conclusions of law upon which the order to
20 admit or exclude expert evidence is based.

21 **§55A-5-6. Mandatory pretrial disclosure of expert testimony.**

22 (a) Whether or not any party elects to request a pretrial
23 hearing contemplated in section five of this article, all parties

1 shall disclose to other parties the identity of any person who may
2 be used at trial to present expert evidence.

3 (b) Except as otherwise stipulated or directed by the court,
4 this disclosure shall, with respect to a witness who is retained or
5 specially employed to provide expert testimony in the case or whose
6 duties as an employee of the party regularly involve giving expert
7 testimony, be accompanied by a written report prepared and signed
8 by the witness. The report shall contain: A complete statement
9 of all opinions to be expressed and the basis and reasons; the data
10 or other information considered by the witness in forming the
11 opinions; any exhibits to be used as a summary of or support for the
12 opinions; the qualifications of the witness, including a list of all
13 publications authored by the witness within the preceding ten years;
14 the compensation to be paid for the study and testimony; and a
15 listing of any other cases in which the witness has testified as an
16 expert at trial or by deposition within the preceding four years.

17 (c) These disclosures shall be made at the times and in the
18 sequence directed by the court. In the absence of other directions
19 from the court or stipulation by the parties, disclosures shall be
20 made at least ninety days before the trial date or the date the case
21 is to be ready for trial, or if the evidence is intended solely to
22 contradict or rebut evidence on the same subject matter identified
23 by another party under subsection (b) of this section, within thirty

1 days after the disclosure made by the other party.

2 (d) A party may depose any person who has been identified as
3 an expert whose opinions may be presented at trial. If a report
4 from the expert is required under subsection (b) of this section,
5 the deposition may not be conducted until after the report is
6 provided.

7 **§55A-5-7. Interpretation.**

8 In interpreting and applying this article, the courts of this
9 state shall follow the opinions of the Supreme Court of the United
10 States in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579
11 (1993), *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), *Kumho*
12 *Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999), *Weisgram v.*
13 *Marley*, 528 U.S. 440 (2000), and cases citing them as precedents.
14 Additionally, the courts of this state may draw from other
15 precedents binding in the federal courts of this state applying the
16 standards announced by the Supreme Court of the United States in
17 those cases.

18 **§55A-5-8. Standard of review.**

19 (a) As the proper construction of the expert evidence
20 admissibility framework prescribed by this section is a question of
21 law, the Supreme Court and Intermediate Court shall apply a *de novo*
22 standard of review in determining whether the circuit court fully

1 applied the proper legal standard in considering the admissibility
2 of expert evidence.

3 (b) As the application of this section to determine the
4 admissibility of expert testimony is a question of fact, the Supreme
5 Court and Intermediate Court shall apply an abuse of discretion
6 standard in determining whether the circuit court properly admitted
7 or excluded particular expert evidence.

8 **ARTICLE 6. PUNITIVE DAMAGES.**

9 **§55A-6-1. General rules.**

10 (a) Punitive damages may be awarded in a civil action against
11 a defendant only if the plaintiff establishes by clear and
12 convincing evidence that the damages suffered were the result of
13 conduct that was carried out by the defendant with actual malice
14 toward the plaintiff or a conscious, reckless, and outrageous
15 indifference to the health safety, and welfare of others.

16 (b) Punitive damages may only be awarded in civil actions
17 seeking money for damages.

18 (c) Punitive damages may be awarded in a civil action against
19 a defendant only if compensatory damages have been awarded against
20 a defendant to the plaintiff for the same course of conduct of the
21 defendant.

22 (d) Punitive damages may not be awarded on a claim for breach
23 of contract.

1 (e) A defendant may not be held liable for punitive damages
2 unless the trier of fact finds that its award of compensatory
3 damages alone is not sufficient to punish the defendant for the
4 conduct and to deter the defendant from like conduct in the future.

5 **§55A-6-2. Proportional awards.**

6 (a) The amount of punitive damages that may be awarded for a
7 claim in a civil action shall not exceed the greater of three times
8 the amount of compensatory damages or \$250,000 where the punitive
9 damages are recoverable from large employers.

10 (b) The amount of punitive damages that may be awarded for a
11 claim in a civil action shall not exceed the lesser of three times
12 compensatory damages or \$100,000 where the punitive damages are
13 recoverable from a defendant who is not a large employer.

14 (c) This section shall be applied by the circuit court and
15 shall not be disclosed to the jury.

16 (d) If a jury returns a verdict for punitive damages against
17 the defendant in excess of these amounts, the circuit court shall
18 reduce the award so that it will not exceed the applicable amount
19 set forth in this section.

20 **§55A-6-3. Multiple awards.**

21 (a) If the jury returns a verdict of punitive damages against
22 a defendant in the case at bar and if the total amount of any prior
23 punitive damages awards obtained by the same or other plaintiffs in

1 any state or federal court against that defendant for the same
2 course of conduct as alleged in the case at bar exceeds the
3 applicable amount set forth in section two of this article no
4 further punitive damages may be awarded against that defendant in
5 that specific case.

6 (b) If the total amount of any prior punitive damages awards
7 is less than the applicable amount set forth in section two of this
8 article, the amount of any punitive damages awarded in that specific
9 case shall be reduced if necessary so that the combined total amount
10 of punitive damages awarded in the case at bar and the prior actions
11 shall not exceed the applicable amount set forth in section two of
12 this article.

13 (c) This section shall be applied by the circuit court and
14 shall not be disclosed to the jury.

15 **§55A-6-4. Bifurcation.**

16 (a) In a civil action in which punitive damages are sought, the
17 court shall bifurcate the trial of the action if requested by a
18 defendant.

19 (b) In the first stage of a bifurcated trial, the trier of fact
20 shall determine liability for compensatory damages, and the amount
21 of compensatory damages. If the trier of fact determines during the
22 first stage of a bifurcated trial that a defendant is liable for
23 compensatory damages, then the court shall determine whether the

1 evidence was sufficient to permit the jury to consider punitive
2 damages.

3 (c) If determined sufficient, that same trier of fact shall
4 determine, in a second stage of the trial, whether the defendant is
5 liable for punitive damages and, if applicable, the amount of
6 punitive damages that should be awarded.

7 (d) If a bifurcated proceeding is requested, evidence relevant
8 only to the claim of punitive damages is inadmissible in the first
9 stage of the trial.

10 **§55A-6-5. Complicity rule.**

11 (a) A principal or employer who is a natural person may be
12 liable for punitive damages as a result of conduct of his or her
13 agent or employee only when the plaintiff proves by clear and
14 convincing evidence that the damages suffered were the result of
15 conduct that was carried out by the principal or employer with
16 actual malice toward the plaintiff or with a conscious, reckless and
17 outrageous indifference to the health, safety and welfare of others.

18 (b) A principal or employer that is other than a natural person
19 may be liable for punitive damages as a result of the conduct of its
20 agent or employee only when the plaintiff proves by clear and
21 convincing evidence that the damages suffered were the result of
22 conduct that was carried out by a senior manager of the principal
23 or employer with actual malice toward the plaintiff or with

1 conscious, reckless and outrageous indifference to the health,
2 safety and welfare of others.

3 (c) A person may be liable for punitive damages as a result of
4 the conduct of members or partners only when the plaintiff proves
5 by clear and convincing evidence that the damages suffered were the
6 result of conduct that was carried out by a senior manager in the
7 employment of a person with actual malice toward the plaintiff or
8 with a conscious, reckless and outrageous indifference to the
9 health, safety, and welfare of others.

10 **ARTICLE 7. COMPARATIVE FAULT.**

11 **§55A-7-1. Comparative fault standard established.**

12 (a) In any action for damages, recovery shall be predicated
13 upon principles of comparative fault and the liability of each
14 person, including plaintiffs, defendants, and nonparties who caused
15 the damages shall be allocated to each person in direct proportion
16 to that person's percentage of fault.

17 (b) The total of the percentages of comparative fault allocated
18 by the trier of fact with respect to a particular incident or injury
19 must equal either zero percent or one hundred percent.

20 **§55A-7-2. Several liability.**

21 (a) In any action for damages, the liability of each defendant
22 for compensatory damages is several only and is not joint. Each
23 defendant shall be liable only for the amount of compensatory

1 damages allocated to that defendant in direct proportion to that
2 defendant's percentage of fault and a separate judgment shall be
3 rendered against the defendant for that amount. The fault allocated
4 under this subsection to an immune defendant or a defendant whose
5 liability is limited by law may not be allocated to any other
6 defendant.

7 (b) To determine the amount of judgment to be entered against
8 each defendant, the court, with regard to each defendant, shall
9 multiply the total amount of compensatory damages recoverable by the
10 plaintiff by the percentage of each defendant's fault and that
11 amount shall be the maximum recoverable against that defendant.

12 **§55A-7-3. Fault of nonparties.**

13 (a) In assessing percentages of fault, the trier of fact shall
14 consider the fault of all persons who contributed to the alleged
15 damages regardless of whether the person was or could have been
16 named as a party to the suit. The fault shall include the fault
17 imputed or attributed to a person by operation of law, if any.

18 (1) Fault of a nonparty may be considered if the plaintiff
19 entered into a settlement agreement with the nonparty or if a
20 defending party gives notice no later than sixty days before the
21 date of trial that a nonparty was wholly or partially at fault.

22 (2) The notice shall be given by filing a pleading or discovery
23 response in the action designating a nonparty and setting forth the

1 nonparty's:

2 (A) Name and last-known address; or

3 (B) The best identification of the nonparty which is possible
4 under the circumstances; and

5 (C) A brief statement of the basis for believing the nonparty
6 to be at fault.

7 (3) In all instances where a nonparty is assessed a percentage
8 of fault, any recovery by a plaintiff shall be reduced in proportion
9 to the percentage of fault chargeable to the nonparty.

10 (4) Where a plaintiff has settled with a party or nonparty
11 before verdict, that plaintiff's recovery will be reduced by the
12 amount of the settlement or in proportion to the percentage of fault
13 assigned to the settling party or nonparty, whichever is greater.

14 (5) The plaintiff shall promptly and fully inform all other
15 persons against whom liability is asserted of the terms of any
16 settlement.

17 (b) Nothing in this article is meant to eliminate or diminish
18 any defenses or immunities which exist as of the effective date of
19 this article, except as expressly noted herein.

20 (c) Assessments of percentages of fault for nonparties are used
21 only as a vehicle for accurately determining the fault of named
22 parties. Where fault is assessed against nonparties, findings of
23 fault shall not subject any nonparty to liability in that or any

1 other action, or be introduced as evidence of liability or for any
2 other purpose in any other action.

3 (d) In all actions involving fault of more than one person,
4 unless otherwise agreed by all parties to the action, the court
5 shall instruct the jury to answer special interrogatories or, if
6 there is no jury, shall make findings, indicating the percentage of
7 the total fault that is allocated to each party and nonparty
8 pursuant to this article. For this purpose, the court may determine
9 that two or more persons are to be treated as a single person.

10 **§55A-7-4. Imputed fault.**

11 Nothing in this article may be construed as precluding a person
12 from being held responsible for the portion of comparative fault
13 assessed against another person who was acting as an agent or
14 servant of that person, or if the fault of the other person is
15 otherwise imputed or attributed to that person by statute or common
16 law.

17 **§55A-7-5. Failure to take reasonable precautionary measures.**

18 In any civil action, the finder of fact may assess a percentage
19 of fault against a plaintiff who is injured as a proximate result
20 of that plaintiff's failure to take reasonable precautionary
21 measures that were available.

22 **§55A-7-6. Fault of person not a manufacturer.**

23 A person who is not the manufacturer of a product but is merely

1 in the chain of its distribution, such as a seller, distributor or
2 installer, and who did not alter, change, or modify the product in
3 a way that created or contributed to the alleged defect, may not be
4 assessed a percentage of comparative fault under the theory of
5 strict product liability for accidents, injuries or damages
6 proximately caused, in whole or in part, by the product.

7 **§55A-7-7. Burden of proof.**

8 The burden of alleging and proving comparative fault shall be
9 upon the person who seeks to establish such fault.

10 **§55A-7-8. Immunity of premise owners from civil liability.**

11 No owner, occupant, lessee or managing agent of property shall
12 be liable for the death or injury of an independent contractor's
13 employees resulting from dangers of which the contractor knew or
14 reasonably should have known.

15 **ARTICLE 8. COLLATERAL SOURCES.**

16 **§55A-8-1. Reduction in compensatory damages for collateral sources**
17 **payments.**

18 Notwithstanding any other provision of this code, in all tort
19 actions, regardless of the theory of liability under which they are
20 commenced, the total amount of compensatory damages awarded to a
21 plaintiff under the action shall be reduced, in accordance with
22 section two of this article, by any collateral source payments made

1 or to be made to the plaintiff, except insurance for which the
2 plaintiff, spouse of the plaintiff or parent of the plaintiff, has
3 paid a premium, insurance that is subject to a right of subrogation,
4 workers' compensation benefits that are subject to a right of
5 subrogation, or insurance that has any other obligation or
6 repayment.

7 **§55A-8-2. Postverdict determination of reduction in compensatory**
8 **damages.**

9 (a) The reduction in compensatory damages required under
10 section one of this article shall be determined by the court after
11 the verdict and before judgment is entered. Reduction may be made
12 only if the collateral source payments are compensation for the same
13 damages for which recovery is sought in the action. At trial no
14 evidence shall be admitted as to the amount of any charges,
15 payments, or losses for which a plaintiff has received payment from
16 a collateral source or the obligation for which has been assumed by
17 a collateral source, or is, or with reasonable certainty will be,
18 eligible to receive payment from a collateral source or the
19 obligation for which will, with reasonable certainty, be assumed by
20 a collateral source.

21 (b) A plaintiff who has received, or is to receive, collateral
22 source payments may introduce evidence before the court, but not at
23 trial, of any amount which the plaintiff has paid or contributed to

1 secure his or her right to any such collateral source payments, any
2 recovery by the plaintiff is subject to a lien by a collateral
3 source, that a provider of the collateral source payments has a
4 statutory right of recovery against the plaintiff for reimbursement
5 of the payments or that the provider of the collateral source
6 payments has a right of subrogation to the rights of the plaintiff.
7 After considering the evidence of collateral source introduced by
8 any party, the court shall make a determination as to the amount by
9 which a plaintiff's compensatory damages will be reduced by any such
10 collateral source payments.

11 **ARTICLE 9. STATUTE OF REPOSE.**

12 **§55A-9-1. Eighteen-year warranty.**

13 No product liability action concerning a durable good as
14 defined in article one, section four of this chapter may be filed
15 after the eighteen-year period beginning at the time of delivery of
16 the product to the first purchaser or lessee.

17 **§55A-9-2. Extended express warranty.**

18 Section one of this article does not bar a product liability
19 action against a defendant who made an express warranty in writing
20 as to the safety or life expectancy of the specific product involved
21 which is for a period of time exceeding eighteen years, except that
22 section one of this article shall apply at the expiration of that

1 warranty.

2 **ARTICLE 10. DAMAGES FOR NONECONOMIC LOSS.**

3 **§55A-10-1. Causes of action where damages were authorized upon**
4 **this legislation's effective date.**

5 Damages for noneconomic loss shall be recoverable for cases
6 where causes of action for those damages are authorized at the time
7 this chapter becomes effective.

8 **§55A-10-2. Civil actions based on physical injury.**

9 (a) Damages for noneconomic loss shall be recoverable in civil
10 actions based on physical injury.

11 (b) The plaintiff who experienced the physical injury on which
12 the action is based and all plaintiffs who derive their claims from
13 or through such plaintiff may recover damages for noneconomic loss
14 in a total amount for those plaintiffs not to exceed the greater of
15 \$250,000 or three times economic damages, up to a maximum of
16 \$500,000.

17 (c) In the event that the physical injury is permanent and
18 severe physical deformity, loss of use of limb or loss of a major
19 bodily organ system or permanent physical functional injury that
20 permanently prevents the injured person from being able to
21 independently care for himself or herself and perform life
22 sustaining activities, then the plaintiff who experienced the

1 physical injury and all other plaintiffs who derive their claims
2 from or through the plaintiff may recover damages for noneconomic
3 loss in a total amount for all such plaintiffs not to exceed the
4 greater of \$1 million or the product of the amount calculated on
5 an annual basis pursuant to article four, chapter twenty-three of
6 this code, which represents the maximum average weekly wage,
7 annualized, for a worker employed in this state times the number of
8 years remaining in the plaintiff's expected life, regardless of the
9 number of parties against whom the action is brought or could have
10 been brought or the number of claims asserted or actions brought or
11 that could have been asserted or brought with respect to the injury.

12 **§55A-10-3. Civil actions not based on physical injury.**

13 (a) Damages for noneconomic loss shall be recoverable in all
14 actions other than those based on physical injury.

15 (b) The plaintiff who experienced the economic loss on which
16 the action is based and all plaintiffs who derive their claims from
17 or through the plaintiff may recover damages for noneconomic loss
18 in a total amount for all such plaintiffs no greater than the award
19 of damages for economic loss or \$1 million, whichever is less,
20 regardless of the number of parties against whom the action is
21 brought or could have been brought or the number of claims asserted
22 or actions brought or that could have been asserted or brought with
23 respect to the economic loss.

1 **ARTICLE 11. LOSER PAYS.**

2 **§55A-11-1. Recovery of attorney's fees by prevailing party;**
3 **applicability to causes of action and parties.**

4 (a) The prevailing party with respect to a claim may recover
5 reasonable attorney's fees from an individual, corporation or other
6 legal entity if the claim is for:

- 7 (1) Rendered services;
- 8 (2) Performed labor;
- 9 (3) Furnished material;
- 10 (4) Freight or express overcharges;
- 11 (5) Lost or damaged freight or express;
- 12 (6) Killed or injured stock;
- 13 (7) A sworn account; or
- 14 (8) An oral or written contract.

15 (b) The prevailing party with respect to a claim may not
16 recover reasonable attorney's fees from an individual, corporation
17 or other legal entity if the claim is for:

- 18 (1) Any civil action primarily governed by the family law
19 chapters of this code;
- 20 (2) A class action;
- 21 (3) A shareholder's derivative action;
- 22 (4) An action filed in magistrate court; or
- 23 (5) A civil action in which the amount in controversy,

1 including all requests for damages, reimbursement of attorney's
2 fees, and litigation costs, is less than \$100,000 and the plaintiff
3 has made an election to proceed.

4 (c) This article applies to any party who is a claimant or
5 defendant, including, but not limited to:

6 (1) A county;

7 (2) A municipality;

8 (3) A public school district;

9 (4) A public junior college district;

10 (5) A charitable organization;

11 (6) A nonprofit organization;

12 (7) A hospital district;

13 (8) A hospital authority;

14 (9) Any other political subdivision of the state; and

15 (10) The State of West Virginia.

16 **§55A-11-2. Procedure for recovery of attorney's fees.**

17 Attorney's fees may be recovered under this article if:

18 (1) The person seeking to recover attorney's fees is
19 represented by an attorney;

20 (2) The plaintiff presents the claim to the opposing party or
21 to a duly authorized agent of the opposing party; and

22 (3) Payment for the just amount owed is not tendered before the
23 expiration of the thirtieth day after the claim is presented.

1 **§55A-11-3. Presumption.**

2 It is presumed that the usual and customary attorney's fees for
3 a claim of the type described in section one of this article are
4 reasonable. The presumption may be rebutted.

5 **§55A-11-4. Judicial notice.**

6 The court may take judicial notice of the usual and customary
7 attorney's fees and of the contents of the case file without
8 receiving further evidence in:

9 (1) A proceeding before the court; or

10 (2) A jury case in which the amount of attorney's fees is
11 submitted to the court by agreement.

12 **§55A-11-5. Liberal construction.**

13 This article shall be liberally construed to promote its
14 underlying purposes.

15 **§55A-11-6. Defendant election.**

16 (a) A defendant may elect to apply this article to any civil
17 action in which a plaintiff has asserted a claim against the
18 defendant.

19 (b) An election under this section must identify each plaintiff
20 against whom the election is made.

21 (c) An election may not be made before the sixtieth day after
22 the date the defendant filed an answer to the plaintiff's civil

1 action or within sixty days of the date of trial.

2 (d) The election must be:

3 (1) In writing;

4 (2) Signed by the attorneys of record of the defendant;

5 (3) Filed with the papers as part of the record; and

6 (4) Served on all plaintiffs against whom the election is made.

7 (e) A deadline under this section may be amended or modified
8 by agreement of the parties or by order of the court in a discovery
9 control plan as provided by Rule 26, West Virginia Rules of Civil
10 Procedure.

11 **§55A-11-7. Plaintiff election.**

12 (a) Plaintiffs may elect to apply the provisions of this
13 article in a civil actions which:

14 (1) The total amount of damages the plaintiff seeks to recover
15 for all claims is not less than \$10,000 and not more than \$100,000;
16 and

17 (2) The plaintiff files and serves a written election.

18 (b) A plaintiff election must be made at the time the electing
19 plaintiff first files a claim in the action.

20 (c) A plaintiff may make an election not later than the
21 sixtieth day after the date the last defendant has filed an answer.

22 (d) An election made by a plaintiff under this section is
23 binding on all parties to the expedited civil action unless a

1 defendant files a claim more than sixty days before trial and in
2 that claim makes a good faith claim that the recovery of monetary
3 damages might be in excess of \$100,000.

4 **§55A-11-8. Revocation of election.**

5 (a) An election made under sections six and seven of this
6 article may be revoked wholly or partly by agreement of the parties.

7 (b) A revocation under this section must identify the
8 plaintiffs and defendants for whom the revocation is made. A
9 revocation may be made at any time before an award is made under
10 section ten of this article based on the election. The revocation
11 must be:

12 (1) In writing;

13 (2) Signed by the attorneys of record of all parties to whom
14 the revocation applies; and

15 (3) Filed as part of the record.

16 **§55A-11-9. Dismissal or nonsuit of action.**

17 If a plaintiff against whom an election is made by a defendant
18 under section six of this article nonsuits or voluntarily dismisses
19 with prejudice the civil action for which the election is made not
20 later than the fifteenth day after the date the plaintiff was served
21 with the election, the election does not apply to the nonsuited or
22 dismissed civil action.

23 **§55A-11-10. Award of litigation costs.**

1 (a) If an election is made under this article, the prevailing
2 party may recover the prevailing party's litigation costs.

3 (b) The determination of which party is the prevailing party
4 is a question of law for the court.

5 (c) Litigation costs under this article are costs directly
6 related to the civil action between the plaintiff and the defendant.

7 Litigation costs include:

8 (1) Reasonable and necessary attorney's fees;

9 (2) Reasonable and necessary travel expenses;

10 (3) Reasonable fees for not more than two testifying expert
11 witnesses; and

12 (4) Court costs.

13 (d) A fee agreement that results in a fee that is fixed or
14 contingent on results obtained or uncertainty of collection before
15 the legal services have been rendered may not be considered in the
16 determination of the amount of reasonable and necessary attorney's
17 fees.

18 **§55A-11-11. Liability of attorney.**

19 (a) This section applies to a civil action if:

20 (1) A party is entitled to recover litigation costs under
21 section eleven of this article;

22 (2) The election under sections six and seven of this article
23 states that the party making the election will seek litigation costs

1 under section ten; and

2 (3) An attorney of record for the party against whom litigation
3 costs are recoverable has a financial interest in the civil action.

4 (b) If the trier of fact determines that a civil action is an
5 abusive civil action, an attorney of record for the party against
6 whom litigation costs are recoverable is liable to the prevailing
7 party, jointly and severally, for the amount of the litigation costs
8 awarded.

9 (c) The determination of whether an attorney has a financial
10 interest in a civil action is a question of law for the court. An
11 attorney is not an attorney of record for the purposes of this
12 section if the attorney withdraws as attorney of record and
13 relinquishes any financial interest in the civil action more than
14 sixty days before trial.

15 (d) The determination of whether a civil action is an abusive
16 civil action is a question of fact. In a case in which the
17 determination of whether a civil action is an abusive civil action
18 is submitted to a jury, the charge to the jury must ask whether the
19 civil action filed by the plaintiff was an abusive civil action.
20 The following instruction must be included in the charge: "You are
21 instructed that an abusive civil action is a civil action that a
22 reasonable person would conclude is a misuse of the civil justice
23 process."

1 **§55A-11-12. Applicability of other law.**

2 If an election is made under sections six or seven of this
3 article, this article controls over any other law to the extent the
4 other law requires, authorizes, prohibits or otherwise governs the
5 award of attorney's fees or other costs of litigation in connection
6 with the civil action.

7 **ARTICLE 12. THE SUPREME COURT ADOPTION OF RULES, CONFLICTING LAWS**
8 **REPEALED, APPLICABILITY, SEVERABILITY, NO ADDITIONAL**
9 **CAUSE OF ACTION CREATED BY THIS CHAPTER AND EFFECTIVE**
10 **DATE.**

11 **§55A-12-1. Supreme Court adoption of rules.**

12 (a) The Supreme Court shall adopt rules to implement this
13 chapter not later than January 1, 2014.

14 (b) The rules shall at a minimum:

15 (1) Require documents filed in all courts of this state to be
16 filed electronically;

17 (2) Require all courts of this state to electronically file and
18 publish orders and decisions;

19 (3) Require the prompt, efficient, and cost-effective
20 resolution of an expedited civil action, including the discovery
21 between the parties and early dismissals of actions;

22 (4) Provide for pleading, practice and procedure in matters

1 before the Intermediate Court;

2 (5) Allow interlocutory appeals to the Supreme Court and the
3 Intermediate Court.

4 **§55A-12-2. Conflicting laws repealed.**

5 This chapter supersedes, invalidates and repeals all other
6 state laws that are in conflict with its provisions.

7 **§55A-12-3. Applicability.**

8 This chapter applies to all causes of action arising on or
9 after the effective date of this chapter.

10 **§55A-12-4. Severability clause.**

11 The provisions of this chapter and each article, section,
12 subsection, subdivision, paragraph, and subparagraph thereof shall
13 be severable from the provisions of each other subparagraph,
14 paragraph, subdivision, subsection, section, article, or chapter of
15 this code so that if any provision of this chapter be held void, the
16 remaining provisions of this chapter and this code shall remain
17 valid.

18 **§55A-12-5. No additional cause of action created by this chapter.**

19 Nothing in this chapter may be construed to create a cause of
20 action.

21 **§55A-12-6. Effective date.**

22 This chapter shall become effective immediately upon passage

1 by the Legislature and approval by the Governor.

NOTE: The purpose of this bill is to reform the civil justice system and create an intermediate court of appeals.

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