

**BETTER FOR BUSINESS, BETTER FOR JUSTICE: WHY WEST VIRGINIA NEEDS AN INTERMEDIATE APPELLATE COURT**

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I. INTRODUCTION

West Virginia is wild and wonderful, but she is not wonderful for business. When Forbes published its annual ranking of the best states for business, the crown went to our next-door neighbor Virginia.<sup>1</sup> West Virginia,

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<sup>1</sup> Kurt Badenhausen, *Virginia Tops 2013 List of the Best States for Business*, FORBES, Sept. 25, 2013, <http://www.forbes.com/sites/kurtbadenhausen/2013/09/25/virginia-tops-2013-list-of-the-best-states-for-business/>. Forbes’ annual ranking is calculated using 35 data inputs relating to business costs, labor supply, regulatory environment, economic climate, growth prospects, and quality of life. *Id.*

on the other hand, ranked 46th.<sup>2</sup> A similar rating by business news channel CNBC is even worse: 48th.<sup>3</sup> Focusing on the state's legal climate, the American Tort Reform Foundation condemns West Virginia as one of the worst "judicial hellhole" jurisdictions in the country.<sup>4</sup> Brace yourself—the worst is coming. The United States Chamber of Commerce's State Lawsuit Climate Report ranked West Virginia as the *worst* state in the nation for litigation against businesses.<sup>5</sup>

This prominent and dismally negative publicity shows that West Virginia has developed a reputation that scares businesses, along with their capital investment, jobs, and other benefits, far away.<sup>6</sup> The people who love and live in the beautiful Mountain State know that improving West Virginia's business and legal environment is vital to achieving a better future for West Virginia and her present and future residents.<sup>7</sup>

Thankfully, the state judiciary has been doing just that. Over the past five years, the West Virginia Supreme Court of Appeals has implemented significant changes that have made West Virginia more business-friendly. In

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<sup>2</sup> *Id.*

<sup>3</sup> *America's Top States for Business 2014*, CNBC (June 3, 2014), <http://www.cnbc.com/id/101758236>.

<sup>4</sup> AM. TORT REFORM FOUND., JUDICIAL HELLHOLES 2013/2014, at 19 (2013) [hereinafter JUDICIAL HELLHOLES 2013/2014], available at <http://www.judicialhellholes.org/wp-content/uploads/2013/12/JudicialHellholes-2013.pdf> ("For the past decade, West Virginia has been included among the top 5 Judicial Hellholes."). While the accuracy and impartiality of the Judicial Hellholes report leaves much to be desired, the impact of its propaganda should not be ignored. See Elizabeth G. Thornburg, *Judicial Hellholes, Lawsuit Climates and Bad Social Science: Lessons from West Virginia*, 110 W. VA. L. REV. 1097, 1103–05 (2008).

<sup>5</sup> U.S. CHAMBER INST. FOR LEGAL REFORM, 2012 STATE LIABILITY SYSTEMS SURVEY 7 (2012) [hereinafter U.S. CHAMBER REPORT], available at [http://www.instituteforlegalreform.com/uploads/sites/1/Lawsuit\\_Climate\\_Report\\_2012.pdf?phpMyAdmin=4xZE47et5fXTNj495soMxJJPJr6](http://www.instituteforlegalreform.com/uploads/sites/1/Lawsuit_Climate_Report_2012.pdf?phpMyAdmin=4xZE47et5fXTNj495soMxJJPJr6). "The 2012 State Liability Systems Ranking Study was conducted for the U.S. Chamber [of Commerce] Institute for Legal Reform to explore how fair and reasonable the states' tort liability systems are perceived to be by U.S. businesses." *Id.* at 1.

<sup>6</sup> Whether or not West Virginia is in fact "bad for business" is not an argument or even a necessary presumption of this Note. This Note only recognizes the state's reputation, and then asserts that actions by the judiciary are improving the situation both as a matter of actuality and appearance. Even if bias or misinformation caused the negative reputation, legal scholars have recently made the argument that businesses fear litigating in West Virginia state courts for legitimate reasons. See Victor E. Schwartz, Sherman Joyce & Cary Silverman, *West Virginia as a Judicial Hellhole: Why Businesses Fear Litigating in State Courts*, 111 W. VA. L. REV. 757, 760 (2009) (describing both the negative and credible aspects of the Judicial Hellhole report, the authors focus on the truth behind the hype, identifying no less than eight distinct "failures of West Virginia's civil justice system," including lack of appellate review).

<sup>7</sup> See Steven Allen Adams, *Public Nearly Split on Intermediate Appeals Court*, W. VA. WATCHDOG, Nov. 7, 2011, <http://westvirginia.watchdog.org/3665/public-nearly-split-on-intermediate-appeals-court/>.

late 2010, West Virginia conceded to the national norm and implemented mandatory appellate review of all trial court decisions.<sup>8</sup> To balance the loss of certiorari, the court now issues memorandum decisions (brief, summary dispositions) as an alternative to full written opinions.<sup>9</sup> Stricter appellate pleading requirements and the creation of an exclusively business-focused trial court division have also made the possibility of litigating in West Virginia more attractive to businesses.

Businesses demand appellate review, especially in West Virginia.<sup>10</sup> In 2008, before the change to mandatory appellate review, the West Virginia Supreme Court refused to hear the appeal of a \$404 million judgment against Chesapeake Energy Corporation.<sup>11</sup> The company then promptly abandoned its plans to build a \$35 million headquarters in Charleston, West Virginia.<sup>12</sup>

Since then, the court has found in favor of business interests in most of its recent decisions.<sup>13</sup> This pro-business trend in case law and the switch to mandatory appellate review have undoubtedly, and likely drastically, improved the way businesses view the state's judicial climate.

To further these improvements, West Virginia should create an intermediate appellate court (IAC). Recommended by numerous entities,<sup>14</sup> an IAC is an excellent way to bring more business—and justice—to the Mountain State. An IAC would enhance the quality of appellate review in West Virginia by allowing the highest court to focus on difficult, influential, and policy-laden decisions instead of simply correcting trial court errors.<sup>15</sup>

This Note analyzes the recent activity of the West Virginia Supreme Court and shows how the state's jurisprudence is becoming friendlier to business interests. Part II outlines West Virginia's state judicial structure,

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<sup>8</sup> See Margaret L. Workman, *Intermediate Appeals Court: We Don't Need It, and We Can't Afford It*, W. VA. LAW., Apr.–June 2011, at 1, 8.

<sup>9</sup> W. VA. R. APP. P. 21.

<sup>10</sup> Trial courts in West Virginia have an unfortunate reputation for local bias and outrageous tort judgments against businesses. See, e.g., Schwartz, Joyce & Silverman, *supra* note 6, at 760–66; JUDICIAL HELLHOLES 2013/2014, *supra* note 4, at 19 (“The litigation climate in the Mountain State remains one where businesses are subject to pro-plaintiff rulings, fear excessive liability, and lack full appellate review.”); U.S. CHAMBER REPORT, *supra* note 5, at 12–13.

<sup>11</sup> Lawrence Messina, *Court Rulings May Reveal Gap in System*, CHARLESTON DAILY MAIL, June 2, 2008, available at 2008 WLNR 10492484.

<sup>12</sup> *Id.*

<sup>13</sup> This Note does not allege that the two events are causally linked—nor does it allege that they are unrelated. See *infra* note 181 and accompanying text.

<sup>14</sup> A West Virginia IAC has been proposed by the state legislature and the West Virginia Independent Commission on Judicial Reform. H.B. 3130, 81st Leg., Reg. Sess. (W. Va. 2013); W. VA. INDEP. COMM'N ON JUDICIAL REFORM, FINAL REPORT 44 (2009) [hereinafter JUDICIAL REFORM REPORT], available at <http://www.scribd.com/doc/22604435/West-Virginia-Independent-Commission-on-Judicial-Reform-Final-Report>.

<sup>15</sup> See discussion *infra* Part III.D.1.

including the changes brought about by the 2010 appellate reform and the new Business Court Division. A description and analysis of recent West Virginia Supreme Court case law follows, revealing a trend of predominately pro-business decisions in the past five years. Part III provides an explanation of how these changes have made West Virginia better for business. The Note concludes with a recommendation for further improvement—the addition of an intermediate appellate court.

## II. BACKGROUND—CHANGES IN THE COURTS

The first step to improving West Virginia's judicial structure is understanding how it works. The following section describes West Virginia's unique state court system, including the challenges faced by the state's sole court of appeals. The main features of the recent appellate reform—mandatory appellate review, memorandum decisions, and stricter pleading requirements—begin the discussion. Next is the Business Court Division, followed by the arguments, proponents, and protestors of creating an IAC in West Virginia. The background concludes with the most influential business-related decisions issued by the West Virginia Supreme Court in the past five years.

### A. Appellate Reform

In 2010, the West Virginia Supreme Court drastically reformed its Rules of Appellate Procedure, amending 41 of the existing 43 rules and adding 18 new ones.<sup>16</sup> The revised rules became effective in December 2010 and brought about highly significant changes—appeal by right and memorandum decisions.<sup>17</sup> A preliminary overview of the West Virginia state court system introduces an analysis of the three main appellate reform changes: mandatory appellate review, memorandum decisions, and stricter pleading requirements.

#### 1. West Virginia's State Court System

West Virginia's state court system consists of the West Virginia Supreme Court, trial courts with general jurisdiction (called circuit courts), and several types of lower courts with limited jurisdiction, including family courts, magistrate courts, and drug courts.<sup>18</sup> The West Virginia Supreme Court is the only appellate court in West Virginia; as such, it is the only court in the state

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<sup>16</sup> Kyla Asbury, *New Appellate Rules Unveiled*, W. VA. REC., May 17, 2010, <http://wvrecord.com/news/226842-new-appellate-rules-unveiled>.

<sup>17</sup> W. VA. R. APP. P. 1; Asbury, *supra* note 16.

<sup>18</sup> See *Lower Courts*, W. VA. JUDICIARY, <http://www.courtswv.gov/lower-courts/index.html> (last visited Oct. 9, 2014).

that creates binding case law.<sup>19</sup> The West Virginia Supreme Court provides initial appellate review of circuit court decisions, some family court decisions,<sup>20</sup> and decisions from the West Virginia Workers' Compensation Board.<sup>21</sup> The court also maintains original jurisdiction over writs of habeas corpus, writs of mandamus, and prohibition actions.<sup>22</sup> Its 5 justices are elected by popular vote to serve terms lasting 12 years.<sup>23</sup>

West Virginia Supreme Court decisions can only be appealed to the United States Supreme Court.<sup>24</sup> The U.S. Supreme Court has limited subject matter jurisdiction and can hear an appeal from a state supreme court only if the case involves complete diversity or a substantial question of federal law.<sup>25</sup> In addition, the U.S. Supreme Court has discretionary appellate review and denies certiorari (refuses to hear the appeal) more than 99% of the time.<sup>26</sup> Therefore, the West Virginia Supreme Court has the final say in virtually every case filed within the state court system.

West Virginia's only trial courts of record are its 31 circuit courts.<sup>27</sup> The circuit courts have general jurisdiction to hear criminal cases and any civil case with an amount in controversy over \$300.<sup>28</sup> They also hear appeals from the magistrate courts, family courts, municipal courts, and all state administrative agencies except the workers' compensation board.<sup>29</sup>

Circuit court decisions, including appellate review of the lower courts and administrative agencies, can only be appealed to the West Virginia Supreme Court.<sup>30</sup> It is the court of last resort for all of the state judicial

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<sup>19</sup> See *Supreme Court of Appeals*, W. VA. JUDICIARY, <http://www.courtswv.gov/supreme-court/index.html> (last visited Oct. 9, 2014).

<sup>20</sup> Family court decisions can be appealed directly to the supreme court if both parties agree to bypass review by a circuit judge. W. VA. FAM. CT. R. 26 (2002).

<sup>21</sup> *Supreme Court of Appeals*, *supra* note 19.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> U.S. CONST. art. III, § 2, cl. 1.

<sup>26</sup> For the 2011 Term, the United States Supreme Court granted 0.862% of certiorari petitions. Kedar S. Bhatia, *Likelihood of a Petition Being Granted*, DAILYWRIT (Jan. 10, 2013), <http://dailywrit.com/2013/01/likelihood-of-a-petition-being-granted/> (citing SUPREME COURT OF THE U.S., OCTOBER TERM 2011, available at <http://www.supremecourt.gov/orders/journal/jnl11.pdf>).

<sup>27</sup> *Circuit Courts*, W. VA. JUDICIARY, <http://www.courtswv.gov/lower-courts/circuit-courts.html> (last visited Oct. 9, 2014).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* Appeals from the West Virginia Workers' Compensation Board are reviewed exclusively by the supreme court. *Supreme Court of Appeals*, *supra* note 19.

<sup>30</sup> *Supreme Court of Appeals*, *supra* note 19.

bodies.<sup>31</sup> Appeals of decisions from 70 circuit court judges, 158 magistrates, 45 family court judges, and hundreds of municipal court and administrative law judges all funnel exclusively to the West Virginia Supreme Court.<sup>32</sup>

This makes the court “the busiest appellate court of its type in the United States.”<sup>33</sup> In 2013, the court issued 1,360 decisions.<sup>34</sup> This figure is more than double the number of decisions issued in 2011.<sup>35</sup> The court’s workload is expected to continue to grow steadily due to a major change in West Virginia’s appellate procedure: mandatory appellate review.<sup>36</sup>

## 2. Mandatory Appellate Review

Before the 2010 reform, West Virginia was the only state in the nation that did not provide mandatory appellate review, or “appeal by right.”<sup>37</sup> Instead, the West Virginia Supreme Court exercised discretionary appellate review, choosing whether or not to hear each appeal using a certiorari process.<sup>38</sup> If the court denied certiorari, the litigants were conclusively bound by the trial court’s decision.<sup>39</sup> In 2010, the year before the appeal by right took effect, the court denied certiorari in 85% of cases.<sup>40</sup>

Effective December 1, 2010, West Virginia changed from discretionary appellate review to mandatory appellate review.<sup>41</sup> In the words of the court, “each properly prepared appeal is fully decided on its merits, and appeals are no longer refused.”<sup>42</sup>

The establishment of appeal by right in West Virginia has been applauded by business owners, politicians, and numerous legal scholars. Before

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<sup>31</sup> *Id.*

<sup>32</sup> *See id.*; *Lower Courts*, *supra* note 18.

<sup>33</sup> *Supreme Court of Appeals*, *supra* note 19.

<sup>34</sup> *See* RORY L. PERRY II, SUPREME COURT OF APPEALS OF W. VA., 2013 STATISTICAL REPORT 4 (2014) [hereinafter 2013 SUPREME COURT REPORT], available at <http://www.courtswv.gov/supreme-court/clerk/statistics/2013StatRept.pdf>.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 4–5 (“Implementing the Appeal by Right Continues to Increase the Number of Decisions on the Merits.”).

<sup>37</sup> Schwartz, Joyce & Silverman, *supra* note 6, at 760–61 (reporting in 2009 that “West Virginia [is] the only state which denies a right to appellate review on the merits”).

<sup>38</sup> *Id.* at 760; *see also* 2013 SUPREME COURT REPORT, *supra* note 34, at 4.

<sup>39</sup> If the West Virginia Supreme Court denied certiorari, the litigants’ only avenue for appellate review was the United States Supreme Court, which hears less than 1% of appeals. *See supra* notes 24–26 and accompanying text.

<sup>40</sup> SUPREME COURT OF APPEALS OF W. VA., 2010 STATISTICAL REPORT 5 tbl.3 (2011), available at <http://www.courtswv.gov/supreme-court/clerk/statistics/2010StatRept.pdf>.

<sup>41</sup> *See* Asbury, *supra* note 16.

<sup>42</sup> 2013 SUPREME COURT REPORT, *supra* note 34, at 4 (emphasis omitted).

the reform, attorneys and civic organizations across the state campaigned for mandatory appellate review.<sup>43</sup> The court finally acquiesced, bringing a landmark of due process and justice—the right to mandatory appellate review—to West Virginia. Then president of the West Virginia State Bar, Letitia Chafin, described the reform as “a big change, but it’s a welcomed change that is for the best.”<sup>44</sup> West Virginia Chamber of Commerce president Steven Roberts publicly praised the court for improving the state’s legal and business climate with the appeal by right reform.<sup>45</sup> Local and out-of-state businesses concede that the judicial system in West Virginia is now more comprehensive and fair for all litigants.<sup>46</sup>

Unfortunately, the change also brought a significant consequence: a huge increase in the number of cases the West Virginia Supreme Court must decide each year. In 2011, the court issued 678 decisions, “*more than triple*[] when compared to the previous system.”<sup>47</sup> In 2012, the workload increased again to 908 decisions, which increased even more in 2013 to 1,360 decisions.<sup>48</sup> The number of full written opinions also jumped from 55 in 2011 to 77 in 2013.<sup>49</sup> This data confirms what common sense already knows—the new appeal by right increases the workload of West Virginia’s sole appellate court because the court can no longer refuse appeals.

### 3. Memorandum Decisions

The second major change to West Virginia’s appellate procedure was the addition of a new type of appellate opinion, the memorandum decision.<sup>50</sup> Before the reform, the West Virginia Supreme Court had one docket and would issue a full written opinion on each appellate case it had granted certiorari.<sup>51</sup>

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<sup>43</sup> See, e.g., W. Henry Jernigan & Jill Rice, *West Virginia Needs Substantive Right of Appeal*, DINSMORE (Oct. 5, 2010), [http://www.dinsmore.com/west\\_virginia\\_needs\\_substantive\\_right\\_of\\_appeal/](http://www.dinsmore.com/west_virginia_needs_substantive_right_of_appeal/).

<sup>44</sup> Asbury, *supra* note 16.

<sup>45</sup> Steve Roberts, *There Is Progress on the State’s Legal Climate*, CHARLESTON DAILY MAIL, Dec. 20, 2011, <http://www.charlestondaily.com/Opinion/Commentary/201112190137?page=2&build=cache>.

<sup>46</sup> See Mannix Porterfield, *House Speaker, State Chamber Want Study to Make Sure New Appellate Rules Fair, Efficient*, REG.-HERALD, Feb. 28, 2013, [http://www.register-herald.com/news/article\\_9ce15eaf-a7d3-52cc-b082-331524657ff5.html](http://www.register-herald.com/news/article_9ce15eaf-a7d3-52cc-b082-331524657ff5.html).

<sup>47</sup> 2013 SUPREME COURT REPORT, *supra* note 34, at 4 (emphasis added).

<sup>48</sup> *Id.* Total case filings reached a peak in 2007 and have been declining since, but this was caused by a jump in workers’ compensation appeals due to “legislative reforms and privatization of the workers’ compensation system.” *Id.* at 1.

<sup>49</sup> *Id.* at 5.

<sup>50</sup> Asbury, *supra* note 16.

<sup>51</sup> *Id.*

Now the court has two types of dispositions: full written opinions and the new memorandum decisions.<sup>52</sup> Cases are now divided into two separate dockets: Rule 20 and Rule 19.<sup>53</sup>

The Rule 20 docket is similar to the singular docket used before the reform.<sup>54</sup> This docket is reserved for cases involving issues of first impression, significant public policy concerns, determinations of constitutional validity, and splits within the circuit courts.<sup>55</sup> Rule 20 cases are usually given 40 minutes of oral argument and decided using a signed full written opinion.<sup>56</sup> The full written opinions are of considerable length and include thorough analysis and syllabus points.<sup>57</sup>

The new Rule 19 docket is reserved for appeals that probably would have been denied certiorari under the previous discretionary review system.<sup>58</sup> Rule 19 cases often involve well-settled, uncomplicated, or narrow issues of law.<sup>59</sup> The court only allows 20 minutes of oral argument, if oral argument is permitted at all.<sup>60</sup> After a case on the Rule 19 docket is reviewed, the court will either move the case to the Rule 20 docket for additional consideration and oral argument, decide the case by issuing a full opinion, or, most commonly, decide the case with a memorandum decision.<sup>61</sup>

Memorandum decisions were introduced with Rule 21.<sup>62</sup> These “abbreviated” or “summary” decisions are mostly limited to instances when the West Virginia Supreme Court affirms a lower court, especially if it fails to find a considerable question of law or prejudicial error.<sup>63</sup> Memorandum decisions are quite brief and do not include the extensive analysis and syllabus points

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<sup>52</sup> W. VA. R. APP. P. 19–21.

<sup>53</sup> *See id.*

<sup>54</sup> Asbury, *supra* note 16.

<sup>55</sup> W. VA. R. APP. P. 20(a).

<sup>56</sup> W. VA. R. APP. P. 20(e), (g).

<sup>57</sup> *See, e.g., State v. Bowling*, 753 S.E.2d 27 (W. Va. 2013), *cert. denied*, 134 S. Ct. 1772 (2014) (This example of a full opinion is over 11,000 words in length and includes eight syllabus points.). Syllabus points are short summaries of the court’s findings of law. *See infra* text accompanying notes 70–72.

<sup>58</sup> *See Asbury, supra* note 16.

<sup>59</sup> W. VA. R. APP. P. 19(a).

<sup>60</sup> W. VA. R. APP. P. 19(e). The court can decide whether or not to hear oral argument in both dockets. W. VA. R. APP. P. 18. Oral argument may be waived by any party upon written notice to the court and all other parties. W. VA. R. APP. P. 19(f), 20(f).

<sup>61</sup> W. VA. R. APP. P. 19(g).

<sup>62</sup> W. VA. R. APP. P. 21.

<sup>63</sup> W. VA. R. APP. P. 21(c).



included in a full written opinion.<sup>64</sup> Rule 21 requires the court to provide only a “concise statement of the reason for affirmance, and a concise statement of the reason for issuing a memorandum decision instead of an opinion.”<sup>65</sup> The court can issue a memorandum decision reversing a lower court only in limited circumstances.<sup>66</sup> When it does so, the court must briefly explain the reason for the reversal and why it chose an abbreviated memorandum decision.<sup>67</sup> Although “non-precedential”—not binding on the lower courts—memorandum decisions may be cited in litigation, but must be designated as such.<sup>68</sup> They are not published in a reporter, but can be found on the West Virginia Supreme Court’s website.<sup>69</sup>

Memorandum decisions do not include syllabus points, a hallmark of the West Virginia appellate opinion.<sup>70</sup> Syllabus points summarize the most important findings of law in each case for the benefit of trial judges, attorneys, and the general public.<sup>71</sup> For example, “This Court will use signed opinions when new points of law are announced and those points will be articulated through syllabus points as required by our state constitution.”<sup>72</sup> The West Virginia Constitution mandates syllabus points in every appellate opinion.<sup>73</sup> However, the West Virginia Supreme Court held decades ago that those constitutional requirements were “only directory.”<sup>74</sup>

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<sup>64</sup> See, e.g., *Lee v. Ballard*, No. 12-1302, 2013 WL 5508152 (W. Va. Oct. 4, 2013) (memorandum decision) (denying a reversal and full opinion to a pro se litigant in less than 1,500 words).

<sup>65</sup> W. VA. R. APP. P. 21(c).

<sup>66</sup> W. VA. R. APP. P. 21(d).

<sup>67</sup> *Id.*

<sup>68</sup> W. VA. R. APP. P. 21(e) cmt.

<sup>69</sup> W. VA. R. APP. P. 21(e).

<sup>70</sup> W. VA. R. APP. P. 21(e) cmt.

<sup>71</sup> James Audley McLaughlin, *The Idea of the Common Law in West Virginia Jurisprudential History: Morningstar v. Black & Decker Revisited*, 103 W. VA. L. REV. 125, 165 (2000).

<sup>72</sup> Syl. Pt. 2, *Walker v. Doe*, 558 S.E.2d 290 (W. Va. 2001). The court’s binding holdings are often found in the syllabus points, but binding language may be located in the body of the opinion as well. *Id.* at 295.

<sup>73</sup> W. VA. CONST. art. 8, § 4 (“When a judgment or order of another court is reversed, modified or affirmed by the court, every point fairly arising upon the record shall be considered and decided; the reasons therefor shall be concisely stated in writing and preserved with the record; and it shall be the duty of the court to prepare a syllabus of the points adjudicated in each case in which an opinion is written and in which a majority of the justices thereof concurred, which shall be prefixed to the published report of the case.”).

<sup>74</sup> *State v. Smith*, 193 S.E. 573, 575 (W. Va. 1937) (citing *Horner v. Amick*, 61 S.E. 40, 41 (W. Va. 1908)). In *State v. Smith*, a criminal defendant appealed on 20 different assignments of error. The court discussed a couple of them in its opinion but found it unnecessary—and not required by the West Virginia Constitution—to consider each of the appellant’s arguments. *Id.* at 574–75.

Since the adoption of the new Rules of Appellate Procedure, there has been significant debate as to whether memorandum decisions qualify as adequate appellate review. West Virginia Supreme Court Justice Margaret Workman considers them to be a full decision on the merits.<sup>75</sup> She argues that “memorandum decisions explain the reasons why the Court is affirming or reversing the lower court’s decision; they may even be cited in legal argument and used for guidance among the circuit courts.”<sup>76</sup> The West Virginia Supreme Court declared in its annual report that memorandum decisions are full decisions on the merits.<sup>77</sup>

Many attorneys and organizations, however, disagree. Because memorandum decisions are abbreviated and do not create binding precedent, some argue they do not supply a sufficient “guaranteed right of full appeal.”<sup>78</sup> The Judicial Hellholes Report described West Virginia’s appellate reform as only a “marginal expansion” that still fails to provide complete consideration of every appeal.<sup>79</sup> Partners at several prominent West Virginia law firms do not consider memorandum decisions to be meaningful or binding appellate review.<sup>80</sup> Critics worry that “[t]he practical effect of the court disposing of appeals via memorandum decision is likely of little comfort to corporations who will continue to believe they are being denied a right to a full appeal from an adverse verdict.”<sup>81</sup>

#### 4. Stricter Pleading Requirements

The third significant change from the 2010 appellate reform is a general heightening of the requirements for filing an appeal. The revised rules

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<sup>75</sup> Workman, *supra* note 8, at 8.

<sup>76</sup> *Id.*

<sup>77</sup> See 2013 SUPREME COURT REPORT, *supra* note 34, at 4.

<sup>78</sup> See, e.g., Steve Roberts, *We Need an Intermediate Appellate Court: The State Does Need Better Courts, and Can Afford Them*, CHARLESTON DAILY MAIL, June 14, 2011, available at 2011 WLNR 11864394.

<sup>79</sup> See AM. TORT REFORM FOUND., JUDICIAL HELLHOLES 2012/13, at 11 (2012) [hereinafter JUDICIAL HELLHOLES 2012/13], available at [http://www.judicialhellholes.org/wp-content/uploads/2012/12/ATRA\\_JH12\\_04.pdf](http://www.judicialhellholes.org/wp-content/uploads/2012/12/ATRA_JH12_04.pdf).

<sup>80</sup> See Jernigan & Rice, *supra* note 43; Paul J. Loftus, *Supreme Court of Appeals of West Virginia Issues Revised Rules of Appellate Procedure*, HUDDLESTON BOLEN LLP (May 17, 2010), [http://www.huddlestonbolen.com/pdfs/chantes\\_appellate\\_procedures.pdf](http://www.huddlestonbolen.com/pdfs/chantes_appellate_procedures.pdf); Andrea Lannom, *Appeals Declining in WV but Some Still Want Intermediate Court*, ST. J., Feb. 6, 2012, <http://www.statejournal.com/story/16685335/appeals-declining-but-some-still-want-intermediate-court> (reporting the opinion of a partner at Nelson Mullins Riley & Scarborough).

<sup>81</sup> Mark McGhee, *Calls for Intermediate Appellate Court in West Virginia Fails Leading to Half-Measure*, EXAMINER (June 14, 2010), <http://www.examiner.com/article/calls-for-intermediate-appellate-court-west-virginia-fails-leading-to-half-measure>.

“require a record that is more exacting and more detailed” than before.<sup>82</sup> The appellant must submit a joint appendix containing all relevant and necessary information, transcripts, pleadings, and exhibits.<sup>83</sup> The appendix must contain a table of contents and a signed certification of accuracy and good faith effort.<sup>84</sup> The appellant’s brief must include a proper cover page, table of contents, table of authorities, assignments of error, statement of the case, summary of the arguments, requests regarding oral argument and the type of decision, argument, conclusion, and certificate of service, all in a clear and concise manner with references to the record and citations to legal authority.<sup>85</sup> The appellee can file a brief similar to the appellant’s or a summary brief, but both must be organized and cited appropriately.<sup>86</sup>

The court issued an administrative order on December 10, 2012, that listed several recurrent issues with compliance with the new rules, such as lacking properly structured arguments and citations of authority.<sup>87</sup> The court decreed that “as of January 1, 2013, all of the requirements of the Rules must be strictly observed by litigants.”<sup>88</sup> The court threatened case dismissal and sanctions for failing to meet the revised pleading requirements.<sup>89</sup>

### B. Business Court Division

Along with reform to its own rules, the West Virginia Supreme Court also established a Business Court Committee to explore the possibility of creating a specialized tribunal to handle complicated business cases.<sup>90</sup> In October 2012, the court ratified Trial Court Rule 29, which created a new Business Court Division in West Virginia.<sup>91</sup> The Business Court Division is a

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<sup>82</sup> Asbury, *supra* note 16.

<sup>83</sup> W. VA. R. APP. P. 7.

<sup>84</sup> W. VA. R. APP. P. 7(b)–(c).

<sup>85</sup> W. VA. R. APP. P. 10.

<sup>86</sup> W. VA. R. APP. P. 10(d)–(e).

<sup>87</sup> Administrative Order, Re: Filings That Do Not Comply with the Rules of Appellate Procedure (2012), *available at* <http://www.courtswv.gov/legal-community/court-rules/Orders/2012/AppealsDoNotComplyAdministrativeOrder.pdf>.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> Christopher C. Wilkes, *West Virginia’s New Business Court Division: An Overview of the Development and Operation of Trial Court Rule 29*, W. VA. LAW., Jan.–Mar. 2013, at 40, 40. The West Virginia Independent Commission on Judicial Reform recommended that the court undertake this project. JUDICIAL REFORM REPORT, *supra* note 14, at 44. The commission and its report are discussed *infra* Part II.C.

<sup>91</sup> Order, Re: Approval of Trial Court Rule 29, Relating to the Business Court Division (2012), *available at* <http://www.courtswv.gov/legal-community/court-rules/Orders/2012/9-11-2012TCR-Rule29.pdf>.

“specialized court docket within the circuit courts” aimed at “resolving litigation involving commercial issues and disputes between businesses.”<sup>92</sup> The division is comprised of six experienced circuit court judges who are appointed and approved by the West Virginia Supreme Court.<sup>93</sup>

Any party or the circuit court judge in a complex case between businesses can seek referral to the Business Court Division docket.<sup>94</sup> If approved, one of the specially trained business court judges will facilitate efficient resolution of the matter using mediation, case management, and an approach tailored to the corporate parties.<sup>95</sup>

### C. Possibility of an Intermediate Appellate Court

The West Virginia Supreme Court has made several sweeping changes since 2010: mandatory appellate review, memorandum decisions, stricter pleading requirements, and a new Business Court Division. It did not, however, change its position as the state’s only appellate court. This section explores the idea of establishing an intermediate appellate court in West Virginia.<sup>96</sup>

An IAC is an appellate court situated hierarchically between the trial courts and the court of last resort.<sup>97</sup> West Virginia is one of only 11 states that does not utilize an IAC.<sup>98</sup> Of the 11, West Virginia is the second most populous.<sup>99</sup>

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<sup>92</sup> W. VA. TRIAL CT. R. 29.01.

<sup>93</sup> See Administrative Order, Re: Appointment of Circuit Judges in Accordance with Rule 29.02 of the West Virginia Trial Court Rules Relating to the Business Court Division (2013), available at <http://www.courtswv.gov/lower-courts/business-court-division/pdf/2013/Clawges-Farrell-Appointment.pdf>. The Business Court Division judges are appointed by the chief justice and approved by the other justices. *Id.*

<sup>94</sup> W. VA. TRIAL CT. R. 29.06.

<sup>95</sup> Wilkes, *supra* note 90, at 43. See *id.* for additional information on the procedures of the Business Court Division.

<sup>96</sup> This Note focuses on West Virginia’s state courts. The federal court system, while outside the scope of this Note, also uses intermediate appellate courts: the circuit courts of appeals. *Federal Courts’ Structure*, U.S. COURTS, <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/FederalCourtsStructure.aspx> (last visited Oct. 9, 2014).

<sup>97</sup> See COUNCIL OF CHIEF JUDGES OF THE STATE COURTS OF APPEAL, THE ROLE OF STATE INTERMEDIATE APPELLATE COURTS: PRINCIPLES FOR ADAPTING TO CHANGE 1 (2012) [hereinafter COUNCIL OF CHIEF JUSTICES REPORT], available at [www.sji.gov/PDF/Report\\_5\\_CCJSCA\\_Report.pdf](http://www.sji.gov/PDF/Report_5_CCJSCA_Report.pdf).

<sup>98</sup> The other states with a single appellate court are Delaware, the District of Columbia, Maine, Montana, Nevada, New Hampshire, Rhode Island, South Dakota, Vermont, and Wyoming. *Id.* at 3.

<sup>99</sup> See *Population Estimates*, U.S. CENSUS BUREAU (July 1, 2013), <http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>.

Almost 100 state IACs exist across the country with varying jurisdiction, roles, and size.<sup>100</sup> Some IACs have general jurisdiction, while others have limited subject matter jurisdiction over criminal, tax, or government-related matters.<sup>101</sup> However, they all function to relieve the workload of the state's court of last resort.<sup>102</sup>

Almost all IACs provide the appeal by right for trial court decisions.<sup>103</sup> Most states provide mandatory appellate review with an IAC and discretionary appellate review by the court of last resort.<sup>104</sup> In some states, all appeals are filed with the court of last resort, which decides to either hear the appeal (usually for complex or highly significant cases and issues of first impression) or refer it to the IAC (for less complicated corrections of trial court error).<sup>105</sup>

There are many advocates for establishing an IAC in West Virginia. The campaign was stronger before the switch to mandatory appellate review, but even now the movement persists. According to the State Supreme Court Initiative, “[b]usiness interests are generally in favor of [a] new [intermediate appellate] court.”<sup>106</sup> The West Virginia Chamber of Commerce and the United States Chamber of Commerce both adamantly support the idea.<sup>107</sup> The current Governor of West Virginia, Earl Ray Tomblin, believes an IAC would further the improvements brought about by the appellate reform.<sup>108</sup> Several prominent attorneys have expressed their support for an IAC in West Virginia, including former West Virginia Supreme Court Chief Justice Elliot Maynard, Jeff

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<sup>100</sup> COUNCIL OF CHIEF JUSTICES REPORT, *supra* note 97, at 1.

<sup>101</sup> *Id.* at 4–5.

<sup>102</sup> *Id.* at 1.

<sup>103</sup> *Id.* at 4.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 4–5. This Note proposes the same structure for West Virginia. *See infra* Part III.D.

<sup>106</sup> *West Virginia (Torts) (Court Structure): Intermediate Appellate Courts in West Virginia*, ST. SUP. CT. INITIATIVE (Feb. 22, 2011), <http://statehighcourtsblog.org/2011/02/22/west-virginia-torts-court-structure-intermediate-appellate-courts-in-west-virginia/>.

<sup>107</sup> Roberts, *supra* note 45; W. VA. CHAMBER OF COMMERCE, ESTABLISH AN INTERMEDIATE APPELLATE COURT, *available at* <http://www.wvchamber.com/CWT/External/WCPages/WCWebContent/WebContentPage.aspx?ContentID=1751>; Press Release, U.S. Chamber of Commerce, Revised West Virginia Appellate Rules are a Good Step Forward but Intermediate Court of Appeals Still Needed (Oct. 18, 2010), *available at* <https://www.uschamber.com/press-release/revised-west-virginia-appellate-rules-are-good-step-forward-intermediate-court-appeals>.

<sup>108</sup> Press Release, Office of the Governor Earl Ray Tomblin, Governor Issues a Statement Regarding an Intermediate Court of Appeals (Mar. 9, 2011), *available at* <http://www.governor.wv.gov/media/pressreleases/2011/Pages/GovernorIssuesaStatementRegardinganIntermediateCourtofAppeals.aspx>.

Rogers, the former director of the West Virginia Public Defender Services, and Henry Jernigan, a partner at Dinsmore & Shohl LLP.<sup>109</sup>

In 2009, then Governor Joe Manchin III formed an Independent Commission on Judicial Reform tasked with developing ideas to improve the public perception, efficiency, and integrity of West Virginia's judicial system.<sup>110</sup> The Commission was led by former United States Supreme Court Justice Sandra Day O'Connor and included attorneys from West Virginia law firms and professors from the West Virginia University College of Law.<sup>111</sup> One of the main unanimous recommendations of the committee's Final Report was to establish an intermediate appellate court in West Virginia.<sup>112</sup>

[A]n intermediate court could help the Supreme Court of Appeals in accommodating the vast, and growing, appellate needs of West Virginia. An intermediate court would increase the ability to address potential errors by trial courts, and could also help to develop consistency in the law and provide additional guidance to lower courts and litigants alike.<sup>113</sup>

On the other hand, some legal scholars disagree, including West Virginia Supreme Court Justice Margaret L. Workman. Her article, *Intermediate Appeals Court: We Don't Need It, and We Can't Afford It*, focuses on the additional expense of an IAC.<sup>114</sup> She argues that after the change to mandatory appellate review, an IAC is no longer necessary.<sup>115</sup> Justice Workman opines that the state judiciary should operate "in a frugal, effective manner" instead of "wasting taxpayer funds" on an additional appellate court.<sup>116</sup> A group of local trial lawyers, the West Virginia Association of Justice, consider an IAC to be "a waste of taxpayer money" that would "delay the resolution of lawsuits."<sup>117</sup>

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<sup>109</sup> Elliott E. Maynard, *West Virginia Needs an Intermediate Appellate Court*, W. VA. LAW., July 2000, at 8; Jack Rogers, *W. Va. Needs an Intermediate Court Now*, CHARLESTON DAILY MAIL, Feb. 4, 2011, <http://www.charlestondaily.com/Opinion/Commentary/201102031423>; W. Henry Jernigan, *The Revised Rules of Appellate Procedure and the Substantive Right of Appeal in West Virginia*, DINSMORE (Sept. 20, 2010), [http://www.dinsmore.com/revised\\_rules\\_of\\_appellate\\_procedure/](http://www.dinsmore.com/revised_rules_of_appellate_procedure/).

<sup>110</sup> JUDICIAL REFORM REPORT, *supra* note 14, at 1–2.

<sup>111</sup> *See id.* at ii.

<sup>112</sup> *Id.* at 6, 32.

<sup>113</sup> *Id.* at 32.

<sup>114</sup> Workman, *supra* note 8, at 8.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 10.

<sup>117</sup> Wolfe Law Firm, *Intermediate Appellate Court Could Resolve Cases Sooner*, W. VA. REC., April 5, 2013, <http://wvrecord.com/arguments/259104-their-view-intermediate-appellate-court-could-resolve-cases-sooner>.

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In the legislature, a bill creating an IAC has been proposed in both houses every year for the past five years.<sup>118</sup> In the 2014 session, House Bill 4462 and Senate Bill 215 seek to establish an IAC in West Virginia.<sup>119</sup> House Bill 4462's IAC would provide mandatory appellate review and be regulated by the West Virginia Supreme Court.<sup>120</sup> The bill proposes a rotating panel of three judges, two sitting or retired circuit court judges and one sitting supreme court justice, who would receive "no additional compensation for [their] service."<sup>121</sup> House Bill 4462 has been pending in the judiciary committee since February 11, 2014.<sup>122</sup>

The West Virginia Senate is currently considering the Civil Justice Reform Act of 2014, which would change numerous aspects of the state's judicial system.<sup>123</sup> The extensive proposed reform is based on findings that "West Virginia's civil liability system has regularly ranked as one of the worst in the nation for legal fairness," which "[a]dversely affect[s] the ability of the state to retain jobs and attract new employers" and "[c]ause[s] the withdrawal of products, producers, services, and service providers from the marketplace."<sup>124</sup> Senate Bill 215 would divide the state into northern and southern districts and create two IACs (one for each district) by 2016.<sup>125</sup> The West Virginia Supreme Court would perform an initial review of each appeal, choosing to either grant certiorari and hear the case or transfer it to the appropriate IAC.<sup>126</sup> All published IAC opinions would be binding on the lower courts.<sup>127</sup> Unlike the House, the Senate bill proposes that six IAC judges exclusively serve the intermediate courts and receive a salary of \$118,000 per year.<sup>128</sup> Senate Bill 215 was referred to the judiciary committee on January 8, 2014.<sup>129</sup>

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<sup>118</sup> Except in 2012, when an IAC bill was introduced in the Senate but not the House of Delegates. Bill Raftery, *West Virginia Legislature's Proposed Intermediate Appellate Court Takes Page out of History*, GAVEL TO GAVEL (April 2, 2013), <http://gaveltogavel.us/site/2013/04/02/west-virginia-legislatures-proposed-intermediate-appellate-court-takes-page-out-of-history/>.

<sup>119</sup> H.B. 4462, 81st Leg., Reg. Sess. (W. Va. 2014); S.B. 215, 81st Leg., Reg. Sess. (W. Va. 2014).

<sup>120</sup> H.B. 4462, 81st Leg., Reg. Sess. (W. Va. 2014).

<sup>121</sup> *Id.*

<sup>122</sup> *West Virginia House Bill 4462*, LEGISCAN, <http://legiscan.com/WV/bill/HB4462/2014> (last visited Oct. 9, 2014).

<sup>123</sup> S.B. 215, 81st Leg., Reg. Sess. (W. Va. 2014).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *West Virginia Senate Bill 215*, LEGISCAN, <http://legiscan.com/WV/bill/SB215/2014> (last visited Oct. 9, 2014).

While the legislative branch considers whether to create an IAC in West Virginia, the West Virginia Supreme Court continues to issue hundreds of appellate decisions each year. The most influential business-related decisions from the past several terms are discussed in the following section.

*D. Recent Business-Related Case Law*

As the state's only appellate court, the West Virginia Supreme Court wields significant power in defining West Virginia business law. In the past five years, the court has frequently ruled in favor of business interests in cases involving corporate taxation, civil liability and damages, employment issues, zoning, and consumer protection.

Taxes are a major expense for any for-profit company, which means the West Virginia Supreme Court's tax law decisions significantly affect the state's business climate.<sup>130</sup> Lately, the court has been ruling in favor of the corporate party on tax-related issues.<sup>131</sup> For example, in *Mountain America, LLC v. Huffman*, the court reversed the circuit court's finding of res judicata and allowed the company to challenge its property tax assessments on the same property for three consecutive years.<sup>132</sup> In *Griffith v. ConAgra Brands, Inc.*, the court excluded an out-of-state licensing company from West Virginia corporate net income tax and business franchise tax liability because the company lacked a "significant economic presence" in the state.<sup>133</sup>

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<sup>130</sup> See generally Timothy J. Bartik, *Business Location Decisions in the United States: Estimates of the Effects of Unionization, Taxes, and Other Characteristics of States*, 3 J. OF BUS. & ECON. STAT. 14 (1985).

<sup>131</sup> See, e.g., *Lee Trace LLC v. Raynes*, 751 S.E.2d 703 (W. Va. 2013) (reversing and finding that a company's challenge to its property tax assessment was timely filed and the method used to value the property was improper); *Rebuild Am., Inc. v. Davis*, 726 S.E.2d 396 (W. Va. 2012) (reversing the trial court's decision to set aside a tax deed because the company that purchased the property at a tax lien sale did not receive proper notice); *Feroletto Steel Co. v. Oughton*, 736 S.E.2d 5 (W. Va. 2012) (reversing and reinstating a company's tax exemption); *Fountain Place Cinema 8, LLC v. Morris*, 707 S.E.2d 859 (W. Va. 2011) (upholding a West Virginia Economic Opportunity Tax Credit); *Morris v. Heartwood Forestland Fund Ltd. P'ship*, 718 S.E.2d 492 (W. Va. 2010) (affirming a business franchise tax exemption); *Charleston Area Med. Ctr., Inc. v. State Tax Dep't of W. Va.*, 687 S.E.2d 374 (W. Va. 2009) (reversing in favor of the corporate taxpayer).

<sup>132</sup> 735 S.E.2d 711 (W. Va. 2012).

<sup>133</sup> 728 S.E.2d 74, 80 (W. Va. 2012). Lacking precedential guidance, the West Virginia Supreme Court chose the pro-business option in this important decision that impacts out-of-state companies. *West Virginia High Court Finds No Economic Nexus, and Thus No Tax on Out-Of-State Company Licensing Brand Names*, 2012 J. OF MULTISTATE TAX'N & INCENTIVES 35.



Recent corporate tort law appeals have received similar treatment. West Virginia trial courts have a reputation for awarding excessive and unreasonable damages to individual plaintiffs.<sup>134</sup> However, the West Virginia Supreme Court has been bringing the state's common law on tort damages and liability more in line with national norms.<sup>135</sup> In *Perrine v. E.I. du Pont de Nemours and Co.*, the court limited the availability of punitive damages with the following rules: (1) punitive damages are not permitted in medical monitoring claims; (2) aggravating and mitigating factors must be considered when ensuring the reasonableness of a punitive damages award; and (3) punitive damages awards can be reduced at the discretion of a trial or appellate court even if the award is not unconstitutionally excessive.<sup>136</sup> In *Perrine*, the court in effect reduced the punitive damages award against the corporate defendant by almost \$100 million.<sup>137</sup>

In the area of employment law, the West Virginia Supreme Court has been finding in favor of the employer as opposed to the employee.<sup>138</sup> In *Verizon Services Corp. v. Epling*, the court denied unemployment compensation benefits to a union employee who quit after her employer unilaterally changed her work schedule.<sup>139</sup> In *Wolfe v. Adkins*, the court held that accumulated sick

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<sup>134</sup> See, e.g., JUDICIAL HELLHOLES 2013/2014, *supra* note 4, at 22; JUDICIAL HELLHOLES 2012/13, *supra* note 79, at 11; Schwartz, Joyce & Silverman, *supra* note 6, at 764.

<sup>135</sup> See, e.g., *MacDonald v. City Hosp., Inc.*, 715 S.E.2d 405 (W. Va. 2011) (affirming the constitutionality of a \$500,000 statutory cap on noneconomic damages in medical malpractice cases); *Acord v. Colane Co.*, 719 S.E.2d 761 (W. Va. 2011) (dismissing a medical monitoring claim because of lack of evidence on breach). *But see* cases cited *infra* note 138; *Hersh v. E-T Enters., Ltd. P'ship*, 752 S.E.2d 336 (W. Va. 2013) (overruling the "open and obvious" doctrine, which limited negligent premises liability).

<sup>136</sup> 694 S.E.2d 815, 827 (W. Va. 2010).

<sup>137</sup> *Id.* at 894. The West Virginia Supreme Court reversed the trial court's punitive damages award of \$196 million and offered the defendant two options: a remittitur of \$20 million, which would bring the punitive damages award to \$97.7 million, or a new trial on punitive damages. *Id.*

<sup>138</sup> See, e.g., *Morton v. W. Va. Office of Ins. Comm'r*, 749 S.E.2d 612 (W. Va. 2013) (denying a worker's compensation claim because the injury occurred during a non-work-related task); *Swears v. R.M. Roach & Sons, Inc.*, 696 S.E.2d 1 (W. Va. 2010) (finding no exception to the assumption of at-will employment and disposing of a wrongful termination claim when the former employee was allegedly fired for reporting potentially criminal fiscal misconduct to upper management); *Young v. Bellofram Corp.*, 705 S.E.2d 560 (W. Va. 2010) (reversing an age and gender discrimination award because the trial court misapplied the but-for test); *Timberline Four Seasons Resort Mgmt. Co. v. Herlan*, 679 S.E.2d 329 (W. Va. 2009) (finding in favor of the employer in an agency relationship issue). *But see* *Burke-Parsons-Bowlby Corp. v. Rice*, 736 S.E.2d 338 (W. Va. 2012) (affirming a \$2 million judgment in an age discrimination case); *Peters v. Rivers Edge Mining, Inc.*, 680 S.E.2d 791 (W. Va. 2009) (allowing unmitigated front pay damages and punitive damages if the employer acts with malice).

<sup>139</sup> 739 S.E.2d 290 (W. Va. 2013).

leave is not a vested benefit under the Wage Payment and Collection Act, so it is not payable to employees as wages upon their termination.<sup>140</sup>

In addition to tax, tort, and employment law, the court has also recently issued several pro-business decisions in the areas of zoning<sup>141</sup> and consumer protection.<sup>142</sup> An analysis of the court's business-related opinions in the past five years as a whole—and the likely impact thereof—begins the next section.

### III. ANALYSIS—BETTER, AND EVEN BETTER

The West Virginia Supreme Court made several important changes in the past five years that have significantly improved the state's jurisprudence and legal climate, especially for corporate interests. These developments are counteracting West Virginia's "bad for business" reputation and bringing more commerce, capital, and justice to the Mountain State. This section analyzes these changes and their positive and negative effects. First, a study of the latest business law decisions shows an emergence of business-friendly case law. Second, reform to the state's judicial structure, including the addition of the Business Court Division, mandatory appellate review, and memorandum decisions, has advanced the administration of justice in West Virginia. Finally, this Note recommends the creation of an intermediate appellate court as a way to bring additional positive change to West Virginia's reputation, business environment, and entire judicial system.

#### A. *Pro-Business Trend in Case Law*

The first way the West Virginia Supreme Court has made West Virginia better for business is through recent case law. Since the late 2000s, a majority of the influential business-related appellate decisions have favored corporate interests over individual employees and consumers. Far from showing inappropriate bias for business litigants, this trend has realigned the state's common law jurisprudence toward greater equality between the two

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<sup>140</sup> 725 S.E.2d 200 (W. Va. 2011).

<sup>141</sup> See, e.g., *Far Away Farm, LLC v. Jefferson Cnty. Bd. of Zoning Appeals*, 664 S.E.2d 137 (W. Va. 2008) (approving the company's request for a conditional use permit to develop a subdivision); *T. Weston, Inc. v. Mineral Cnty.*, 638 S.E.2d 167 (W. Va. 2006) (holding that the county government cannot adopt an ordinance limiting where an exotic entertainment business can be located).

<sup>142</sup> See, e.g., *Tribeca Lending Corp. v. McCormick*, 745 S.E.2d 493 (W. Va. 2013) (applying the same statute of limitations to an individual's counterclaims against a mortgage lender in a foreclosure action); *White v. Wyeth*, 705 S.E.2d 828 (W. Va. 2010) (requiring proof of actual reliance on a drug company's misrepresentation in order to recover under a consumer fraud claim). But see *Vanderbilt Mortg. & Fin., Inc. v. Cole*, 740 S.E.2d 562 (W. Va. 2013) (allowing an award of civil penalties and attorneys' fees without proof of actual damages against a creditor who had violated the Consumer Credit and Protection Act).

groups.<sup>143</sup> This section explains the reasoning behind identification of a pro-business case law trend and why this development is so important and helpful. The following analysis includes the areas of tax, tort liability, damages, employment law, consumer protection, and zoning.

State taxes are a huge consideration when a company decides where to operate and, more importantly, in which state to base its operations.<sup>144</sup> The courts issue binding interpretations of the application, exceptions, and intricacies of the tax code.<sup>145</sup> In recent years, the West Virginia Supreme Court has routinely adjudicated various tax issues to the benefit of businesses. For example, in *Mountain America*, the court reversed the trial court's finding of res judicata and allowed the company's two property tax assessment challenges to proceed.<sup>146</sup> A similar decision was reached in *Lee Trace LLC v. Raynes*, where a real estate development company was allowed to challenge its property tax assessment after the trial court deemed the challenge untimely.<sup>147</sup> Allowing tax challenges gives businesses confidence that thorough due process and appellate review will accompany the imposition of state tax liability.

The court also found for the following corporate taxpayers: Ferroto Steel Company was granted a property tax exemption because it did not "transform" its product;<sup>148</sup> Charleston Area Medical Center was not required to include health services it provided to its own employees in the calculation of taxable gross receipts;<sup>149</sup> Fountain Place Cinema was granted a West Virginia Economic Opportunity Tax Credit for operation of a movie theater;<sup>150</sup> and Heartwood Forestland Fund was permitted to claim an agriculture and farming exception to the business franchise tax for managing woodland property.<sup>151</sup>

These decisions show the West Virginia Supreme Court is reasonably balancing the state's interests in collecting revenue with businesses' interests in saving money through various tax incentives. The legislature drafted certain exemptions and credits into the tax code with the express purpose of encouraging business activity and investment in the state.<sup>152</sup> The above

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<sup>143</sup> Perceived judicial bias *against* business interests is one of the main reasons behind West Virginia's "bad for business" reputation. See *supra* notes 1–6 and accompanying text.

<sup>144</sup> See Bartik, *supra* note 130 (concluding that high state taxes discourage new business activity in a state).

<sup>145</sup> See John F. Coverdale, *Text as Limit: A Plea for a Decent Respect for the Tax Code*, 71 TUL. L. REV. 1501, 1516–18 (1997).

<sup>146</sup> *Mountain Am., LLC v. Huffman*, 735 S.E.2d 711 (W. Va. 2012).

<sup>147</sup> 751 S.E.2d 703 (W. Va. 2013).

<sup>148</sup> *Ferroto Steel Co. v. Oughton*, 736 S.E.2d 5 (W. Va. 2012).

<sup>149</sup> *Charleston Area Med. Ctr., Inc. v. State Tax Dep't of W. Va.*, 687 S.E.2d 374 (W. Va. 2009).

<sup>150</sup> *Fountain Place Cinema 8, LLC v. Morris*, 707 S.E.2d 859 (W. Va. 2011).

<sup>151</sup> *Morris v. Heartwood Forestland Fund Ltd. P'ship*, 718 S.E.2d 492 (W. Va. 2010).

<sup>152</sup> See, e.g., W. VA. CODE § 11-13Q-2 (2013).

appellate decisions further this policy and purpose—to make West Virginia more attractive to business—by allowing a broad application of these incentives.

*Griffith v. ConAgra Brands, Inc.*'s 2012 holding was extremely important and beneficial to out-of-state corporate taxpayers. ConAgra Brands is an out-of-state licensing company that was subjected to corporate net income and business franchise tax assessments for selling trademark licenses to companies that operate in West Virginia.<sup>153</sup> In determining the constitutionality of the assessment,<sup>154</sup> the West Virginia Supreme Court focused on the company's economic as opposed to its physical presence in the state.<sup>155</sup> The court chose the heightened requirement of "significant economic presence" for corporate income and franchise tax liability.<sup>156</sup> The *ConAgra* decision is especially indicative of the court's emerging respect for out-of-state business rights because of the "absence of U.S. Supreme Court guidance on the subject."<sup>157</sup> Out-of-state businesses lacking a physical presence (having no facilities, inventory, or employees) in West Virginia now know they will not be assessed state corporate income and business franchise taxes unless the company "direct[s] or dictate[s]" the sale of its products in the state.<sup>158</sup> Limiting the imposition of these taxes encourages out-of-state companies to partner with and sell to local businesses.<sup>159</sup> More foreign companies willing to work with West Virginia retailers means more competition within the state,

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<sup>153</sup> *Griffith v. ConAgra Brands, Inc.*, 728 S.E.2d 74 (W. Va. 2012).

<sup>154</sup> The United States Supreme Court established a four element test to determine if state taxation of interstate business activity violates the Commerce Clause: (1) the out-of-state business must have a "substantial nexus" with the taxing state, (2) the tax must be "fairly apportioned," (3) the tax cannot discriminate against out-of-state companies, and (4) the tax must be "fairly related to the services provided by the [s]tate." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). The West Virginia Supreme Court also found inadequate due process using the minimum contacts test established in *Asahi Metal Indust. Co. v. Superior Court*, 480 U.S. 102 (1987). *Griffith*, 728 S.E.2d at 84.

<sup>155</sup> *West Virginia High Court Finds No Economic Nexus, and Thus No Tax on Out-Of-State Company Licensing Brand Names*, 2012 J. OF MULTISTATE TAX'N & INCENTIVES 35.

<sup>156</sup> Syl. Pt. 3, *Griffith*, 728 S.E.2d at 75.

<sup>157</sup> *West Virginia High Court Finds No Economic Nexus, and Thus No Tax on Out-Of-State Company Licensing Brand Names*, 2012 J. OF MULTISTATE TAX'N & INCENTIVES 35 (referring in part to the plurality opinion in *Asahi*).

<sup>158</sup> *Griffith*, 728 S.E.2d at 84.

<sup>159</sup> For example, ConAgra Brands is a large wholly-owned subsidiary of ConAgra Foods, Inc., which owns several popular food brands including Butterball, Healthy Choice, and Kid Cuisine. *Id.* at 76. The companies who license from ConAgra to manufacture and sell the products directly to consumers in West Virginia sold "between \$19 million and \$46 million" of ConAgra brand products in three years. *Id.* at 80.

which means additional options and lower prices for consumers.<sup>160</sup> Everyone wins.

This trend of business-friendly tax law decisions—permitting judicial review, granting exemptions and credits, and requiring considerable in-state activity for corporate income tax liability—encourages companies to operate in West Virginia. Local and out-of-state businesses can be assured that state taxes will be imposed with fairness and interpreted to appropriately benefit business interests. Because state taxes are such an important factor for strategic business decisions,<sup>161</sup> this case law trend will likely have a significant impact on improving the state’s reputation and economy.<sup>162</sup>

Recent decisions in other business law areas also support the argument that the court is making West Virginia’s jurisprudence better for business. Unjustly excessive tort liability and damages awards is a main reason behind the United States Chamber of Commerce and American Tort Reform Foundation’s accusations that West Virginia is unfair to businesses.<sup>163</sup> However, West Virginia’s reputation is improving—due in large part to the court’s recent tort liability decisions.<sup>164</sup> For example, *Perrine* significantly limited the risk of punitive damages.<sup>165</sup> Punitive damages are a corporate defendant’s worst nightmare, but the three constraints announced in *Perrine*<sup>166</sup> will certainly calm the nerves of companies facing tort litigation in West Virginia.<sup>167</sup>

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<sup>160</sup> *FTC Fact Sheet: Why Competition Matters*, FED. TRADE COMM’N, [http://www.consumer.ftc.gov/sites/default/files/games/off-site/youarehere/pages/pdf/FTC-Competition\\_Why-Comp-Matters.pdf](http://www.consumer.ftc.gov/sites/default/files/games/off-site/youarehere/pages/pdf/FTC-Competition_Why-Comp-Matters.pdf) (last visited Sep. 7, 2014).

<sup>161</sup> Bartik, *supra* note 130, at 19–20.

<sup>162</sup> See *infra* notes 183–85 and accompanying text.

<sup>163</sup> U.S. CHAMBER REPORT, *supra* note 5, at 13; JUDICIAL HELLHOLES 2013/2014, *supra* note 4, at 19; Schwartz, Joyce & Silverman, *supra* note 6, at 764.

<sup>164</sup> West Virginia went from the second worst “judicial hellhole” in 2012 to the fourth worst in 2013. JUDICIAL HELLHOLES 2012/13, *supra* note 79, at 3; JUDICIAL HELLHOLES 2013/2014, *supra* note 4, at 3–4. In 2014, the court reduced a widely criticized verdict against a nursing home from \$90 million to \$37 million, prompting a commentator to ask, “Has the state [of West Virginia] gone from a full[-blown] hellhole to about half [a judicial hellhole]?” Dmedit, *Our Views Is West Virginia Now Just Half a Judicial Hellhole? Questionable Conclusions Remain in Reduced Nursing Home Verdict*, CHARLESTON DAILY MAIL, June 20, 2014, available at 2014 WLNR 17017910.

<sup>165</sup> *Perrine v. E.I. du Pont de Nemours & Co.*, 694 S.E.2d 815 (W. Va. 2010).

<sup>166</sup> The West Virginia Supreme Court reduced the trial court’s judgment by nearly \$100 million and established common law rules outlawing punitive damages in certain cases, requiring the consideration of multiple mitigating factors, and allowing judicial reduction of any punitive damage award. *Id.* at 827; see *supra* notes 136–37 and accompanying text.

<sup>167</sup> See Larry Bumgardner, *Slowing Runaway Juries*, 7 GRAZIADIO BUS. REV. 1, 1 (2004) (“Businesses facing lawsuits often fear the prospect of a ‘runaway’ jury ordering them to pay millions or even billions of dollars in punitive damages. A recent Supreme Court decision should provide corporate defendants some hope for relief.”).

Other cases evidencing a trend benefiting corporate defendants include *MacDonald v. City Hospital, Inc.*, where the court affirmed the constitutionality of a statutory cap on medical malpractice damages,<sup>168</sup> and *Acord v. Colane Co.*, where the court dismissed a class action alleging negligent management of hazardous waste.<sup>169</sup> These decisions counteract West Virginia's reputation as an injured plaintiff haven, and in doing so, make businesses more confident they can fairly defend themselves against civil lawsuits. Companies are now more willing to accept the risk of personal jurisdiction and conduct business operations in West Virginia.

In employment law appeals, the court has been finding for corporate employers as opposed to their former employees. In *Timberline*, the court found an agency relationship between an employer and the employee's separate but related company.<sup>170</sup> In *Verizon*, the court held that an employer could reasonably change a union employee's work schedule without being liable for unemployment compensation benefits when she subsequently quit.<sup>171</sup> The court has also recently held that accumulated sick leave is not payable to employees once they resign;<sup>172</sup> employment discrimination liability requires adequate proof the employee would not have been terminated but for her protected status;<sup>173</sup> an employee must have been injured performing a work-related task to qualify for worker's compensation benefits;<sup>174</sup> and revocation of the assumption of at-will employment is appropriate only when an employer's actions are against a conservative interpretation of "substantial public policy."<sup>175</sup> These decisions, most of them reversing the lower court, all found in favor of the corporate employer and further evidence a pro-business trend.

Additional confirmation is found in consumer protection and zoning decisions. When interpreting the West Virginia Consumer Credit and Protection Act, the court barred a mortgagor's counterclaim because the statute of limitations began tolling once the plaintiff's loan was accelerated,<sup>176</sup> denied a claim for fraudulent misrepresentation because the plaintiff lacked affirmative

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<sup>168</sup> 715 S.E.2d 405 (W. Va. 2011) (\$500,000).

<sup>169</sup> 719 S.E.2d 761 (W. Va. 2011).

<sup>170</sup> The agency relationship created a duty of loyalty and good faith, which the former employee breached when she took the employer's business records. The West Virginia Supreme Court reversed the trial court and ordered the defendant to return the records. *Timberline Four Seasons Resort Mgmt. Co. v. Herlan*, 679 S.E.2d 329 (W. Va. 2009).

<sup>171</sup> *Verizon Servs. Corp. v. Epling*, 739 S.E.2d 290 (W. Va. 2013).

<sup>172</sup> *Wolfe v. Adkins*, 725 S.E.2d 200 (W. Va. 2011).

<sup>173</sup> *Young v. Bellofram Corp.*, 705 S.E.2d 560 (W. Va. 2010).

<sup>174</sup> *Morton v. W. Va. Office of Ins. Comm'r*, 749 S.E.2d 612 (W. Va. 2013).

<sup>175</sup> *Swears v. R.M. Roach & Sons, Inc.*, 696 S.E.2d 1 (W. Va. 2010).

<sup>176</sup> *Tribeca Lending Corp. v. McCormick*, 745 S.E.2d 493 (W. Va. 2013).

proof of actual reliance,<sup>177</sup> and found that the Act does not cover prescription drug purchases.<sup>178</sup> Regarding zoning, the court reversed an order blocking development of a new subdivision<sup>179</sup> and found that a municipal government does not have authority to dictate where a certain type of business can be located.<sup>180</sup> All these decisions make West Virginia's jurisprudence more fair and friendly to businesses.

West Virginia's business-related common law jurisprudence has made a significant shift in direction in the past five years.<sup>181</sup> The state judiciary's reputation for being hostile toward corporate interests came to a climax in 2008, when the West Virginia Supreme Court refused to hear the appeals of \$260 million and \$400 million judgments against two giant energy companies.<sup>182</sup> Some argue this caused one of the shunned appellants, Chesapeake Energy Corporation, to withdraw its plan to build a \$35 million headquarters in Charleston—a devastating blow to West Virginia's future economy.<sup>183</sup> Since then, the court's decisions in the areas of taxation, tort liability and damages, employment, zoning, and consumer protection have consistently favored corporate litigants. The court increased judicial review of tax assessments and punitive damages awards, permitted statutory damages caps, raised the burdens to establish liability for various torts, and denied questionable claims for employment discrimination and consumer fraud. As a

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<sup>177</sup> White v. Wyeth, 705 S.E.2d 828 (W. Va. 2010).

<sup>178</sup> *Id.*

<sup>179</sup> Far Away Farm, LLC v. Jefferson Cnty. Bd. of Zoning Appeals, 664 S.E.2d 137 (W. Va. 2008).

<sup>180</sup> T. Weston, Inc. v. Mineral Cnty., 638 S.E.2d 167 (W. Va. 2006).

<sup>181</sup> Before 2009, the court had not been friendly toward businesses. Kristen M. Leddy, Russell S. Sobel & Matthew T. Yanni, *Should We Keep This Court? An Economic Examination of Recent Decisions by the West Virginia Supreme Court of Appeals*, in *THE RULE OF LAW* 91, 93 (Russell S. Sobel ed., 2009) (examining West Virginia Supreme Court business law decisions from 2006 to 2008). “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.” *Id.*

<sup>182</sup> Messina, *supra* note 11. (“The state Supreme Court has supplied ammo to the ongoing battle over West Virginia's business climate and judicial system by refusing last month to accept appeals of a pair of civil verdicts together worth more than \$664 million.”); *see also* Schwartz, Joyce & Silverman, *supra* note 6, at 761–62.

<sup>183</sup> Messina, *supra* note 11. The Charleston Government Examiner reported that

Chesapeake Energy announced in 2009 that it would cancel its plans to build a \$35 million regional headquarters in Charleston allegedly as a direct result of the [West Virginia] Supreme Court's refusal to accept Chesapeake's appeal of a \$404 [m]illion verdict . . . [which included] \$220 [m]illion in punitive damages. Months after announcing that it would not build the Charleston Regional Headquarter, Chesapeake [laid] off 215 of its 255 employees in Charleston, again blaming the Supreme Court's refusal to hear its appeal of the verdict.

McGhee, *supra* note 81.

result, the law that impacts businesses is now more equitable, predictable, and amicable to their interests.

This pro-business trend in case law has made a dramatic positive impact on West Virginia's business climate and economic development.<sup>184</sup> "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" there.<sup>185</sup> Business-friendly jurisprudence allows companies to spend more resources on investment, jobs, and research and development, and less on litigation costs.<sup>186</sup>

The judicial branch has the power to redistribute resources within society.<sup>187</sup> The courts can "promote or subsidize industrial growth and development, and hence advance the interests of certain classes [businesses, consumers, et cetera] at the expense of others."<sup>188</sup> Through specific decisions and broad policy choices, the West Virginia Supreme Court has the ability to significantly affect whether wealth remains with corporate interests or is transferred to individual plaintiffs.<sup>189</sup> The court's decisions in the past five years show a determinative agenda to only redistribute corporate wealth in truly deserving situations. This approach rectifies the "bad for business" reputation published by various entities, and increases West Virginia's appeal as a place for companies to operate. Recent case law is one way the judiciary is making West Virginia better for business.

#### B. Business Court Division

The new Business Court Division is another way the court has improved the state's judicial environment for businesses. Created in 2012, the Business Court Division is designed to resolve the state's "complex commercial litigation cases between businesses."<sup>190</sup> The new division imitates the specialized commercial litigation courts in highly business-friendly jurisdictions like Delaware.<sup>191</sup> West Virginia's program utilizes experienced

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<sup>184</sup> Leddy et al., *supra* note 181, at 91 ("[A] state's judicial system is [] an important element in determining the relative attractiveness of a state to business development.").

<sup>185</sup> *Id.*

<sup>186</sup> *See id.* at 93.

<sup>187</sup> Richard A. Epstein, *The Social Consequences of Common Law Rules*, 95 HARV. L. REV. 1717, 1717 (1982).

<sup>188</sup> *Id.*

<sup>189</sup> *See id.* at 1718.

<sup>190</sup> Wilkes, *supra* note 90, at 41.

<sup>191</sup> *Id.* at 40–41.



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circuit court judges that receive additional and ongoing training in business law issues and alternative resolution techniques, such as judicially-led mediation.<sup>192</sup>

This development will result in more efficient, expeditious, and effective resolution of complex commercial cases.<sup>193</sup> In the words of Judge Christopher Wilkes, chairman of the Business Court Division,

Like most in the business and legal communities, the Business Court Judges believe this development will prove to be a positive change for West Virginia in a variety of ways—much like it has been in other states that have instituted a business court. Business litigants should be excited that West Virginia will be providing businesses an opportunity to have a specially trained judge resolve complex business issues. With the Business Court Division, West Virginia is now becoming one of the best legal environments for businesses in the country.<sup>194</sup>

Surely an exalted statement, but one that clearly shows the judiciary's affirmative efforts to make the state more attractive to business.

The new Business Court Division will benefit companies litigating in West Virginia in several ways. Corporate parties will enjoy a more effective and efficient resolution in the business court when compared to a general jurisdiction circuit court. The specialized docket employs experienced judges with continuous additional training in business law issues and developments.<sup>195</sup> West Virginia Supreme Court Justice Menis Ketchum believes the highly competent business court judges will issue better decisions that are less likely to be appealed.<sup>196</sup> Also, the emphasis on alternative dispute resolution will encourage quicker and less costly resolution than full litigation.<sup>197</sup> Using thorough case management, the division's goal is to resolve each case within ten months—extraordinarily fast for the complicated commercial cases the division handles.<sup>198</sup> The new Business Court Division is a significant improvement to how cases between companies are handled and decided in West Virginia.

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<sup>192</sup> *Id.* at 42 (“The judges have undertaken and will continue to undertake special training in areas such as the administration and governance of business entities, complex discovery of electronically stored information, mediation of commercial disputes, as well as other issues unique to litigation between businesses.”).

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 43.

<sup>195</sup> *Id.* at 42.

<sup>196</sup> Lannom, *supra* note 80.

<sup>197</sup> Wilkes, *supra* note 90, at 42.

<sup>198</sup> *Id.* at 43.

The division is supervised by the West Virginia Supreme Court, which chooses the business court judges and hears any appeal of their decisions.<sup>199</sup> Appeals will be rare due to the division's use of specialized judicial training and emphasis on alternative dispute resolution.<sup>200</sup> Still, the supreme court should proactively and thoroughly review any business court appeal. Doing so will lead to better development of business-related jurisprudence, which means less risk and uncertainty, and a better business climate.<sup>201</sup> Creating an IAC would allow the court to dedicate more time to resolving the complex and influential appeals arising from the Business Court Division. In the next section, the need and benefits of an IAC follow an examination of the procedural changes the court has already made.

### C. Appellate Reform

The 2010 reform to the West Virginia Supreme Court's Rules of Appellate Procedure significantly improved the state's overall legal environment, especially for businesses. The details and impact of the three major aspects of the reform are analyzed below. First, heightened pleading requirements for all litigants before the appellate court allows both the justices and opposing parties to better understand the evidence, reasoning, and legal authority behind the arguments at issue. Second, the switch from discretionary to mandatory appellate review is a tremendous enhancement to the availability of justice and confidence in the state's legal system. Third, the introduction of memorandum decisions minimizes the supreme court's workload, but has several drawbacks to the development of the state's jurisprudence. Each change, and the effects thereof, is discussed next.

#### 1. Stricter Requirements—Helpful Start

The more demanding pleading requirements for appellate cases will benefit the West Virginia Supreme Court justices and any appellate parties, particularly corporate defendants. The new rules "require a record that is more exacting and more detailed" than the appendix and briefs permitted before.<sup>202</sup> Failure to meet the heightened requirements can result in sanctions or dismissal of the appeal.<sup>203</sup>

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<sup>199</sup> W. VA. TRIAL CT. R. 29.02.

<sup>200</sup> See *supra* notes 195–96.

<sup>201</sup> See discussion *infra* Part III.D.2.

<sup>202</sup> See *supra* Part II.A.4 (quoting Asbury, *supra* note 16).

<sup>203</sup> Administrative Order, Re: Filings That Do Not Comply with the Rules of Appellate Procedure (2012), available at <http://www.courts.wv.gov/legal-community/court-rules/Orders/2012/AppealsDoNotComplyAdministrativeOrder.pdf>.

This change benefits business litigants in several ways. Businesses are less likely to be forced to spend resources defending themselves against frivolous appeals by appellants who cannot meet the new requirements. The rules may dissuade a pro se plaintiff from appealing a meritless claim that was easily dismissed by the trial court. In addition, the court is now stricter about requiring timely submitted briefs that contain “concise, accurate, and clear” arguments with “appropriate and specific references” and citations.<sup>204</sup> As a result, corporate parties will gain a more clear and thorough understanding of the opposing party’s legal arguments and supporting evidence and authority. This encourages settlement and more efficient resolution of cases.

The new pleading requirements will also result in better review by the court.<sup>205</sup> The added summaries, references to the record, and citations to legal authority will benefit the justices in making prompt and fully informed decisions. The rules also allow the court to request additional information or authority on a particular issue.<sup>206</sup> In addition, because “[o]nly material relevant and necessary for the [c]ourt to decide a case should be part of the appellate record,” the court will spend less time shifting through superfluous material and unsupported arguments.<sup>207</sup> This produces quicker dispositions and also leaves more time for analysis of the legal questions and policy implications. The result—higher quality appellate decisions—benefits not just the litigants, but also the comprehensive development of common law jurisprudence.

## 2. Mandatory Appellate Review—Tremendous Improvement

The West Virginia Supreme Court’s switch from discretionary appellate review to mandatory appellate review was an incredibly influential and beneficial transformation. The instatement of an appeal by right in West Virginia has and will continue to tremendously improve the state’s reputation, appeal to businesses, and overall judicial climate.

As mentioned before, lack of mandatory appellate review was one of the biggest reasons West Virginia is consistently branded a “judicial hellhole.”<sup>208</sup> Trial courts in West Virginia have a reputation for “excessive damage awards” and acting “unjust and biased” against businesses, especially large out-of-state corporations.<sup>209</sup> This reputation—regardless of whether it is

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<sup>204</sup> W. VA. R. APP. P. 10(b)–(c).

<sup>205</sup> W. VA. R. APP. P. 7 cmt. (“By providing specific guidance to counsel, . . . [the new rules] will improve the quality of the appellate review process.”).

<sup>206</sup> W. VA. R. APP. P. 10(h).

<sup>207</sup> Asbury, *supra* note 16.

<sup>208</sup> See, e.g., JUDICIAL HELLHOLES 2012/13, *supra* note 79, at 10–11.

<sup>209</sup> *Id.* at 11; see also Schwartz, Joyce & Silverman, *supra* note 6, at 760–66 (“The lack of appellate review is particularly concerning to out-of-state businesses that are hauled into West

based in truth, inaccuracy, or resentment<sup>210</sup>—is undoubtedly harmful to the state's economy. Chesapeake Energy's abandonment of a planned \$35 million investment in Charleston mere months after being denied certiorari by the West Virginia Supreme Court is evidence enough.<sup>211</sup>

Due to enormous workloads and lack of specific expertise, general jurisdiction circuit courts understandably err;<sup>212</sup> some opine they exhibit "inevitable substantial error."<sup>213</sup> Although the right to an appeal is not guaranteed by the United States Constitution<sup>214</sup> nor the West Virginia Constitution,<sup>215</sup> sufficient appellate review has for centuries been one of the most important and fundamental principles of due process.<sup>216</sup> The denial of appellate review for countless litigants was terrible for businesses and justice.<sup>217</sup>

Thankfully, things have changed. After the 2010 reform, West Virginia is no longer the only jurisdiction in the United States that does not have mandatory appellate review of trial court decisions.<sup>218</sup> This important improvement has been publically applauded by the United States Chamber of Commerce,<sup>219</sup> the West Virginia State Bar Association,<sup>220</sup> and numerous legal scholars.<sup>221</sup>

The change is a welcome relief for businesses operating in West Virginia. Especially with the court's recent pro-business decisions—many of

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Virginia courts because they are placed at a distinct disadvantage against a hometown plaintiff and his or her local attorney."); U.S. CHAMBER REPORT, *supra* note 5, at 13.

<sup>210</sup> See *supra* note 6 and accompanying text.

<sup>211</sup> Rogers, *supra* note 109 ("Because it was denied the right to appeal a major verdict against it, Chesapeake Energy abandoned plans to establish a multimillion-dollar headquarters in West Virginia, a loss of jobs and investment that would have paid many millions in future benefits.").

<sup>212</sup> Matthew R. Bowles & Mark A. Sadd, *Appealing Changes: A Case for Expanding Appellate Review in West Virginia's Judiciary*, in *THE RULE OF LAW*, *supra* note 181, at 123, 125–26.

<sup>213</sup> W. VA. CHAMBER OF COMMERCE, *supra* note 107.

<sup>214</sup> *McKane v. Durston*, 153 U.S. 684, 687 (1894).

<sup>215</sup> Schwartz, Joyce & Silverman, *supra* note 6, at 760. The West Virginia Supreme Court, the state's only appellate court, used a certiorari process to deny the majority of the appeals requested in the state until late 2010. See *supra* notes 38–40 and accompanying text.

<sup>216</sup> See Alex S. Ellerson, *The Right to Appeal and Appellate Procedural Reform*, 91 COLUM. L. REV. 373, 373, 386 (1991).

<sup>217</sup> The West Virginia Supreme Court was granting less than one-third of petitions for certiorari. See, e.g., SUPREME COURT OF APPEALS OF W. VA., 2010 STATISTICAL REPORT tbl.2 (2011), available at <http://www.courtswv.gov/supreme-court/clerk/statistics/2010StatRept.pdf>; see also Schwartz, Joyce & Silverman, *supra* note 6, at 761.

<sup>218</sup> Schwartz, Joyce & Silverman, *supra* note 6, at 761.

<sup>219</sup> Press Release, U.S. Chamber of Commerce, *supra* note 107.

<sup>220</sup> See Asbury, *supra* note 16.

<sup>221</sup> See, e.g., Workman, *supra* note 8, at 8.

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which overruled potentially biased circuit courts<sup>222</sup>—companies are reassured that they now have the absolute right to appeal trial court judgments.<sup>223</sup> According to a local newspaper, leaders in the business community report that the new appeal by right gives businesses more confidence they will receive fairness and justice from the state court system.<sup>224</sup>

The new appeal by right will also result in more thoroughly developed West Virginia common law—an outcome that benefits every type of potential litigant. Since the court can no longer deny appeals, it will issue more appellate decisions. In fact, the court issued four times more decisions in the past two years when compared to years before the reform.<sup>225</sup> More appellate decisions means more binding case law, including interpretations of statutes and regulations, clarifications and modernizations of common law doctrines, and articulations of public policy.<sup>226</sup> More binding case law means more thoroughly developed West Virginia jurisprudence; the law is more defined, explained, and updated.

Highly developed state law jurisprudence attracts and benefits businesses for several reasons. First, fewer unanswered questions of law results in less ambiguity over what the law is, and how judges will analyze and enforce it. Less uncertainty equals less risk and fear of the unknown, so businesses can be more confident about the legality and possible consequences of different actions when making strategic decisions.<sup>227</sup> There will also be less litigation—and therefore less resources wasted and relationships strained—because parties are more likely to settle when they can fully understand the likely outcome of their legal issue. Finally, the appeal by right and more developed jurisprudence creates “increase[ed] public confidence in the administration of justice in West Virginia.”<sup>228</sup>

The only downside to the switch to mandatory appellate review is the drastic increase in the West Virginia Supreme Court’s workload. Before the reform, the court received a similar number of filings but usually denied the petition for certiorari.<sup>229</sup> In 2009, the year before the reform, the court issued only 67 written opinions.<sup>230</sup> The new appeal by right caused a more than 300%

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<sup>222</sup> See sources cited *infra* note 287; see *supra* Parts II.D, III.A.

<sup>223</sup> See Porterfield, *supra* note 46.

<sup>224</sup> *Id.*

<sup>225</sup> Workman, *supra* note 8, at 8. The figure used for post-reform years includes written opinions and memorandum decisions. *Id.*

<sup>226</sup> Ellerson, *supra* note 216, at 386.

<sup>227</sup> See Jernigan & Rice, *supra* note 43.

<sup>228</sup> W. VA. CHAMBER OF COMMERCE, *supra* note 107.

<sup>229</sup> SUPREME COURT OF APPEALS OF W. VA., 2009 STATISTICAL REPORT 4, tbl.2 (2010), available at <http://www.courtswv.gov/supreme-court/clerk/statistics/2009StatRept.pdf>.

<sup>230</sup> *Id.*

increase in the court's workload the first year.<sup>231</sup> Since then, the numbers continue to rise. In 2011, the court issued 678 appellate decisions; in 2013, the decisions numbered 1,360.<sup>232</sup> The 100% increase from 2011 to 2013 indicates that the workload will likely continue to increase steadily.<sup>233</sup> The West Virginia Supreme Court is already the busiest state court of last resort in the nation.<sup>234</sup> The court is successfully managing its current caseload,<sup>235</sup> but future increases may hinder its ability to issue timely and thorough dispositions.<sup>236</sup> The court's main strategy to avoid becoming overwhelmed by the increase in cases is the new memorandum decision.

### 3. Memorandum Decisions—Inadequate Accommodation

To compensate for the increased workload caused by the switch to mandatory appellate review, the West Virginia Supreme Court developed a faster and easier way to resolve appeals: the memorandum decision.<sup>237</sup> Memorandum decisions are “abbreviated” decisions that very briefly state why the court is affirming, or in limited circumstances reversing, the trial court, and why a full written opinion was not given.<sup>238</sup> The court reaches a ruling much more quickly and with far less analysis when using a memorandum decision as opposed to a full opinion.<sup>239</sup> While memorandum decisions can be cited in legal argument, they are “non-precedential”<sup>240</sup> and must be “clearly denote[d]” as such.<sup>241</sup> Further, memorandum decisions are prohibited by the West Virginia Constitution because they are not published and do not contain syllabus points.<sup>242</sup>

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<sup>231</sup> 2013 SUPREME COURT REPORT, *supra* note 34, at 4.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Supreme Court of Appeals, supra* note 19.

<sup>235</sup> 2013 SUPREME COURT REPORT, *supra* note 34, at 6.

<sup>236</sup> Some scholars disagree with the court's assertion that it can handle the current workload. “The Supreme Court of Appeals, irrespective of the effort or work ethic of its justices, does not have the resources to address the variety of important functions required of the judicial branch.” Bowles & Sadd, *supra* note 212, at 130 (describing the court's workload *before* the switch to mandatory appellate review).

<sup>237</sup> *See* Jernigan, *supra* note 109.

<sup>238</sup> W. VA. R. APP. P. 21.

<sup>239</sup> Memorandum opinions are much shorter, involve less analysis, and do not include oral argument. *See supra* Part II.A.3.

<sup>240</sup> W. VA. R. APP. P. 21 cmt.

<sup>241</sup> W. VA. R. APP. P. 21.

<sup>242</sup> *See* discussion *supra* notes 70–73 and accompanying text. *But see supra* note 74 (The West Virginia Supreme Court held that the constitutional requirements were “only directory.”).

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Although the court insists that memorandum decisions qualify as a full decision on the merits,<sup>243</sup> many attorneys and political leaders disagree.<sup>244</sup> Because the court only briefly analyzes the trial court's reasoning and holding, and only summarily states why the lower court is affirmed or reversed, some argue this does not qualify as meaningful appellate review.<sup>245</sup> A ruling by memorandum decision is certainly some level of appellate review, but it has significantly less analysis and explanation than the traditional written opinion.<sup>246</sup>

Companies are aware of the difference and disfavor the summary approach.<sup>247</sup> “The practical effect of the court disposing of appeals via memorandum decision[s] is likely of little comfort to corporations who will continue to believe they are being denied a right to a full appeal.”<sup>248</sup>

In addition, memorandum decisions are “non-precedential”—they provide guidance, but are not binding on any lower courts or the West Virginia Supreme Court itself.<sup>249</sup> In fact, memorandum decisions were originally prohibited from any use as legal citation.<sup>250</sup> According to a team of attorneys at Dinsmore & Shohl, the non-binding nature of memorandum decisions makes them essentially useless to the development of West Virginia's jurisprudence:

Once rendered, it would be as if they never happened and those living and working in West Virginia would be unable to rely on those decisions, even if made [for] them, for guidance in terms of conforming their activities to the law of the state. In other words, the rationale contained in memorandum decisions cannot be cited, relied upon, or applied by any other individuals or set of facts and would have no binding effect on any future court, including the Supreme Court itself, if called upon to rule upon the same or similar set of facts.<sup>251</sup>

Another attorney describes the memorandum decisions as a “half-step” measure because the court's analysis is limited and the reasoning and holding cannot be relied on.<sup>252</sup> The appellate reform in its entirety—mandatory

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<sup>243</sup> 2013 SUPREME COURT REPORT, *supra* note 34, at 4.

<sup>244</sup> See discussion *supra* notes 78–81 and accompanying text.

<sup>245</sup> See, e.g., Rogers, *supra* note 109; see also sources cited *supra* note 80.

<sup>246</sup> See *supra* Part II.A.3.

<sup>247</sup> Jernigan & Rice, *supra* note 43.

<sup>248</sup> McGhee, *supra* note 81.

<sup>249</sup> W. VA. R. APP. P. 21 cmt.

<sup>250</sup> *Id.* (“Also in response to public comment, the prohibition on citation of memorandum decisions was removed.”).

<sup>251</sup> Jernigan & Rice, *supra* note 43.

<sup>252</sup> Lannom, *supra* note 80.

appellate review and the new option of memorandum decisions—means that the West Virginia Supreme Court “will decide every appeal brought to it, though the level of analysis, and the precedential nature of any disposition, will be at the discretion of the [c]ourt.”<sup>253</sup>

While mandatory appellate review is undoubtedly a significant benefit to West Virginia’s jurisprudence and reputation regarding corporate interests, memorandum decisions limit the extent of that improvement. Business leaders have expressed that they do not consider memorandum decisions to be full appellate review.<sup>254</sup> Also, because they are non-precedential, every appellate ruling by memorandum decision does little to increase case law, develop jurisprudence, or limit ambiguity in the law.<sup>255</sup> Businesses want predictability; memorandum decisions are inadequate because they are not binding law that can be relied on for strategic planning or settling disagreements.<sup>256</sup>

Although aspects of the memorandum decision are undesirable, they are necessary so the West Virginia Supreme Court can handle the increase in caseload caused by mandatory appellate review. A way to fix both problems—the insufficient memorandum decisions and consistently increasing workload—is an intermediate appellate court.

#### *D. The Solution—Intermediate Appellate Court*

Adding an intermediate appellate court to West Virginia’s state court system will amplify the benefits and correct the flaws of the recent appellate reform. An IAC should be created to provide mandatory appellate review of all lower court decisions.<sup>257</sup> The West Virginia Supreme Court should reinstate discretionary appellate review. All appeals should be briefly reviewed by the supreme court, which can grant certiorari and hear the case or transfer it to the IAC.<sup>258</sup> This popular method would minimize the cost and delay of the two-tier

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<sup>253</sup> Loftus, *supra* note 80, at 2.

<sup>254</sup> McGhee, *supra* note 81.

<sup>255</sup> A “critical element” in adequate development of common law is “published opinions that future litigants and judges may rely on.” Bowles & Sadd, *supra* note 212, at 126–27.

<sup>256</sup> Only precedential opinions enhance predictability and uniformity of the law. *Id.* at 127.

<sup>257</sup> The procedural details of the IAC—how the justices are chosen, the length of their terms, the type of opinion, and whether the holdings are binding on the circuit courts—are beyond the scope of this Note. The Author recommends that the IAC only issue full written opinions, which should be binding on the lower courts. This would further the development of common law jurisprudence and make West Virginia more predictable and attractive to businesses.

<sup>258</sup> Decisions from the Business Court Division should be treated the same as circuit court decisions. Appeals of judgments from the IAC should receive discretionary appellate review from the supreme court.



appellate process.<sup>259</sup> Lastly, memorandum decisions should be abolished. The supreme court should issue a full written opinion for every case it hears.

This proposal would ensure that all litigants continue to have an appeal by right. Additionally, the West Virginia Supreme Court could focus its time on providing extensive review, analysis, and explanation in appellate cases with issues of first impression and high importance. A return to discretionary review would lower the court's caseload and eliminate non-precedential memorandum decisions—resulting in more thorough and thoughtful development of common law jurisprudence. The jurisprudential advantages would also attract and benefit businesses. Far from an unnecessary expense, creation of an IAC would make West Virginia better for justice and business alike.

### 1. Better for Justice

An IAC would improve the quantity and quality of West Virginia's common law. Almost every state in the nation has recognized and enjoyed the many benefits of an IAC.<sup>260</sup> The nearly 100 IACs across the country are used to provide mandatory appellate review, correct trial courts in error of established law, and alleviate the workload of the state's court of last resort.<sup>261</sup> Most states utilize the approach proposed in this Note—mandatory appellate review from an IAC and discretionary review from the highest court.<sup>262</sup> This dual appellate structure would work especially well in West Virginia.<sup>263</sup>

The 2010 establishment of appeal by right was undoubtedly a drastic improvement to West Virginia's legal environment.<sup>264</sup> Mandatory appellate review gives the public much more confidence that any trial court bias, error, or oversight will be appropriately remedied by an appellate court.<sup>265</sup> However, because West Virginia only has one appellate court, the change brought

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<sup>259</sup> Cases appropriate for consideration by the supreme court would bypass the IAC. This system was recommended by the West Virginia Independent Commission on Judicial Reform and is currently being considered by the West Virginia Senate. JUDICIAL REFORM REPORT, *supra* note 14, at 36–37; S.B. 215, 81st Leg., Reg. Sess. (W. Va. 2014).

<sup>260</sup> See COUNCIL OF CHIEF JUSTICES REPORT, *supra* note 97, at 1, 3.

<sup>261</sup> *Id.* at 1.

<sup>262</sup> Edward W. Najam, Jr., *Caught in the Middle: The Role of State Intermediate Appellate Courts*, 35 IND. L. REV. 329, 330 (2002).

<sup>263</sup> The West Virginia Independent Commission on Judicial Reform concluded after extensive study that “[t]he creation of an intermediate appellate could complement and assist the [West Virginia] Supreme Court of Appeals in performing the core functions of an appellate system. . . . [A]n intermediate court could help the Supreme Court of Appeals in accommodating the vast, and growing, appellate needs of West Virginia.” JUDICIAL REFORM REPORT, *supra* note 14, at 31–32.

<sup>264</sup> See, e.g., Ellerson, *supra* note 216, at 386.

<sup>265</sup> Porterfield, *supra* note 46, at A2.

drawbacks as well—a substantial increase in the supreme court’s caseload<sup>266</sup> and the introduction of memorandum decisions, which do not develop common law or thoroughly explain the court’s reasoning.<sup>267</sup> Adding an IAC would maintain the significant benefits of the reform (appeal by right) and remedy the negative consequences (increased supreme court workload and subpar memorandum decisions).

A West Virginia IAC should provide mandatory appellate review of any straightforward trial court decisions. IAC decisions could correct uncomplicated errors and provide additional appellate guidance to the lower courts. In other states, IACs work especially well “for resolving the larger number of appeals presenting routine or clear-cut issues and requiring simple error correction.”<sup>268</sup> By resolving the less complicated appeals applying well-settled law—which are likely a majority of the appellate cases filed in West Virginia—an IAC would be a competent and helpful companion to the West Virginia Supreme Court.<sup>269</sup>

Transferring the duty of mandatory appellate review to an IAC would substantially lessen the West Virginia Supreme Court’s caseload and allow it to focus on establishing doctrines and making important policy decisions.<sup>270</sup> If an IAC provides mandatory appellate review, the supreme court could return to discretionary review: select and hear only the most important, difficult, and influential appellate cases and transfer the bulk of simpler appeals to the IAC.

This change would relieve the adverse effects of the court’s consistently increasing caseload.<sup>271</sup> According to the American Bar Association, higher appellate caseloads and reactive measures such as memorandum decisions

have hampered the quality of review and decision making and have restricted public information regarding the reasons for decisions. As a result, attorneys, their clients, legal scholars and others may believe that cases have not received full

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<sup>266</sup> 2013 SUPREME COURT REPORT, *supra* note 34, at 4.

<sup>267</sup> *See supra* Part III.C.3.

<sup>268</sup> Edmund M. Y. Leong, *The Changing Role of Hawai’i’s Intermediate Appellate Court*, 10 HAW. B.J. 6, 6 (2006).

<sup>269</sup> JUDICIAL REFORM REPORT, *supra* note 14, at 31–32.

<sup>270</sup> *Id.*

<sup>271</sup> The West Virginia Supreme Court’s caseload may not presently be a crucial concern, but the numbers show a steady and significant upward trend with no relief in sight. *See supra* notes 47–50, 229–35 and accompanying text.

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consideration and that the opinions, judgments and orders are inadequate and even unjust.<sup>272</sup>

Lessening the supreme court's caseload would eliminate the need for memorandum decisions.<sup>273</sup> The highest court could then issue the more thoroughly considered, fully explained, and binding full written opinions.<sup>274</sup> Adding an IAC would drastically improve the state's judicial system by combating the negative effects of an overburdened and overworked supreme court.<sup>275</sup>

An IAC would allow the West Virginia Supreme Court to reinstate certiorari and issue a full written opinion in every case it chooses to hear. The supreme court should spend its highly valuable but limited amount of time and resources providing comprehensive review of the most paramount and influential appellate cases.<sup>276</sup> Full written opinions exclusively create binding case law, which citizens and companies rely on when making strategic decisions and presenting arguments in the lower courts. They are the "gold standard of appellate disposition": "They increase the stock of precedent, guide future litigants, give certainty to the law, enhance predictability, harden precedent, increase access to the high court, hold lower court judges accountable for their decisions and encourage well-reasoned decisions."<sup>277</sup> Memorandum decisions do not provide these benefits, and they should be avoided.

This Note's proposal—adding an IAC so the West Virginia Supreme Court can (1) choose which cases it hears, (2) perform an intense examination and analysis of the most important legal questions, then (3) extensively explain its reasoning and binding holding in a full written opinion—will result in more thoughtfully and thoroughly developed jurisprudence.<sup>278</sup> Development of

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<sup>272</sup> Linda M. McGee, *Therapeutic Jurisprudence and the Appellate Courts: Possibilities*, 24 SEATTLE U. L. REV. 477, 478 (2000) (quoting ABA OF THE DISTRICT OF COLUMBIA, REPORT TO THE HOUSE OF DELEGATES 1 (2000)).

<sup>273</sup> See Jernigan & Rice, *supra* note 43; Wolfe Law Firm, *supra* note 117.

<sup>274</sup> Full written opinions, as opposed to memorandum decisions, include binding precedent, lengthier analysis, syllabus points, and additional oral argument. See *supra* Part II.A.3.

<sup>275</sup> Increased caseload at the supreme court level "results in 'less legal research undertaken in the writing of opinions, fewer dissents, shorter opinions, and an overall lower quality of output . . .'" Victor Eugene Flango, *State Supreme Court Opinions as Law Development*, 11 J. APP. PRAC. & PROCESS 105, 110 (2010) (emphasis added) (quoting HARRY P. STUMPF & JOHN H. CULVER, *THE POLITICS OF STATE COURTS* 137 (1992)).

<sup>276</sup> See *id.* at 106 ("Indeed, a primary rationale for the creation of intermediate appellate courts is to dispose of the bulk of appeals so that supreme courts can focus on cases with significant policy implications or cases of high salience to the public.")

<sup>277</sup> Bowles & Sadd, *supra* note 212, at 134.

<sup>278</sup> [L]aw development requires selection of appropriate cases and then the articulation of reasons behind decisions, especially those that resolve conflicts of law, create new principles of law, more clearly articulate

common law is “intrinsically welfare enhancing” and will lead West Virginia to “superior financial and economic development” by creating “more efficient and predictable legal rules.”<sup>279</sup> Improving the quantity and quality of West Virginia common law will bring enormous benefit to citizens and companies, both present and future.<sup>280</sup>

Simple correction of uncomplicated trial court error should be the task of an IAC. When the supreme court is burdened with reviewing trial court applications of established law, its “capacity to articulate carefully legal policy for the state . . . [is] seriously impaired.”<sup>281</sup> The West Virginia Supreme Court should focus on prudently updating and developing the state’s jurisprudence through full written opinions, not rushing through mundane trial court correction or affirmance with memorandum decisions.<sup>282</sup> Memorandum decisions are a poor use of the court’s resources because they do not provide binding case law or thoroughly explain the court’s reasoning.<sup>283</sup> Instead, an IAC should be created to resolve the type of routine appellate cases that are appropriate for memorandum decisions.

This Note’s proposal would maximize the West Virginia Supreme Court’s value and benefit to the state. First, the court could focus exclusively on cases that involve constitutionality challenges, unsettled or outdated law, and important public policy issues. Second, the court would have time to fully articulate the reasoning behind each binding decision through full written opinions. Finally, the IAC would guarantee adequate review of each appeal and provide additional guidance to the lower courts.

## 2. Better for Business

Not only would an IAC be highly beneficial to the state’s legal system, it would also improve West Virginia’s business environment. West Virginia’s “bad for business” reputation has been expressed by numerous entities and had a debilitating effect on the state’s economy.<sup>284</sup> The 2010 appellate reform, new

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principles to guide lower-court decisions, and are intended to inform the legal community and the public at large of the rationale for a particular decision.

Flango, *supra* note 275, at 118.

<sup>279</sup> Giacomo A. M. Ponzetto & Patricio A. Fernandez, *Case Law Versus Statute Law: An Evolutionary Comparison*, 37 J. LEGAL STUD. 379, 379, 389, 411 (2008).

<sup>280</sup> Bowles & Sadd, *supra* note 212, at 135 (“West Virginia’s judicial branch needs to promote the certainty of the law and guidance to its citizens and businesses through the publishing of more opinions.”).

<sup>281</sup> HARRY P. STUMPF & JOHN H. CULVER, *THE POLITICS OF STATE COURTS* 137 (1992).

<sup>282</sup> “One great decision that breaks new ground, reconciles conflicts of law, or settles an area of law is worth more than a larger number of ‘routine’ decisions that are justified by more or less conventional lines of reasoning.” Flango, *supra* note 275, at 110.

<sup>283</sup> See *supra* Part III.C.3.

<sup>284</sup> See *supra* notes 2–7, 11–12 and accompanying text.

Business Court Division, and recent pro-business trend in case law have counteracted this notoriety and made West Virginia substantially better for corporate interests. Adding an IAC would provide even more benefits, confidence, and enticement to local and out-of-state companies.

An IAC would provide an appeal by right and allow the supreme court to focus on more sophisticated development of the state's jurisprudence. Businesses appreciate and desire expansive binding case law so they can accurately understand what the law is and how it will be applied.<sup>285</sup> This helps companies make strategic business decisions and efficiently resolve legal conflicts. The more clear and developed West Virginia law is, the more likely businesses will feel comfortable operating here. An IAC will give this state and the companies who engage in business here the best of both worlds—unqualified appellate review of trial court decisions and a supreme court that can dedicate its resources to creating fair, effective, and thoroughly explained precedential case law.

The proposed changes will give businesses more confidence in the state's legal system, which will make them more likely to engage in commerce and open offices here. West Virginia's "bad for business" reputation is largely based on perceived anti-business bias at the trial court level.<sup>286</sup> Appellate courts are more likely to issue decisions that are just and fair to corporate parties, as evidenced by the pro-business trend in West Virginia Supreme Court case law discussed above.<sup>287</sup> Adding an additional appellate court will result in more court decisions that are better informed and impartial toward corporate parties. Also, ending the use of non-binding memorandum decisions will please businesses, who have expressed distaste for the non-precedential, unpublished, and summarized dispositions.<sup>288</sup> "The legitimacy of the judicial branch rests largely on the responsibility of judges to explain and justify their decisions in opinions that can be publicly read, analyzed, and criticized."<sup>289</sup>

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<sup>285</sup> See Jernigan & Rice, *supra* note 43.

<sup>286</sup> Schwartz, Joyce & Silverman, *supra* note 6, at 760–66 ("There is a perception that the judiciary generally favors local plaintiffs over out-of-state corporate defendants.").

<sup>287</sup> For example, the West Virginia Supreme Court reversed the lower court's judgment against a corporate party in *Lee Trace LLC v. Raynes*, 751 S.E.2d 703 (W. Va. 2013), *Verizon Servs. Corp. v. Epling*, 739 S.E.2d 290 (W. Va. 2013), *Mountain Am., LLC v. Huffman*, 735 S.E.2d 711 (W. Va. 2012), *Rebuild America, Inc. v. Davis*, 726 S.E.2d 396 (W. Va. 2012), *Feroleto Steel Co. v. Oughton*, 736 S.E.2d 5 (W. Va. 2012), *Wolfe v. Adkins*, 725 S.E.2d 200 (W. Va. 2011), *Perrine v. E.I. du Pont de Nemours & Co.*, 694 S.E.2d 815 (W. Va. 2010), *Young v. Bellofram Corp.*, 705 S.E.2d 560 (W. Va. 2010), *Charleston Area Med. Ctr., Inc. v. St. Tax Dep't of W. Va.*, 687 S.E.2d 374 (W. Va. 2009), *Timberline Four Seasons Resort Mgmt. Co. v. Herlan*, 679 S.E.2d 329 (W. Va. 2009), and *Far Away Farm, LLC v. Jefferson Cnty. Bd. of Zoning Appeals*, 664 S.E.2d 137 (W. Va. 2008). See *supra* Parts II.D, III.A.

<sup>288</sup> See Jernigan & Rice, *supra* note 43.

<sup>289</sup> Flango, *supra* note 275, at 108–09.

If an IAC provides mandatory appellate review, the West Virginia Supreme Court can issue full written opinions in the most important and influential cases. This will result in more comprehensive, thorough, and up-to-date common law jurisprudence. For businesses, this means a better understanding of West Virginia law, which gives them more confidence in the legal system and less risk when engaging in business here. Increased confidence and understanding of the law will bring more business—and commerce, investment, capital, and jobs—to West Virginia.

### 3. Join the Bandwagon

The concept of adding an IAC to West Virginia's state court system is neither new nor uncommon. The West Virginia Independent Commission on Judicial Reform, both houses of the West Virginia legislature, several civic organizations, and numerous local attorneys have proposed or publicly endorsed the idea. However, some legal scholars are not persuaded, most notably current West Virginia Supreme Court Justice Margaret Workman.<sup>290</sup> Her article, *Intermediate Appeals Court: We Don't Need It, and We Can't Afford It*, argues against an IAC for two reasons: the West Virginia Supreme Court now provides mandatory appellate review, so an IAC is an unnecessary additional expense, and adding another appellate level will result in slower resolution of cases.<sup>291</sup>

Justice Workman asserts that the memorandum decisions provide a sufficient "decision[] on the merits" for every appeal.<sup>292</sup> Therefore, she argues, an additional appellate court is unnecessary and would "wast[e] taxpayer funds."<sup>293</sup> However, while memorandum decisions are a form of appellate review, they are inferior to full written opinions in several ways. They are not binding on the lower courts, and the level and explanation of the analysis is limited.<sup>294</sup> As such, they are not as beneficial to citizens, companies, and attorneys.<sup>295</sup>

The downsides of memorandum decisions, as well as the increase in the West Virginia Supreme Court's caseload, would all be remedied by adding an IAC.<sup>296</sup> Justice Workman admits that "the power of the Supreme Court would be far greater with an IAC," but warns "the judicial budget would also

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<sup>290</sup> Workman, *supra* note 8.

<sup>291</sup> *Id.* at 8–9.

<sup>292</sup> *Id.* at 8.

<sup>293</sup> *Id.* at 10.

<sup>294</sup> *See supra* Part III.C.3.

<sup>295</sup> *See supra* Part III.C.3.

<sup>296</sup> *See supra* Part III.D.1.

increase dramatically.”<sup>297</sup> While there will be additional costs, an IAC is an intelligent investment that will improve West Virginia’s legal and business environment. The actual cost of implementing this plan is not fully known,<sup>298</sup> but almost every other state, especially those of similar size,<sup>299</sup> concedes that an IAC is a worthwhile expense.<sup>300</sup> Spending state revenue to achieve higher quality appellate review, better common law jurisprudence, and a more effective state judiciary is a wise, not a wasteful, use of taxpayer money. An investment in justice—that will also attract businesses and grow the economy—is certainly an investment worth making.

Justice Workman’s second argument against an IAC is the flawed assumption that an additional appellate court will result “in substantial delay to litigants’ achieving finality in their legal disputes.”<sup>301</sup> Her criticism assumes a system where every appeal would be heard first by the IAC, with the possibility of an additional appeal to the supreme court.<sup>302</sup> However, the recommendation of the West Virginia Independent Commission on Judicial Reform, multiple state legislators, and this Note is that the supreme court should provide the initial review *or* transfer it to the IAC.<sup>303</sup> The most important and difficult appeals would be immediately considered by the West Virginia Supreme Court. This eliminates the additional time and expense of a second appeal. Furthermore, adding an IAC would significantly lessen the court’s workload, resulting in prompter resolutions with the increased consideration, analysis, and explanation crucial for influential appellate cases. Justice Workman’s argument for fiscal frugality is acknowledged, but investing in an IAC is better for justice, better for business, and better for West Virginia.

The numerous supporters of creating an IAC in West Virginia agree that the benefits far exceed the additional cost. The most meaningful proponent is the West Virginia Independent Commission on Judicial Reform, which included a United States Supreme Court Justice, a former West Virginia Supreme Court Justice, the president of the West Virginia State Bar, the dean of the West Virginia University College of Law, and six other esteemed attorneys, judges, and law professors.<sup>304</sup> After careful consideration, the commission unanimously recommended an IAC in West Virginia.<sup>305</sup> The IAC

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<sup>297</sup> Workman, *supra* note 8, at 10.

<sup>298</sup> The legislature estimates \$5.2 million; Justice Workman thinks the cost is even higher. *See id.* at 9.

<sup>299</sup> West Virginia is the second most populous of the states without an IAC. *See supra* note 99.

<sup>300</sup> *See* COUNCIL OF CHIEF JUSTICES REPORT, *supra* note 97, at 1–2.

<sup>301</sup> Workman, *supra* note 8, at 8.

<sup>302</sup> *Id.*

<sup>303</sup> *See infra* note 307.

<sup>304</sup> JUDICIAL REFORM REPORT, *supra* note 14, at ii.

<sup>305</sup> *Id.* at 32.

would provide mandatory appellate review and “manage[] the bulk of the appellate caseload” so the supreme court can focus on questions of first impression, substantial public importance, and constitutionality.<sup>306</sup> The commission proposed that all appeals should be initially filed with the supreme court, which would maintain discretionary review and select which cases to transfer to the IAC.<sup>307</sup> The members felt an IAC would greatly “help the Supreme Court of Appeals in accommodating the vast, and growing, appellate needs of West Virginia.”<sup>308</sup>

Members of the executive and legislative branches have also pushed for an IAC in West Virginia. Governor Earl Ray Tomblin publically announced his support of a Senate bill that would establish an IAC with mandatory appellate review.<sup>309</sup> In fact, an IAC bill has been introduced in the West Virginia legislature in 1999, 2003, 2010, 2011, 2012, 2013, and 2014.<sup>310</sup> Many attorneys in the community have expressed that an IAC would substantially benefit West Virginia’s legal system.<sup>311</sup> A recent survey of over 500 West Virginia citizens found that more than half of them support the idea.<sup>312</sup> Finally, “[b]usiness interests have been pressing for an intermediate appellate court” as well.<sup>313</sup>

Clearly, creating an IAC in West Virginia is a popular idea supported by legal scholars, elected officials, and the general public.<sup>314</sup> An IAC would significantly improve West Virginia’s legal system, common law

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<sup>306</sup> *Id.* at 32, 37.

<sup>307</sup> *Id.* at 36.

<sup>308</sup> *Id.* at 32.

<sup>309</sup> Press Release, Office of the Governor Earl Ray Tomblin, *supra* note 108.

<sup>310</sup> Raftery, *supra* note 118; H.B. 4462, 81st Leg., Reg. Sess. (W. Va. 2014); S.B. 215, 81st Leg., Reg. Sess. (W. Va. 2014). These bills never left the judiciary committee. Unfortunately, the West Virginia House and Senate do not document why a bill is not chosen to advance to the floor for voting. Telephone Interview with Robert Williams, Staff Attorney, W. Va. House of Delegates Judiciary Comm. (Aug. 6, 2014) (notes on file with the author).

<sup>311</sup> *See* sources cited *supra* note 109.

<sup>312</sup> Adams, *supra* note 7.

<sup>313</sup> Wolfe Law Firm, *supra* note 117; *see also Intermediate Appellate Courts in West Virginia, STATE SUPREME COURT INITIATIVE* (Feb. 22, 2011), <http://statehighcourtsblog.org/2011/02/22/west-virginia-torts-court-structure-intermediate-appellate-courts-in-west-virginia/> (“Business interests are generally in favor of the new [intermediate appellate] court.”).

<sup>314</sup> With all of this support, one wonders why an IAC has not been created in West Virginia already. As Justice Workman’s article suggests, perhaps the state government is not willing to allocate the financial resources. *See* Workman, *supra* note 8. Also, the West Virginia Supreme Court reports that it is “keep[ing] pace with the number of incoming cases.” 2013 SUPREME COURT REPORT, *supra* note 34, at 5. However, the court’s caseload is consistently and significantly increasing, so this confidence may not last forever. *See* discussion *supra* notes 230–36 and accompanying text.



jurisprudence, and business environment. The recommendations of the West Virginia Independent Commission on Judicial Reform should be implemented immediately. The West Virginia Supreme Court should briefly review each appeal, transfer uncomplicated or inconsequential cases to the IAC, and issue a full written opinion for each case it chooses to hear. Every litigant would have the right to appeal, and the West Virginia Supreme Court would focus on developing the state's jurisprudence with thorough and precedential rulings on the most significant appellate cases.

#### IV. CONCLUSION

The West Virginia Supreme Court has markedly improved the state's legal and business environment. The 2010 change to mandatory appellate review was a ground-breaking upgrade in justice and public confidence. Appeal by right, stricter appellate pleading requirements, and the specialized Business Court Division will appease businesses and draw more commercial activity to West Virginia. By justly finding in favor of corporate interests, the supreme court is advancing a pro-business trend in case law that brings West Virginia more in line with other states. However, the new memorandum decisions—although a necessary evil of mandatory appellate review and a single appellate court—do not advance the development of common law.

To solve this problem, West Virginia should create an intermediate appellate court. The benefit to the state's legal system and attractiveness to businesses would far justify the additional cost. Lack of an IAC has already “directly cost our state hundreds of jobs and more than \$25 million in investment.”<sup>315</sup> An IAC with mandatory appellate review would maintain the value of appeal by right while allowing the West Virginia Supreme Court to return to discretionary review and issue thorough and binding full written opinions on the most important and influential cases. This change will enhance the development of the state's jurisprudence—a benefit to its citizens, companies, reputation, economy, and future. The West Virginia Supreme Court's appellate reform, new Business Court Division, and pro-business trend in case law have made West Virginia better for business. The addition of an intermediate appellate court will make her even better.

*Stephanie Zwerner\**

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<sup>315</sup> Adams, *supra* note 7. Considering the Chesapeake Energy falling-out, this figure may be grossly underestimated. See *supra* notes 182–83, 209–11 and accompanying text.

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