

APPEAL NO. 11-0079

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

GRANT THORNTON LLP,

Petitioner/Plaintiff Below,

v.

On Appeal from the Circuit Court of
McDowell County, Civil Action No.
04-C-33-M

KUTAK ROCK LLP,

Respondent/Defendant Below.

KUTAK ROCK LLP'S RESPONSE TO PETITION FOR APPEAL

January 27, 2011

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I. Introduction

West Virginia law has long held that a good faith settlement bars a claim for contribution against the settling party and that wrongdoers are not entitled to assert claims for indemnification. By this Petition, Grant Thornton LLP (“Grant Thornton”) seeks to change this settled West Virginia law. Kutak Rock LLP (“Kutak”) respectfully requests that this Court deny this Petition for Appeal.

Grant Thornton seeks an appeal from the “Order Granting Defendants’ Motion for Summary Judgment” (“Order”) entered by the Circuit Court of McDowell County (“Circuit Court”) on March 11, 2010. Grant Thornton, auditor of the failed First National Bank of Keystone (“the Bank”), had sought damages from Kutak, a law firm which provided legal services to the Bank. The Federal Deposit Insurance Corporation (“FDIC”) had asserted claims for damages against both Grant Thornton and Kutak resulting from the failure of the Bank. The Circuit Court Order held that Grant Thornton’s claims against Kutak, arising from a single, indivisible loss to the Bank, were contribution claims barred by Kutak’s good faith settlement with the FDIC. To the extent they could be construed as indemnity claims, the Circuit Court held those claims barred by Grant Thornton’s own wrongdoing.

Grant Thornton is an adjudicated wrongdoer. The United States District Court for the Southern District of West Virginia (“District Court”) found that Grant Thornton performed a negligent audit of the Bank and presented testimony at trial that was “not entirely truthful.” *Grant Thornton, LLP v. FDIC*, 535 F. Supp. 2d 676, 691 (S.D. W.Va. 2007), attached to Kutak’s Motion for Summary Judgment as Ex. 10 (“*Grant Thornton I*”), *rev’d in part on other grounds sub nom. Ellis v. Grant Thornton LLP*, 530 F.3d 280 (4th Cir. 2008). The District Court found in

part that Grant Thornton violated Generally Accepted Accounting Standards (“GAAS”) by failing to pursue a \$236 million discrepancy on the Bank’s books and demonstrated a “lack of professional skepticism and due care.” (*Id.* at 690, ¶ 58.) Specifically, the District Court found that if Grant Thornton auditor Susan Buenger (“Buenger”) “had followed GAAS and promptly investigated the \$236 million discrepancy, she would have discovered the fraud, which would have led to the closure of the Bank. Her actions were an extreme departure from GAAS.” (*Id.* at 689-90) (Citations omitted.) Ultimately, the District Court found that the negligent audit of the Bank caused over \$25 million dollars in losses to the Bank (“FDIC Verdict”) when it failed on September 1, 1999. (*Id.* at 710-711) (“Thus, ‘but for’ Grant Thornton’s *gross negligence*, the FDIC would have avoided \$25,080,777 in losses.”) (emphasis added.)

Over the last decade, Grant Thornton has sought to excuse its conduct by attempting to blame many others for its own negligence, including Kutak, the FDIC, the Office of the Comptroller of the Currency (“OCC”), the outside directors of the Bank, and other third parties.

Indeed, when Kutak settled with the FDIC by tendering all of its legal malpractice insurance, as well as the payment of \$4 million from the law firm, Grant Thornton challenged the good faith of that settlement. After receiving briefing on the issue and hearing argument of counsel, the District Court held in 2003 that the parties reached the settlement valued at \$22 million in good faith. (*See* Order dated Dec. 11, 2003, attached as Ex. F to Grant Thornton’s Response to Kutak’s Motion for Summary Judgment; *Grant Thornton, LLP v. FDIC*, 694 F. Supp. 2d 506, 514-16 (S.D. W. Va. 2010) (“*Grant Thornton IP*”). The District Court later ordered that Grant Thornton receive a credit for a portion of the Kutak settlement. (*See* Order dated Sept. 30, 2008, attached to Kutak’s Motion for Summary Judgment as Ex.11; *Grant Thornton II*.)

As recognized by the Circuit Court, permitting Grant Thornton to attempt to shift responsibility for its own negligence to Kutak – a good faith settling tortfeasor – “would place a chilling effect on settlements, and settlements would cease to exist.” (Order, p. 14.) Litigants would be loath to settle, knowing that even a good faith settlement could nonetheless expose them to years of additional litigation from acknowledged joint tortfeasors and adjudicated wrongdoers that recast their barred contribution claims as so-called “independent” claims or duties.

Grant Thornton can pursue whatever federal appellate rights it may have; Kutak Rock has bought its peace. West Virginia law is well-settled regarding the operation of the contribution rule to bar claims against a joint tortfeasor who has entered into a good faith settlement. Grant Thornton offers nothing new to show why this Court should revisit those long-standing principles. Grant Thornton’s Petition for Appeal is without merit and should be denied.

II. Statement of Facts

While Kutak strongly disputes virtually all of the allegations couched as “facts” in the Petition,¹ such allegations are immaterial to the **undisputed facts and law** upon which the Circuit Court based the summary judgment order.

¹ The “Statement of Facts” contained in Grant Thornton’s Petition consists essentially of allegations and arguments found in mediation statements, opinions of Grant Thornton experts, and the judicial findings in *Grant Thornton II*, an action to which Kutak was not a party. The District Court’s “findings” in *Grant Thornton II* are not binding on Kutak and served only to determine the amount of the settlement credit awarded to Grant Thornton, a joint tortfeasor, as a result of Kutak’s settlement with the FDIC.

A. Grant Thornton's Failed Audit

This case arises out of the fraudulent operation of the Bank and its resulting closure by the OCC on September 1, 1999 – one of the largest bank failures in history at the time.

In 1998, the Bank hired Grant Thornton, an independent accounting firm, to perform an audit of the Bank's 1998 financial statements in accordance with GAAS and pursuant to the directives of a Supervisory Agreement with the OCC. (*See Grant Thornton I*, 535 F. Supp. 2d at 682). Grant Thornton partner Stan Quay ("Quay") conducted the Bank audit, along with associate Buenger. (*Id.* at 683, ¶ 16.) Grant Thornton knew from the start that the Bank had "significant accounting problems" and that there was a "troubled relationship between the Bank and federal regulatory authorities." (*Id.* at 682, ¶ 12.) Grant Thornton rated the Bank audit as maximum risk and it was, in fact, the highest risk audit on which Quay and Buenger had ever worked. Quay admitted that entering the audit his fraud antennae were up as high as they would go. (*Id.* at 683, ¶ 20).

On April 19, 1999, Grant Thornton issued a clean audit opinion to the Bank. (*Id.* at 695, ¶ 82.) This audit opinion was fundamentally flawed. On August 25, 1999, federal regulators determined that Grant Thornton had failed to discover that approximately \$500 million in loans reported as assets on the Bank's balance sheet were, in fact, the property of United National Bank. The Bank's balance sheet fraudulently overstated assets by hundreds of millions of dollars. (*Id.* at 697, ¶ 105.) Upon discovery of its true financial condition, the OCC closed the Bank.

B. The Federal Litigation

Following the Bank's closure, the FDIC, as Receiver for the Bank, intervened to assert claims in multiple Bank-related lawsuits filed in the District Court (the "Federal Litigation"). On October 16, 2001, the FDIC filed a claim for damages against Grant Thornton for the negligent audit which failed to uncover the fraud.

1. Kutak Settled with the FDIC; Grant Thornton Did Not

Kutak is one of the law firms that represented the Bank in connection with certain securities transactions between 1993 and 1998. Prior to the filing of any action against Kutak, the FDIC and Kutak entered into a settlement valued at \$22 million. (*See* Settlement and Release Agreement between FDIC and Kutak dated May 23, 2003, attached as Ex. E to Grant Thornton's Response to Kutak's Motion for Summary Judgment.) The settlement included all of the professional liability insurance available to Kutak as well as the payment of an additional \$4 million. (*Id.*) The settlement released any claims the FDIC might have had against Kutak for the alleged failure to detect or report the misstatement of the balance sheet or any other matters.² The FDIC successfully negotiated settlements with most of the potential defendants – except Grant Thornton. Unlike nearly all of the other targets of the FDIC investigation, Grant Thornton did not settle and chose to proceed to trial with the FDIC.

² It has never been determined in an action in which Kutak was a party that Kutak was aware of the Bank's fraudulent activities. Kutak **denies** any such knowledge. In fact, the FDIC itself concluded Kutak was not aware of the fraud. (*See* June 4, 2004 Trial Testimony of Mark Blair, pp. 144-146; August 17, 2007 Dep. of Floyd Robinson, p. 306; Affidavit of Floyd Robinson, at ¶ 19; Sept. 23, 2002; Dep. of Terry Church, pp. 2242, 2280-2281; Sept. 26, 2002 Dep. of Michael Lambert, pp. 9-10; Sept. 27, 2002 Dep. of Michael Lambert, p. 442; August 21, 2002 Dep. of Michael Graham, pp. 151-153, attached as Ex. 3-9 to Kutak's Motion for Summary Judgment.)

Grant Thornton moved to file a third-party complaint against Kutak in the Federal Litigation, asserting claims of fraud, negligent misrepresentation, tortious interference with a contract, and contribution. The District Court denied Grant Thornton's Motion by Order dated December 11, 2003, holding that Grant Thornton's contribution claims were barred by Kutak's good faith settlement with the FDIC. (*See* Order dated Dec. 11, 2003, attached as Ex. F to Grant Thornton's Response to Kutak's Motion for Summary Judgment.) In its Order, the District Court noted that Grant Thornton "contends that it has a number of direct claims against Kutak . . ." (*Id.* at 5). The District Court denied as untimely Grant Thornton's attempt to assert these claims, if any, ruling that "[a]ny direct claims Grant Thornton has against Kutak Rock may be addressed in another lawsuit." (*Id.*) The District Court did not rule upon the validity of Grant Thornton's claims or any defenses Kutak may have to those claims.

Grant Thornton filed the underlying action against Kutak in the Circuit Court on February 10, 2004, alleging fraud, negligent misrepresentation, and tortious interference with a contract. Notably, Grant Thornton specifically plead in the Circuit Court action that it "bases the allegations" in the Complaint upon the prior Federal Litigation. (Complaint, ¶ 6.)

2. Grant Thornton Adjudicated a Wrongdoer

Following a bench trial which began on May 17, 2004, the District Court found in favor of the FDIC and against Grant Thornton, making extensive findings of fact and conclusions of law as to Grant Thornton's negligence in *See Grant Thornton I*. Among other things, the District Court found that Grant Thornton: (a) repeatedly violated GAAS in the performance of its audit (*Grant Thornton I*, at 685-90, 695, ¶¶ 30, 31, 38, 40, 47, 49, 58, 63, 82); (b) failed to follow its own audit manual (*Id.* at 687, ¶ 38); (c) gave "a 'clean opinion' on the Bank's financial statement

without having adequate evidence to support that opinion and while having substantial evidence that contradicts the opinion” (*Id.* at 695, ¶¶ 82, 84); and (d) presented at trial the testimony of Buenger, who was “not entirely truthful” in her testimony to the District Court. (*Id.* at 691, ¶ 69.) Grant Thornton offered evidence and arguments at trial that Kutak was a superseding and intervening cause of the failure of the Bank in an attempt to relieve Grant Thornton from liability for the FDIC claims. The District Court rejected that argument. (*See* Jan. 15, 2004 District Court Order and Grant Thornton’s Answer to District Court Second Amended Complaint, attached as Ex. 14 and 15, respectively, to Kutak’s Motion for Summary Judgment.)

The District Court concluded that Grant Thornton was negligent and should have discovered the fraud that caused the closure of the Bank no later than March, 1999. The FDIC Verdict against Grant Thornton totaled \$25,080,777, which included the Bank’s net additional cost of operations and dividends paid from April 21, 1999 until the Bank closed on September 1, 1999. (*Id.* at 627, ¶ 140; 729, ¶ 12.) Grant Thornton subsequently moved the District Court for a settlement credit against the FDIC Verdict for the Kutak settlement with the FDIC.

3. Grant Thornton Argues that Kutak and Grant Thornton are Joint Tortfeasors

In its Motion for a Settlement Credit, Grant Thornton argued that the District Court should reduce the FDIC Verdict by the full amount of the Kutak settlement because Grant Thornton and Kutak were **joint tortfeasors** responsible for a **single, indivisible injury to the Bank**. In fact, Grant Thornton argued that there was a “one hundred percent overlap on the \$25 million loss with respect to Kutak Rock and Grant Thornton liability.” (*See* Excerpts of Nov. 27, 2007 hearing transcript, pp. 6:23-7:16, attached as Ex.17 to Kutak’s Motion for Summary

Judgment.) Grant Thornton argued that in order to avoid the application of a full \$22 million settlement credit to the FDIC Verdict, the FDIC must prove that Grant Thornton caused an injury to the Bank separate and divisible from any injury encompassed by Kutak's settlement, and admitted that "Grant Thornton does not believe any evidence can support this point." (Grant Thornton's Motion for a Settlement Credit, p. 4, attached as Ex. 31 to Kutak's Reply to Grant Thornton's Response to Motion for Summary Judgment.) On September 30, 2008, the District Court entered an Order granting Grant Thornton's Motion for a Settlement Credit, confirming that Grant Thornton was a joint tortfeasor with Kutak. (See Sept. 30, 2008 Order, attached as Ex. 11 to Kutak's Motion for Summary Judgment).³

C. The Circuit Court Litigation

Notwithstanding these District Court opinions, Grant Thornton now seeks to transfer to Kutak **all** of its liability arising out of the Federal Litigation, including: (a) the amount of the ~~FDIC Verdict for the negligent audit of the Bank (\$25,080,777 minus the offset awarded by the~~ District Court); and (b) over a decade of litigation expenses, including the attorneys' fees and costs it chose to expend in the Federal Litigation. Indeed, at oral argument on the Summary Judgment Motion on January 16, 2009, Grant Thornton acknowledged that the Circuit Court action seeks to impose on Kutak a total liability of over \$60 million with **no** resulting liability on

³ In *Grant Thornton II*, the District Court determined the amount of Grant Thornton's settlement credit to be \$1,343,750.57. Grant Thornton is appealing this decision.

Grant Thornton. (Order, p. 6, ¶ 19; Excerpts of Jan. 16, 2009 hearing transcript, p. 10, attached as Ex. 2 to Kutak Rock's Proposed Findings of Fact and Conclusions of Law Granting Motion for Summary Judgment.)⁴

In moving for summary judgment on the so-called "independent" claims Grant Thornton purports to assert in this case, Kutak argued in part that its good faith settlement with the FDIC barred these claims in their entirety. The Circuit Court agreed. On March 11, 2010, the Circuit Court entered an Order granting Kutak Summary Judgment, concluding:

Regardless of how many different ways this Court has reviewed this case, it all relates back to a common source, the failure of the First National Bank of Keystone. The acts of both Kutak and Grant Thornton resulted in a single, indivisible injury. Kutak and Grant Thornton were joint tortfeasors. Kutak entered into a good faith settlement with the F.D.I.C. **Grant Thornton did not and chose to go to trial.** Now Grant Thornton wants judgment against Kutak for the amount of the judgment against them, plus their attorney fees. If allowed, this would make Kutak pay for both their liability and Grant Thornton's liability. In effect, this would make Kutak pay for Grant Thornton's wrongdoing, as found by the District Court. Grant Thornton would not even have the cost of their own attorney fees, except for this case. **This would place a chilling effect on settlements, and settlements would cease to exist.**

(Order, p. 14) (emphasis added.)⁵

⁴ Kutak Rock's "Proposed Findings of Fact and Conclusions of Law Granting Motion for Summary Judgment" was filed with the Circuit Court of McDowell County on February 23, 2009. Therefore, it is a part of the record below in this case. Given that the Order Petitioner seeks to appeal was entered on March 11, 2010, The West Virginia Rules of Appellate Procedure in effect prior to December 1, 2010 apply. Those applicable Rules do not provide for further designation of the record by Respondent at this point.

⁵ On March 24, 2010, Grant Thornton filed a Motion to Alter or Amend Judgment seeking reconsideration of the Circuit Court's Order grant of summary judgment. This Motion was based on allegedly new evidence due in part to the District Court's Order granting a settlement credit. After briefing and oral argument, the Circuit Court denied the Motion to Alter or Amend Judgment on August 31, 2010.

III. Argument

A. Grant Thornton's Appeal has No Legal Support and Should be Denied by this Court

The Circuit Court Order held that Grant Thornton, having conceded its status as a joint tortfeasor in order to obtain a credit for the Kutak settlement in the Federal Litigation, was now estopped to deny that: (1) it was a joint tortfeasor; (2) it was at fault; and (3) the FDIC Verdict was based on its culpable negligence or reckless conduct. (Order, p. 5, ¶ 17.) In fact, the Grant Thornton Petition for Appeal does not and cannot deny that Grant Thornton: (1) is an adjudicated wrongdoer with regard to the losses suffered by the Bank; and (2) is a joint tortfeasor with Kutak for those losses. Finding that Kutak and Grant Thornton were joint tortfeasors,⁶ the Circuit Court properly held that Grant Thornton's claims against Kutak, **whatever the legal theory**, arose out of the same operative set of facts, and were, thus, barred under West Virginia law. Grant Thornton has received a credit for the Kutak settlement. As an adjudicated wrongdoer, it is entitled to nothing more.

B. The Circuit Court Properly Found that Kutak's Good Faith Settlement with the FDIC Bars Grant Thornton's Claims

1. West Virginia Law

This Court has long held that regardless of different theories of liability, where the acts of various parties result in a **single, indivisible injury**, a good faith settlement bars contribution claims against the settling party. *Board of Educ. of McDowell County v. Zando, Martin & Milstead, Inc.*, 182 W. Va. 597, 604, 390 S.E.2d 796, 803 (1990). In turn, a joint or successive

⁶ Grant Thornton itself admitted that Kutak and Grant Thornton were joint tortfeasors (*See* Grant Thornton's Proposed Post Trial Findings of Fact and Conclusions of Law, p. 95, ¶ 233, attached as Ex. 26 to Kutak's Motion for Summary Judgment.)

tortfeasor is entitled to set-off the amount of the settlement against any judgment. *Charleston Area Medical Center, Inc. v. Parke-Davis*, 217 W. Va. 15, 23, 614 S.E.2d 15, 23 (2005) (whatever the theory of liability, where the acts of various parties result in a common obligation or liability to a third party, a right of contribution arises that is extinguished by a good faith settlement). *Pennington v. Bluefield Orthopedics, P.C.*, 187 W. Va. 344, 419 S.E.2d 8 (1992) (finding the tortfeasors, whether characterized as joint, successive, or independent, to be jointly responsible for a single, indivisible injury).

The right of a nonsettling tortfeasor to a credit for the amount of a prior settlement between a plaintiff and a joint tortfeasor, and the concurrent discharge of the settling party from further liability, are based upon West Virginia's substantial public policy of encouraging out-of-court settlements. Allowing Grant Thornton to pursue what it calls "direct" claims, which would not have arisen *but for* the very litigation that Kutak settled with the FDIC, would have precisely the opposite effect. *See, e.g., Zando*, 182 W. Va. 605, 390 S.E.2d at 804 ("Few things would be better calculated to frustrate this policy [of encouraging settlements] and to discourage settlement of disputed tort claims, than knowledge that such a settlement lacked finality and would but lead to further litigation with one's joint tortfeasors, and perhaps further liability."); Syl. pt. 1, *Sanders v. Roselawn Memorial Gardens, Inc.* 152 W. Va. 91, 159 S.E.2d 784 (1998) ("The law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by litigation."); Syl. pt. 5, *New River & Pocahontas Consol. Coal Co. v. Eary*, 115 W. Va. 46, 174 S.E. 573 (1934).

The law barring claims for contribution in the face of a good faith settlement was never intended to shift to the settling party the risk that another litigant would be unable to reach a

settlement. Grant Thornton seeks to have it both ways: arguing in this case its claims are “direct” or “independent,” yet having previously admitted that Grant Thornton would have no injury absent the very litigation which led to the FDIC Verdict against it. The Circuit Court correctly found that Grant Thornton “while arguing that its claims against Kutak for fraud, tortious interference and negligent representation are direct and based upon independent duties to Grant Thornton, Grant Thornton simultaneously undermines its own position by arguing that it suffered no injury with regard to the FDIC claims until the FDIC filed suit against Grant Thornton,” (Order, p. 8, ¶ 5) (Excerpts from Jan. 16, 2009 hearing before Judge Murensky, p. 17, attached as Ex. 2 to Kutak’s Proposed Findings of Fact and Conclusions of law Granting Summary Judgment.)

In fact, in its Complaint, Grant Thornton expressly sought recovery for the amount of any judgment plaintiffs in the “Keystone-related litigation” might recover against Grant Thornton. (Complaint, pp. 39-40.) The Circuit Court found that “Grant Thornton has conceded that if the District Court had found no liability on the part of Grant Thornton in [*Grant Thornton I*] any damages it now seeks would be moot” (Order, p. 8 ¶ 6). Grant Thornton has never disputed that finding. Its Petition for Appeal should be denied.

2. Grant Thornton’s Shifting Arguments

a. In the District Court, Grant Thornton Urged Joint Tortfeasor Status

In its Motion for a Settlement Credit filed in the Federal Litigation, Grant Thornton urged the Court to reduce the \$25 million FDIC Verdict by the full amount of the Kutak settlement on grounds that Grant Thornton and Kutak were responsible for a **single, indivisible injury** to the

Bank. (See Grant Thornton’s Motion for a Settlement Credit, p. 3, ¶ 4, attached as Ex. 31 to Kutak’s Reply to Grant Thornton’s Response to Motion for Summary Judgment.) (“the FDIC has the burden to prove that Grant Thornton caused an injury to Keystone that is separate and divisible from any injury encompassed by Kutak’s settlement with the FDIC . . . and Grant Thornton does not believe any evidence can support the point.”) Grant Thornton argued for joint tortfeasor status in the Federal Litigation, citing *Strahin v. Cleavenger*, 216 W. Va. 175, 189, 603 S.E.2d 197, 211 (2004) for the proposition that “[t]hose who act together in committing wrong, or whose acts **if independent of each other, unite in causing a single injury,**” are therefore, “jointly or severally liable in tort for the same injury to person or property.” (Grant Thornton’s Motion for Settlement Credit, p. 3) (quoting *Black’s Law Dictionary*, 836 (6th ed. West 1990) (emphasis added.))⁷

b. In the Circuit Court, and Before this Court, Grant Thornton Now Takes a Contrary Position, Asserting “Independent” Claims

Recognizing that its approach in the District Court – where it relied on its joint tortfeasor status to obtain a settlement credit – would preclude the claim it now attempts to assert against Kutak, and in an effort to circumvent the good faith settlement bar, Grant Thornton, in the Circuit Court and in its Appeal Petition, has reversed course and now attempts to argue that its claims against Kutak are “independent.” Grant Thornton represents to this Court that “the [settlement] credit could not substitute for Grant Thornton’s direct claims, which seek

⁷ In contending that its status as an adjudicated wrongdoer does not bar its claims, Grant Thornton points to cases holding that contributory negligence is not a defense to an intentional tort such as fraud. These cases, including *Bradley v. Appalachian Power Co.*, 163 W. Va. 332, 256 S.E.2d 879, 887 (1979), do not involve a co-defendant who is an adjudicated wrongdoer seeking to establish a claim against a settling joint tortfeasor.

compensation for harm that Kutak caused Grant Thornton.” (Petition, p. 32.) However, regardless of this change of label, Grant Thornton does not and cannot deny that the same “overlapping damages” are at issue. Neither the facts nor the law support Grant Thornton’s position. Grant Thornton is not an innocent party forced to pay damages or incur attorney’s fees due to the wrong doing of another. Grant Thornton is simply seeking to shift its responsibility for the FDIC Verdict to Kutak. Kutak’s good faith settlement with the FDIC, which covered the same damages, bars Grant Thornton’s claim.

3. *Jennings v. Farmers Mutual Insurance Company* does not Support Grant Thornton’s Position

Jennings v. Farmers Mut. Ins. Co., 224 W. Va. 636, 687 S.E.2d 574 (2009), does not support Grant Thornton’s position. *Jennings*, a *per curiam* decision⁸, does not hold that so-called “direct” claims are an exception to the settlement bar on contribution claims among joint tortfeasors. Indeed, the case does not even discuss “direct” claims among joint tortfeasors. Rather, as the Circuit Court noted in denying Grant Thornton’s Motion to Alter or Amend the Judgment,⁹ *Jennings* cites the *Zando* holding that “a party in a civil action who has made a good faith settlement with the plaintiff prior to a judicial determination of liability is relieved from any liability for contribution.” *Jennings* does not change the settled law regarding the claims of joint

⁸ This Court has made clear that *per curiam* opinions have precedential value as to the application of settled law to facts, but that the Court will use only signed opinions to announce new principles of law. *Stanley v. Department of Tax and Revenue*, 217 W. Va. 65, 71, n.4 614 S.E.2d 712, 718, n.4 (2005); *Walker v. Doe*, 210 W. Va. 490, 558 S.E.2d 290 (2001).

⁹ Grant Thornton contends that the Circuit Court does not discuss *Jennings* in its summary judgment Order. (Petition, p. 28.) However, Grant Thornton based its Motion to Alter or Amend the Judgment primarily on *Jennings*, and in denying Grant Thornton’s Motion, the Circuit Court discussed the holding in *Jennings*.

tortfeasors. (Order Denying Grant Thornton’s Motion to Alter or Amend Judgment, p. 3) (quoting syl. pt. 6 of *Zando*.)

Grant Thornton argues that “the [*Jennings*] Court did not suggest that the settlement [at issue in that case] precluded the assertion of the misrepresentation claim, which – like the contribution and indemnity claims was predicated on the agent’s alleged misconduct in completing and handling *Jennings*’ application.” (Petition, p. 27). However, Grant Thornton mixes apples and oranges. The Supreme Court in *Jennings* held that the \$500,000 settlement reached between the plaintiff and the insurance company on the bad faith claim specifically related to the investigation of the fire loss, and barred any contribution or indemnity claim against the joint tortfeasor agent for that bad faith claim. The \$500,000 bad faith settlement had nothing to do with the completion of the application.

However, the settlement of the bad faith claim did not bar the insurance company from seeking subrogation from the agent for the \$245,000 indemnity paid to the insured for the fire loss, which did relate to the alleged negligence by the agent in the completion of the application. The Supreme Court found the subrogation claim was barred due to a lack of reliance by the insurance company on the absent information provided in the application by the agent, as well as the insurance company’s own fault in failing to discover that the application was not complete before providing coverage.

Jennings stands for the uniformly recognized legal principle that a good faith settlement bars contribution claims. *Jennings* is also consistent with the principle that an adjudicated wrongdoer cannot seek contribution or indemnity from another settled tortfeasor. This *per curiam* opinion cannot be read to establish that an adjudicated wrongdoer has a right to assert an

independent claim for contribution or indemnity against a settling tortfeasor for a single, indivisible loss.

4. ***Dunn v. Kanawha County Board of Education* does not Support Grant Thornton's Position**

Dunn v. Kanawha County Bd. of Educ., 194 W. Va. 40, 459 S.E. 2d 151 (1995), is also in complete accord with the Circuit Court Order granting summary judgment to Kutak. In *Dunn*, alleged victims of exposure to toxic substances present in a school building brought a product liability action against the product manufacturer and others in the product's chain of distribution. After the plaintiffs settled with the manufacturer, they jointly requested a finding that the settlement was in good faith in order to bar contribution and indemnity claims against the manufacturer by the other defendants. In holding that the settlement extinguished contribution claims but not indemnity claims, the Court distinguished the two concepts, stating, "[w]hile contribution permits one tortfeasor to shift a part of the loss to another, the purpose of indemnity is to shift **the whole loss.**" 459 S.E.2d at 157 (emphasis added and citations omitted.) Contribution claims, the Court noted, involve joint tortfeasors who **share some degree of fault**, while indemnity claims require the absence of fault on the part of the one seeking indemnification. (*Id.*) Grant Thornton is not without fault; Grant Thornton has no indemnity claim.

The Court in *Dunn* never suggests that "independent" claims, separate from contribution or indemnity, could be asserted against the settling defendant by the other defendants with regard to the plaintiffs' loss. No West Virginia law supports this contention, which would eliminate good faith settlements in West Virginia. Indeed, under Grant Thornton's reasoning, defendants

in large scale litigation could prevent a good faith settlement merely by asserting so-called “independent” claims against their co-defendants. Defendants in such cases would never settle with the plaintiff if such a settlement would not buy their peace as to all claims that might be made by any party.

Completely consistent with *Dunn*, the Circuit Court properly held that Kutak’s good faith settlement with the FDIC barred Grant Thornton’s contribution claims, while Grant Thornton’s own negligence barred any potential indemnity claims.

5. Law from Other Jurisdictions Cited by Grant Thornton does not Support Grant Thornton

In contrast to well settled West Virginia law directly on point, Grant Thornton seeks support from maritime and securities law from other jurisdictions. Such cases likewise do not support Grant Thornton.

a. Maritime Law is not Applicable

Grant Thornton looks primarily to maritime cases – *Liberty Seafood, Inc. v. Herndon Marine Products, Inc.*, 38 F.3d 755 (5th Cir. 1994); *Bertram v. Freeport McMoran, Inc.*, 35 F.3d 1008 (5th Cir. 1994); and *U.S. v. Tug Manzanillo*, 310 F.2d 220 (9th Cir. 1962), not cited to the Circuit Court, to support a claim clearly rejected by West Virginia law. These cases, involving the law applicable to “maintenance and cure” payments made by an employer in maritime cases, are easily distinguishable from the case at bar.

In *Liberty Seafood*, a seaman injured in a collision between two vessels received “maintenance and cure” payments from his shipowner employer.¹⁰ The court in *Liberty Seafood*

¹⁰ As explained by Grant Thornton, “maintenance and cure” are maritime terms for an injured seaman’s right to receive food and lodging (“maintenance”) and necessary medical services (“cure”) from his

noted that while general law bars claims for contribution by non-settling tortfeasors against settling tortfeasors, a separate rule governs an employer's claim for recovery of maintenance and cure, "which is separate and distinct from an injured seaman's claim for damages." (*Id.* at 758.) The court found it "well-known" that "maritime law provides **two separate lines of recovery** for an injured seaman: damages, and maintenance and cure." (*Id.*) (emphasis added.) The seaman may recover maintenance and cure only from his employer, who is obligated to pay regardless of fault, based upon its relationship with the seaman. Under maritime law, however, the employer is entitled to recover all or a portion of those payments from third-party tortfeasors. In addition to receiving maintenance and cure, an injured seaman may also seek traditional tort damages against his employer and any third-party responsible for his injuries. Thus, in a maritime collision, a third-party tortfeasor faces two distinct contribution or indemnity claims by a shipowner/employer: "(1) for damages assessed against the shipowner; and (2) for maintenance and cure." (*Id.* at 758.) Settlement by a third-party with the injured seaman on the damage claim will bar contribution on that claim but will not bar the shipowner's recovery of maintenance and cure. (*Id.* at 758) (*citing Bertram*, 35 F.3d at 1021-21.)

U.S. v. Tug Manzanillo, 310 F.2d 220 (9th Cir. 1962), similarly acknowledged the special subrogation rights of a shipowner who has paid maintenance and cure to an injured seaman. In *Tug Manzanillo*, since the owner of a different vessel was fully responsible for the seaman's injuries, the court found that the seaman's employer was entitled to recover the maintenance and cure payments made to the seaman. These subrogation rights, applicable to maintenance and

employer. The employer is required to make such payments without regard to fault. *Liberty Seafood*, 38 F.3d at 757.

cure, were not affected by the seaman's settlement with the owner of the tug because, the court reasoned, "If *A* is indebted to *B* he cannot discharge that indebtedness by payment to *C*." (*Id.* at 222.)

These "maintenance and cure" cases are like insurance subrogation cases where an insurance company has a legal obligation to make its insured whole regardless of fault but retains a right of subrogation against those parties actually at fault. Unlike shipowners and insurance companies, who must pay regardless of fault, Grant Thornton has continued to contest liability to any party for its negligent audit of the Bank. Grant Thornton's right to challenge liability in a West Virginia court of law eliminates any possibility that it can seek subrogation type payments from third parties, particularly since the third party has reached a good faith settlement with the plaintiff and Grant Thornton is an adjudicated wrongdoer.

b. Federal Securities Cases are not Applicable

Throughout its Petition, Grant Thornton cites a number of federal securities cases, including *In re Cendant Corp. Securities Litigation*, 139 F. Supp. 2d 585 (D.N.J. 2001), and the related case, *In re Cendant Corp. Securities Litigation*, 166 F. Supp. 2d 1 (D.N.J. 2001); *In re Cenco, Inc. Securities Litigation*, 642 F. Supp. 539 (N.D. 1986) and the related case, *Cenco Inc. v. Seidman & Seidman*, 686 F.2d 449 (7th Cir. 1982); and *In re Sunrise Securities Litigation*, 793 F. Supp. 1306 (E.D. Pa. 1992). In its Summary Judgment Order, the Circuit Court summarily distinguished these cases, stating:

The Court finds all of these cases distinguishable and, being based upon the law of other jurisdictions, not binding in any event. Notably, none of these cases cited by Grant Thornton involve a plaintiff which has been found guilty of wrongdoing (as Grant Thornton was), asserting a claim against another joint tortfeasor

who has entered into a good faith settlement (which Kutak did). Here, as the District Court expressly held, Grant Thornton is an adjudicated wrongdoer.

(Order, p. 9, ¶ 7.)

Nonetheless, Grant Thornton continues to rely upon cases decided under federal securities laws to support its claim against Kutak. Both *In re Cendant* cases involve a shareholders' action against a corporation, Cendant, and its auditor, arising out of accounting fraud discovered during a merger. Cendant was not an adjudicated wrongdoer. Cendant settled with plaintiffs and then cross-claimed against the auditor.¹¹ Cendant alleged the auditor had a duty to report information to Cendant's Board which could have ended the fraud. The auditor did not settle and moved to dismiss all counts of the cross-claim, including claims for negligence fraud, breach of contract, and breach of fiduciary duty, as "disguised contribution claims." Not only is *In re Cendant* decided under federal securities laws, rather than West Virginia law, it does not endorse a claim by a judgment defendant guilty of wrongdoing – such as Grant Thornton – against a settled defendant – such as Kutak.¹²

Likewise, *Cenco Inc. v. Seidman & Seidman*, 686 F.2d 449 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982), does not support Grant Thornton's position that an adjudicated wrongdoer can assert a claim against a settled tortfeasor. *Cenco* was a shareholders' action against a corporation, Cenco, and its auditor, Seidman & Seidman ("Seidman"). The auditor settled the shareholders' claims and proceeded to trial on the cross-claims. The auditor was not an

¹¹ This voluntary settlement and subsequent contribution action is not permitted under West Virginia law. *See, e.g., Charleston Area Medical Center, Inc. v. Parke-Davis*, 217 W. Va. 15, 614 S.E.2d 15 (2005).

¹² Moreover, whereas Grant Thornton (an adjudicated wrongdoer) is seeking to shift all of its responsibility for the FDIC liability to Kutak, the *In re Cendant* court relied, in part, on the fact that

adjudicated wrongdoer. The cross-claim defendants were not settled tortfeasors. The Court of Appeals for the Seventh Circuit in *Cenco* reversed the trial court decision, which had dismissed certain common law claims brought by Seidman against Cenco for lack of proof of any injury. The circuit court in *Cenco* said the trial court should have taken judicial notice of Seidman's settlement as sufficient evidence of injury to withstand a directed verdict on liability and found that the trial court did not take judicial notice of the settlement because it thought Seidman was just seeking indemnification of a co-defendant, which was not allowed in a 10b-5 case under *Heizer Corp. v. Ross*, 601 F.2d 330, 334-35 (7th Cir. 1979). The Seventh Circuit further reasoned:

But indemnity is a remedy of one wrongdoer against another and Seidman's claim is that it was a victim rather than a wrongdoer. It is true that it paid several millions to the class plaintiffs, but it **never admitted wrongdoing or was adjudicated a wrongdoer**. Therefore if it can prove that Cenco defrauded it into issuing false audit reports which in turn exposed it to liability to the class plaintiffs, the amount it paid to settle with the class would be a permissible item of damage. (Since Cenco's cross-claim was dismissed on liability grounds, we need not consider the possible implications of *Heizer* for Cenco's damage claim based on its settlement with the class plaintiffs — **Cenco, unlike Seidman, being an admitted wrongdoer**).

Cenco, 686 F.2d at 457-458 (emphasis added.)

Conversely, in the case at bar, **Grant Thornton is an adjudicated wrongdoer**. Kutak is not. The District Court expressly held:

FDIC has proved that if Grant Thornton had followed GAAS, it would have discovered and reported the fraud and insolvency of Keystone before April 19, 1999, which would have led to the immediate closure of the Bank . . . Grant Thornton's negligence in

"Cendant (does not) attempt to use these claims to shift its entire liability under the settlement." *In re Cendant*, 139 F. Supp. 2d at 596.

failing to discover the fraud at Keystone allowed that fraud to continue, and the losses that the FDIC seeks to recover are the foreseeable result of that ongoing fraudulent scheme.

Grant Thornton I, 535 F. Supp. 2d at 710-711.

In re Sunrise Securities Litigation, 793 F. Supp. 1306 (E.D. Pa. 1992), cited by Grant Thornton, is also inapplicable. *In re Sunrise* addressed motions filed by settling defendants to dismiss state law cross-claims by non-settling defendants. The cross-claim plaintiffs were not adjudicated wrongdoers. The court, interpreting Florida law, held that the indemnity claims against the settling defendants were properly dismissed because, “indemnity is limited to those situations where the whole fault is in the one against whom indemnity is sought. (*Id.* at 1320.)¹³

In short, the Circuit Court correctly found that the federal securities cases relied upon by Grant Thornton do not support the claims against Kutak. The good faith settlement between Kutak and the FDIC, along with Grant Thornton’s status as an adjudicated wrongdoer, bars any such claims.

C. The Circuit Court Properly Found that the Relief Sought by Grant Thornton, Far from Advancing Public Policy, Would Impede or Preclude Good Faith Settlements in West Virginia

The good faith settlement bar in West Virginia is intended to allow a defendant, even when it disputes a plaintiff’s claims, to buy peace and finality to a controversy – from both the plaintiff and its co-defendants. Ignoring this principle to suit its own self-serving purpose, Grant Thornton argues that allowing its claims against Kutak actually would further West Virginia

¹³ The court in *In re: Sunrise* did preserve certain state law claims against the settling defendants, finding at the motion to dismiss stage that *under Florida law* the claims at issue were not “de facto indemnity” but, rather, claims of direct wrongdoing by the settling defendants. Unlike *Sunrise*, however, the Court in this case has the benefit of an extensively developed record to show that Grant Thornton’s claims are in all material respects implied indemnity or contribution claims barred under West Virginia law.

public policy in that it would “encourage tortfeasors to negotiate global settlements that resolve potential liability to co-defendants as well as the plaintiff.” (Petition, p. 39.) Stretching the argument to an absurd limit, Grant Thornton asserts the Circuit Court’s ruling would “undermine deterrence by over-incentivizing tortfeasors to settle on the cheap.” (*Id.*, p. 40.)

In fact, as the Circuit Court found, allowing Grant Thornton’s claims against Kutak to proceed would completely undermine good faith settlements in West Virginia in cases involving multiple defendants. Defendants would be loath to settle when settlement would bring no finality and no peace. Indeed, in mass litigation, defendants could assert so-called “independent” claims merely to forestall or prevent settlements by other defendants. It is easy to imagine how a product or chemical manufacturer may assert “independent” claims or duties against distributors of their product, contractors who use their product, or premises owners where the products are used. Similar “independent” claims or duties are easy to envision by all parties against the others. Likewise, medical malpractice and pharmaceutical cases could not be settled against just one defendant, regardless of relative culpability, because parties intent on gaming the system to their own advantage would assert disguised contribution claims as so-called “independent” claims to avoid the contribution bar rules. Cases would never settle, compensation to plaintiffs would be delayed and the already overburdened court system would grind to a halt.

Finally, Grant Thornton’s suggestion that Kutak’s \$22 million settlement encourages defendants to settle “on the cheap” is ludicrous. Rather, allowing a defendant who has entered into a good faith settlement to be subjected to years of continuing litigation with non-settling co-defendants under the guise of “independent claims,” would eliminate any incentive to settle. As the Circuit Court found, “settlements would cease to exist.” (Order, p. 14.)

D. The Circuit Court Properly Found that Grant Thornton, an Adjudicated Wrongdoer, Cannot Recover its Litigation Expenses from Kutak

Grant Thornton – an auditor that owed a professional duty to assure the Bank’s financial condition was properly stated, yet repeatedly violated GAAS – attempts to posture itself as a “victim of wrongdoing.” It is, in fact, a wrongdoer as found by the District Court. Not only did it conduct a negligent audit in violation of GAAS, but it also attempted to defend its wrongful conduct by presenting testimony that was “not entirely truthful” to the District Court in that proceeding. (*Grant Thornton I*, 535 F. Supp. 2d at 691.)

Faced with the Circuit Court’s correct ruling that Grant Thornton cannot recover the expenses it incurred in the Federal Litigation from Kutak when such expenses resulted from its own wrongdoing and refusal to settle the FDIC’s claims, Grant Thornton argues that Grant Thornton’s collateral litigation expenses should not have been considered by the Circuit Court because Kutak first raised this issue in its Reply to Grant Thornton’s Response to Kutak’s Summary Judgment Motion. In fact, Kutak has consistently maintained that Grant Thornton’s claims are barred **in their entirety** and has denied that Grant Thornton is entitled to **any** of the claimed damages, including collateral litigation expenses. Moreover, it was Grant Thornton – not Kutak – that raised the issue. Kutak discussed the law governing recovery of collateral litigation expenses in reply to arguments raised in Grant Thornton’s Response to Kutak’s Motion for Summary Judgment.¹⁴

Grant Thornton stated in its Response that it “seeks damages **beyond** the amount of any judgment or settlement it might be required to pay to the FDIC, including Grant Thornton’s

litigation expenses.” (Response, p. 14.) In Reply, Kutak produced settled law in West Virginia and elsewhere that costs and expenses incurred in collateral litigation may be recovered only when they are proximately caused by the defendants’ fraud and are a consequence of that wrongdoing. *See, e.g., Thomason v. Mosrie*, 134 W. Va. 634, 644, 60 S.E.2d 699, 706 (1950); 22 Am. Jur. 2d, *Damages* § 437 (“To be recoverable as damages, expenses incurred in prior litigation with third parties must be the natural and necessary consequence of a defendant’s act”); *Beavers v. Kaiser*, 537 N.W.2d 653 (N.D. 1995) (holding that the attorneys’ fees incurred by settling tortfeasors in connection with an oil company’s claim were incurred through their own wrongdoing and that they were thus not entitled to recover those fees in a later action against the oil lessor under the “tort of another” exception to the general rule governing awards of attorney’s fees); *Tradewell Group Inc. v. Mavis*, 857 P.2d 1053, 1057 (Wash. App. 1991) (holding that “a party may not recover attorney fees under the theory of equitable indemnity if, in addition to the wrongful act or omission of *A*, there are **other reasons** why *B* became involved in litigation with *C*”). (emphasis added.)

Following Kutak’s Reply Brief, Grant Thornton filed a Motion to Strike Kutak’s Reply on the issue of collateral litigation expenses, which the Circuit Court denied. Following the entry of the March 11, 2010 Order granting Kutak summary judgment, Grant Thornton filed a Motion to Alter or Amend the Judgment, citing additional case law and grounds opposing the Court’s ruling. This Motion, which did not mention the “tort of another” doctrine, was pending for over five months before being denied by the Circuit Court. Grant Thornton thus had ample

¹⁴ In any event, whether raised by a party or not, a court can take judicial notice of applicable law. *See, e.g., Jackson v. Putnam Co. Bd. of Educ.*, 221 W. Va. 170, 181, 653 S.E.2d 632, 643 (2007) (“The rules of this court permit judicial notice of adjudicative facts or law.”)

time and opportunity to challenge Kutak's claims and the Circuit Court's finding regarding the collateral litigation expenses but chose not to do so. This choice is understandable as any contention that Grant Thornton's collateral litigation expenses were proximately caused by Kutak – including expenses Grant Thornton incurred in defending an FDIC action in which it was found to have conducted a negligent audit in violation of GAAS – defies logic. Contrary to Grant Thornton's contention, as the Circuit Court found, Grant Thornton voluntarily chose to continue to incur these expenses over the last decade.

Unlike the other defendants faced with claims by the FDIC, Grant Thornton voluntarily elected not to settle but to go to trial. In addition to refusing to settle the FDIC's claim, Grant Thornton **chose** to bring claims against other parties, incurring expenses which it now seeks to recover from Kutak. Having had multiple “days in court” futilely attempting to prove its case, Grant Thornton cannot now shift the cost of its flawed and unsuccessful litigation strategy to Kutak.

Moreover, none of the cases cited by Grant Thornton in support of its position involve claims by an adjudicated wrongdoer seeking to recover the expenses of its own unsuccessful litigation strategy from a co-defendant that entered into a good faith settlement. Rather, they involve innocent parties forced to defend litigation, or to bring suit to clear title to land due to the wrongful conduct of another. *See, e.g., Elijah v. Fender*, 674 P.2d 946 (Colo. 1984).

For example, in *Collins v. First Financial Services, Inc.*, 815 P.2d 411 (Ariz. 1991), the court found that a lienholder could recover attorney's fees incurred in a quiet title action under the “tort of another” exception to the American Rule where its participation in the purchaser's quiet title action was caused **solely** by the beneficiary's conversion of the lienholder's interest in

a mobile home. Considering the claim for attorney's fees, the court quoted the *Restatement (Second) of Torts* § 914(2)(1979) that:

One who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover reasonable compensation for loss of time, attorney fees and other expenditures thereby suffered or incurred in the earlier action. (815 P.2d at 413.)

Notably, in allowing the claim for attorney's fees, the court in *Collins* distinguished cases involving indemnity and contribution claims among joint tortfeasors, arising where a plaintiff had sued multiple defendants on various claims, and the defendants found not liable sought attorney's fees. The court noted that in denying recovery of such fees, the courts in both *Brochner v. Western Ins. Co.*, 724 P.2d 1293 (Colo. 1986) and *Conrad v. Suhr*, 274 N.W.2d 571 (N.D. 1979), had denied defendants the right to recover attorney's fees from co-defendants because, in the prior lawsuits, "both were defending at least partially against allegations of their own independent acts." *Collins*, 815 P.2d at 414.

Finally, Grant Thornton's reliance upon the holding of this Court in *Thomason v. Mosrie*, 60 S.E.2d 699 (W. Va. 1950), is inexplicable. In *Thomason*, the defendant fraudulently induced the plaintiffs to enter into a lease and purchase of property that, the defendant fraudulently concealed, had previously been sold. After the plaintiffs were sued by the rightful owner of the property for unlawful detainer, they sued the defendant for damages, including the expenses and fees incurred in defending the detainer action. Finding that the plaintiffs' loss of the lease

“resulted from the fraudulent conduct of the defendant,” this Court allowed recovery of his litigation expenses in that action.¹⁵

Unlike the plaintiffs in any of the cases cited in Grant Thornton’s Petition, Grant Thornton’s separate acts of wrongdoing caused it to be in a position to defend the actions brought against it by the FDIC and others. As noted, Grant Thornton’s own negligence is well documented in the District Court’s Findings of Fact and Conclusion of Law set forth in *Grant Thornton I*. The FDIC Verdict was proximately caused by Grant Thornton’s own wrongdoing and its litigation costs were imprudently incurred by its own refusal to settle with the FDIC. Irrespective of Kutak’s action, Grant Thornton **chose** to litigate the FDIC’s claims and further **chose** to bring actions against other parties. Such amounts cannot be recovered as any natural or necessary consequence of Kutak’s actions. West Virginia law does not permit such a claim.

IV. Conclusion

The Circuit Court’s Order Granting Summary Judgment in favor of Kutak is well supported by the undisputed facts and applicable law. Kutak resolved any claims the FDIC may have had for a settlement valued at \$22 million. Grant Thornton chose to force the FDIC to prove its claims for the negligent audit of the Bank. Grant Thornton assumed that litigation risk. Grant Thornton lost. Settled West Virginia law does not permit Grant Thornton to now shift the entire blame and seek to recoup its litigation losses from Kutak, a settling joint tortfeasor. Indeed, to permit Grant Thornton to pursue its thinly disguised claims for contribution against

¹⁵ Grant Thornton’s claim of wrongful conduct on the part of the plaintiffs in *Mosrie* is based upon the property owner’s claim that he had been unable to gain possession of the property until the plaintiffs had been convicted of committing adultery. 60 S.E.2d at 704. This factor had nothing to do with the plaintiffs’ purchase of the lease due to the defendant’s fraudulent representations.

Kutak would seriously undermine West Virginia's bar on contribution claims against settling defendants.

Grant Thornton should not be permitted yet another bite at the apple. The over ten years of civil and criminal litigation involving the First National Bank of Keystone should be brought to a close. Kutak respectfully requests that Grant Thornton's Petition for Appeal be refused by this Court.

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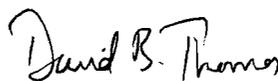
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CERTIFICATE OF SERVICE

I, David B. Thomas, counsel for Kutak Rock LLP, do hereby certify that the foregoing “Kutak Rock LLP’s Response to Petition for Appeal” has this day been served upon counsel of record via U. S. Mail, postage prepaid, this the 27th day of January, 2011, addressed as follows:

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