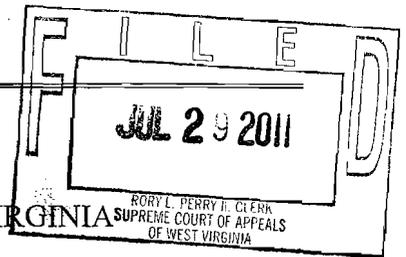


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APPEAL NO. 11-0079

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.

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**RESPONSE OF KUTAK ROCK LLP  
TO SUPPLEMENTAL BRIEF**

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July 29, 2011

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## I. SUMMARY OF ARGUMENT

Grant Thornton LLP's ("Grant Thornton") Supplemental Brief continues the auditor's ten-year quest to evade all responsibility for its own adjudicated wrongdoing. Despite being found negligent and dishonest in its dealings with the First National Bank of Keystone ("the Bank" or "Keystone"), Grant Thornton continues to seek reimbursement from Kutak Rock LLP ("Kutak"), a co-defendant who settled with the Bank, for all of the liabilities and attorneys' fees incurred in litigation following the failure of the Bank, including its unsuccessful defense of the Federal Deposit Insurance Corporation ("FDIC") action. Indeed, in a case of *déjà vu*, the Supplemental Brief rehashes the same arguments repeatedly made by Grant Thornton and repeatedly rejected by the Circuit Court and District Court.

Grant Thornton's pursuit of Kutak, a joint tortfeasor, contravenes this Court's policy of encouraging good-faith settlements. Kutak bought its peace by settling with the FDIC. Despite receiving the benefit of Kutak's settlement through a credit awarded by the District Court as modified by the United States Court of Appeals for the Fourth Circuit in *Grant Thornton LLP v. Federal Deposit Insurance Corp.*, No. 10-1306, 2011 WL 2420264 (4<sup>th</sup> Cir. June 17, 2011) (unpublished), Grant Thornton attempts to deny Kutak the benefit of that settlement. Grant Thornton must convince this Court to overturn well-settled precedent in order for its case to proceed. However, Grant Thornton has not identified a single case from any jurisdiction where an adjudicated wrongdoer has been permitted to recover all of its liabilities, attorneys' fees and costs from a settling joint tortfeasor.

Throughout its Supplemental Brief, Grant Thornton disingenuously alleges various bad acts and wrongful conduct of Kutak. Kutak vehemently denies these *unproven* allegations, made

in actions in which Kutak was *not a party*, having settled out of the FDIC action. The allegations are, however, irrelevant to the Circuit Court's Summary Judgment Order from which Grant Thornton appeals. Even assuming the truth of the allegations at the summary judgment stage, the Order granting Kutak's Motion for Summary Judgment must be affirmed.

In contrast to the allegations against Kutak, a settling tortfeasor, Grant Thornton has been adjudicated a wrongdoer by the United States District Court for the Southern District of West Virginia and the Fourth Circuit. As noted in the Fourth Circuit's recent decision, Grant Thornton did not appeal the District Court's negligence findings, which included findings that:

- Grant Thornton committed various violations of Generally Accepted Auditing Standards ("GAAS");
- If Grant Thornton had exercised due professional care in connection with its audit, the fraud would have been discovered;
- Grant Thornton's negligence proximately caused damages in the amount of Keystone's net operating expenses from April 21, 1999, two days after the audit report was released, until September 1, 1999, when the Bank was closed.

*Grant Thornton v. FDIC*, 2011 WL 2420264 at \*1-\*3.

Contrary to Grant Thornton's polemics, the claim Grant Thornton seeks to assert against Kutak in this action, arising solely from Grant Thornton's liability for damages suffered by the Bank, is not an "independent" or "direct" claim. Rather, it is entirely dependent, as Grant Thornton seeks to recover from Kutak the same damages for which it has been found legally responsible to the FDIC as well as the attorneys' fees and costs it incurred in disputing its liability for those damages. Grant Thornton chose to go to trial, rather than settle with the FDIC, apparently believing it could hedge against any losses by later bringing disguised contribution or indemnity claims against its settling co-defendants to recover all liability and costs arising from

being adjudicated a wrongdoer. But such claims are foreclosed by well-established West Virginia law holding that (1) whatever the theory of liability, when the acts of various parties result in a common obligation or liability, a right of contribution arises that is extinguished by a good-faith settlement, and (2) an adjudicated wrongdoer cannot bring an indemnity claim (*i.e.*, a claim seeking damages that are the adjudicated wrongdoer’s liability in the underlying lawsuit). *Charleston Area Medical Center, Inc. v. Parke-Davis*, 217 W. Va. 15, 23, 614 S.E.2d 15, 23 (2005); *Board of Education of McDowell County v. Zando, Martin & Milstead*, 182 W. Va. 597, 604, 390 S.E.2d 796, 803 (1990); *see also Hager v. Marshall*, 202 W. Va. 577, 585, 505 S.E.2d 640, 648 (1998).

In sum, despite losing at trial and being adjudicated a wrongdoer, Grant Thornton seeks to pay nothing. The Circuit Court properly rejected these efforts in its March 11, 2010 Summary Judgment Order, and this Court should now affirm that Order.

## II. ARGUMENT

### A. **The Damages Grant Thornton Seeks Prove that its Claim is Barred by Kutak’s Settlement.**

In order for Grant Thornton to prevail on this appeal, it must show that the claims alleged against Kutak are not claims for contribution or indemnification. Grant Thornton cannot make this showing because (1) the damages it seeks are not independent of the common liability owed to the Bank, (2) no case law supports its theory of liability against Kutak, and (3) the damages Grant Thornton seeks result from its being adjudicated a wrongdoer.

#### 1. **Grant Thornton Seeks No Independent Damages**

In its Supplemental Brief, Grant Thornton argues that its claims against Kutak are “direct,” in that “Kutak would be liable to Grant Thornton even if Kutak had no liability to

Keystone” (Response, p. 3).<sup>1</sup> In fact, Grant Thornton’s claims are not direct precisely because, as Grant Thornton has admitted, Kutak would have no liability to Grant Thornton if Grant Thornton had no liability to Keystone. (See S.J. Order, p. 8, ¶ 6).<sup>2</sup> All of Grant Thornton’s claims against Kutak arise out of their common duty and common liability to the Bank, making Kutak and Grant Thornton joint tortfeasors for any losses to the Bank caused by their joint conduct.

Grant Thornton’s successful effort to obtain a set off for the portion of the Kutak settlement attributable to this common liability confirms the common nature of the damages and the parties’ joint tortfeasor status. *Grant Thornton LLP v. FDIC*, 2011 WL 2420264 at \*13 (“the total damages sought against Kutak by the FDIC included the full \$25 million of the Bank’s post-audit net operating loss for which Grant Thornton was also found responsible.”). Indeed, Grant Thornton represented to the District Court that Grant Thornton and Kutak were joint tortfeasors responsible for a single, indivisible injury to the Bank and that there was “one hundred percent overlap on the \$25 million loss with respect to Kutak Rock and Grant Thornton.”<sup>3</sup> The Fourth Circuit, in fact, gave Grant Thornton a one hundred percent credit for that common portion of the Kutak settlement. *Id.* at \*11-\*15.

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<sup>1</sup> This statement is not accurate because Grant Thornton, an adjudicated wrongdoer, could not under any scenario have shifted its liability for the Bank’s losses to Kutak. See *Hill v. Joseph T. Ryerson & Son, Inc.*, 165 W. Va. 22, 268 S.E.2d 296 (1980); *Hager v. Marshall*, 202 W. Va. 577, 505 S.E.2d 640 (1998) (holding that an adjudicated wrongdoer cannot establish an implied indemnity claim under West Virginia law). Indeed, had Kutak not been a co-defendant who settled with the FDIC, Grant Thornton could not have obtained the benefit of a settlement credit in the FDIC action.

<sup>2</sup> In its Order granting summary judgment, the Circuit Court stated that “Grant Thornton has conceded that if the District Court had found no liability on the part of Grant Thornton in the FDIC Federal Court Action, any damages it now seeks against Kutak would be moot.” (S.J. Order, p. 8, ¶ 6).

<sup>3</sup> See Excerpts of Nov. 27, 2007 hearing, pp. 6:23-7:16, attached as Ex. 17 to Kutak’s S.J. Motion. Grant Thornton argued that in order to avoid the application of a full \$22 million settlement credit to the

While Grant Thornton's Supplemental Brief references Kutak's "many duties" to Grant Thornton (Supp. Brief, p. 5), Kutak and Grant Thornton had no relationship with each other that could have created any legal duties apart from their common relationship with the Bank. Their relationship was one of common representation of, and common duties to, the Bank.

Under long-settled West Virginia law, whatever the theory of liability, when the acts of various parties result in a common obligation or liability, a right of contribution arises that is extinguished by a good-faith settlement. *Charleston Area Med. Ctr., Inc. v. Parke-Davis*, 217 W. Va. at 23, 614 S.E.2d at 23. Thus, it is black-letter law that Kutak's settlement of any claims the FDIC/Bank may have had against it bars any claim Grant Thornton may have had arising out of their joint tortfeasor status. *See Bd. of Educ. of McDowell County v. Zando, Martin & Milstead*, 182 W. Va. at 604, 390 S.E.2d at 803.

## **2. The Summary Judgment Order is Consistent With Law in Other Jurisdictions**

This Court's rulings in *Zando* and *Parke-Davis* are consistent with well-settled principles in West Virginia and virtually every jurisdiction. In attempting to show that not every claim between co-defendants necessarily seeks contribution or indemnity, Grant Thornton relies upon federal cases involving securities law. (Supp. Brief, pp. 12-14). Grant Thornton ignores, however, the overwhelming weight of federal authority that looks to the *damages* a co-defendant claims, not the *duty* allegedly breached, to determine whether a particular claim seeks indemnity or is actually "independent" of the underlying lawsuit. At least four federal circuits and

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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).

numerous district courts have recently and repeatedly held that a co-defendant's claim is merely a disguised indemnity claim, and *not* an independent claim, where it seeks damages representing its own liability in the underlying lawsuit. In other words, because Grant Thornton alleges an injury only inasmuch as it owes damages to the FDIC, Grant Thornton's claim is not truly independent. *See, e.g., Gerber v. MTC Elec. Tech. Co.*, 329 F.3d 297, 306-07 (2d Cir. 2003) ("The issue, in other words, is less one of independent 'claims' than independent 'damages.'"). *Accord, In re HealthSouth Corp. Secs. Litig.*, 572 F.3d 854, 863-65 (11<sup>th</sup> Cir. 2009) (adopting same test and holding that a co-defendant's claims were not "independent" because the damages sought, including attorney's fees, "were incurred on account of [his] liability or the risk thereof to the underlying plaintiffs" and could not "be considered to be independent of his liability to the underlying plaintiffs"); *In re Heritage Bond Litig.*, 546 F.3d 667, 679-80 (9<sup>th</sup> Cir. 2008) (holding that the distinction between indemnity and independent claims "turns not on the presence of independent claims but on whether the injured party can assert independent damages" (internal quotation marks omitted)); *TBG, Inc. v. Bendis*, 36 F.3d 916, 928 (10<sup>th</sup> Cir. 1994) ("any claims in which the injury is the nonsettling defendant's liability to the plaintiff" are not "independent").

Courts across the country have applied this common-sense test, holding that claims seeking damages that amount to, or that would not have arisen but for, the claimant's liability in the underlying lawsuit are merely indemnity claims in disguise—and thus are properly precluded by another co-defendant's good-faith settlement. *See, e.g., Denney v. Deutsche Bank AG*, 443 F.3d 253, 273-74 (2d Cir. 2006); *In re Worldcom, Inc. Secs. Litig.*, No. 02 Civ. 3288 (DLC), 2005 WL 591189, at \*10 (S.D.N.Y. Mar. 14, 2005); *Neuberger v. Shapiro*, 110 F. Supp. 2d 373, 384 (E.D. Pa. 2000); *S.C. Nat'l Bank v. Stone*, 749 F. Supp. 1419, 1433 (D.S.C. 1990); *Alvarado*

*Partners, LP v. Mehta*, 723 F. Supp. 540, 554 (D. Colo. 1989); *Allstate Ins. Co. v. Halima*, No. 06 Civ. 1316 (DLI) (MDG), 2008 WL 2673333, at \*2 (E.D.N.Y. June 26, 2008); *Greene v. Emersons, Ltd.*, No. 76 Civ. 2178 (CSH), 1983 WL 1395, at \*2 (S.D.N.Y. Dec. 1, 1983).<sup>4</sup>

In this case, it is not simply that the damages would not have arisen *but for* Grant Thornton's liability; rather, the damages Grant Thornton seeks *are*, in fact, that liability. For this reason, the Circuit Court aptly noted that Grant Thornton had admitted its damage claim would be moot if Grant Thornton had not been found liable to Keystone. (S.J. Order, p. 8, ¶ 6).

### **3. Grant Thornton Seeks Damages Resulting From its Own Wrongful Conduct**

The damages Grant Thornton seeks in this action consist of the \$25 million judgment against it for damages to the Bank, minus the \$1,883,860 settlement credit ordered by the Fourth Circuit.<sup>5</sup> Those damages have been finally, judicially determined to have resulted from Grant Thornton's negligent audit. While not appealing the District Court's negligence finding, Grant Thornton did challenge the finding that its negligence proximately caused the losses—a challenge rejected by the Fourth Circuit. In its recent decision, the Fourth Circuit cited with approval the District Court's finding that:

Grant Thornton's negligence in failing to discover the fraud at Keystone allowed that fraud to continue, and the losses the FDIC seeks to recover are the foreseeable result of the ongoing fraudulent scheme. As Grant Thornton's expert conceded, it is

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<sup>4</sup> Indeed, this approach is followed beyond the federal securities context by federal courts addressing other areas of law and by state courts confronting similar issues. *See, e.g., Agway, Inc. Employees' 401(k) Thrift Inv. Plan*, 409 F. Supp. 2d 136, 146-47 (N.D.N.Y. 2005) (employee-benefit plans); *In re Wedtech Corp.*, 87 B.R. 279, 287 (Bankr. S.D.N.Y. 1987) (bankruptcy); *Bankers Trust Co. v. Rhoades*, No. 82 Civ. 5590 (WCC), 1992 WL 170677, at \*2-\*3 (S.D.N.Y. July 2, 1992) (civil RICO); *Jain v. J.P. Morgan Secs., Inc.*, 177 P.3d 117, 121-23 (Wash. App. 2008); *Cardinal Glennon Hosp. v. Am. Cyanamid Co.*, 997 S.W.2d 42, 45-46 (Mo. App. 1999).

<sup>5</sup> The legal expenses and costs sought by Grant Thornton are addressed in section D, below.

certainly foreseeable from the standpoint of a reasonably prudent auditor that the failure to discover fraud will result in the continuance of the fraud.

*Grant Thornton v. FDIC* at \*4. The Fourth Circuit further endorsed the District Court’s finding that “had the audit been performed properly instead of negligently, federal regulators would have closed the bank two days after an accurate audit report had issued.” *Id.* at \*6. The Fourth Circuit thus held the District Court’s finding of proximate cause to be supported by the evidence and consistent with West Virginia law. *Id.*

The damages Grant Thornton seeks to recover from Kutak Rock—the \$25 million judgment against it—thus resulted, without question, from Grant Thornton’s own wrongful conduct that proximately caused the damages to the Bank. Without those damages, Grant Thornton has admitted it would have no claim (S.J. Order, p. 8, ¶ 6), as even Grant Thornton recognizes its claim against Kutak is strictly dependent on its liability and damage to the FDIC. Accordingly, Grant Thornton cannot properly claim any independent damages caused by Kutak.

Under settled West Virginia law, the judicial determination that the damages Grant Thornton seeks to recover from Kutak were caused by its own negligent conduct precludes Grant Thornton’s disguised indemnity claim. *See Hager*, 202 W. Va. at 585, 505 S.E.2d at 648. Grant Thornton is not without fault for the Bank’s losses and the Circuit Court did not err in dismissing Grant Thornton’s action.

**B. Kutak’s Good-Faith Settlement Bars Implied Indemnity Claims By Grant Thornton, An Adjudicated Wrongdoer.**

**1. Grant Thornton Cannot Bring An Indemnity Claim Because It Is An Adjudicated Wrongdoer**

The fact that Grant Thornton’s claims against Kutak are merely indemnity claims by another name ends the analysis. As this Court has held, *Zando*’s bar on contribution claims against a co-defendant who settles in good faith extends to implied indemnity claims *unless* the claimant is innocent of *any* wrongdoing. *Hager*, 202 W. Va. at 585, 505 S.E.2d at 648 (“[W]e hold that in non-product liability multi-party civil actions, a good faith settlement between a plaintiff and a defendant will extinguish the right of a non-settling defendant to seek implied indemnity unless such non-settling defendant is without fault.”). *See also Smith v. Monongahela Power Co.*, 189 W. Va. 237, 243, 429 S.E.2d 643, 649 (1993) (holding that defendant’s “right to seek contribution or indemnification from [a settling co-defendant] was extinguished” by the co-defendant’s good-faith settlement with the plaintiff).<sup>6</sup>

As discussed above, Grant Thornton is anything but guiltless. Indeed, as the Circuit Court recognized, Grant Thornton—unlike the claimants in the securities cases Grant Thornton cites—is an *adjudicated wrongdoer*. *See* S.J. Order at 9; *cf. Cenco, Inc. v. Seidman & Seidman*, 686 F.2d 449, 458 (7<sup>th</sup> Cir. 1982) (co-defendant seeking indemnity “never admitted wrongdoing or was adjudicated a wrongdoer”); *In re Cendant Corp. Secs. Litig.*, 139 F. Supp. 2d 585, 587,

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<sup>6</sup> The “key to an indemnity claim” is that the claimant has committed no independent wrongdoing that caused or even “contribute[d] to” his own injury. *Bowyer v. Hi-Lad, Inc.*, 216 W. Va. 634, 653, 609 S.E.2d 895, 914 (2004) (internal quotation marks omitted) (rejecting an implied indemnification claim because the party asserting the claim was a wrongdoer). This rule makes perfect sense, because only a party that bears *no responsibility* for the harm it has suffered is equitably entitled to shift the *entire burden* of that injury onto another. *See Dunn v. Kanawha County Bd. of Educ.*, 194 W. Va. 40, 44-45, 459 S.E.2d 151, 155-56 (1995).

597-98 (D.N.J. 2001) (noting settlement by claimant of underlying action and declining to impute others' wrongdoing to claimant); *In re Sunrise Secs. Litig.*, 793 F. Supp. 1306, 1320-21 and n.17 (E.D. Pa. 1992) (holding co-defendants stated claim for indemnity, which only one "without fault" could bring).

## 2. The Degree of a Co-Defendant's Fault Makes No Difference

Grant Thornton artfully attempts to evade the holding in *Hager* barring indemnity claims by wrongdoers by contrasting its own adjudicated wrongdoing with seemingly more serious allegations lobbed at Kutak. Supp. Brief, pp. 14-16. But the *degree* of the claiming co-defendant's fault makes no difference. To seek indemnity under *Hager*, a co-defendant must be "without fault," 202 W. Va. at 585, 505 S.E.2d at 648 (emphasis added)—not merely *less* to blame than his settling co-defendants. Indeed, in *Hager* itself, even crediting the claiming co-defendant's assertion that it was merely "five percent responsible" for the plaintiffs' injuries, this Court held that the co-defendant's indemnity claims were barred. *Id.* and n.4. Because Grant Thornton cannot claim *zero* culpability, its indemnity claims plainly fail.

Contrary to Grant Thornton's contention, *Dunn v. Kanawha County Board of Education*, 194 W. Va. 40, 459 S.E.2d 151 (1995), casts no doubt on this conclusion. Supp. Brief, p. 12; Petition, pp. 27-28. As *Hager* explained, *Dunn* addressed indemnity for *strict liability* claims, for which a defendant could be liable even if he was *without fault*. See *Hager*, 202 W. Va. at 585, 505 S.E.2d at 648. That was not true of the claims at issue in *Hager*, which this Court held were barred. *Id.* It is equally untrue of the claims for which Grant Thornton seeks indemnity in this case.

For the same reason, Grant Thornton can find no refuge in the maritime cases to which it once again retreats. Supp. Brief, p. 12; Petition, pp. 29-30. Although accepting the general rule that settlements bar claims for indemnity, those cases applied a special exception for maintenance-and-cure claims—which, like the strict liability claims in *Dunn*, can be brought *regardless* of the shipowner’s fault and even against a settling tortfeasor. See *Liberty Seafood, Inc. v. Herndon Marine Prods., Inc.*, 38 F.3d 755, 757-58 (5<sup>th</sup> Cir. 1995); *Bertram v. Freeport McMoran, Inc.*, 35 F.3d 1008, 1015-18 (5<sup>th</sup> Cir. 1994). Also, as the maritime cases held, a co-defendant’s settlement of a seaman’s *damage* claims has no effect on the seaman’s claim for maintenance-and-cure payments, as the two types of claims seek recovery for two separate types of injury. See *Bertram*, 35 F.3d at 1015 (claim for reimbursement of maintenance-and-cure payments, unlike claim for indemnification of liability for tort claims, “is *not* for recovery over for the amount of damages [the claiming co-defendant] owes the plaintiff” (internal quotation marks omitted)); see also *Liberty Seafood*, 38 F.3d at 758. Indeed, a seaman can seek maintenance and cure *only* from his employer. *Id.* Consequently, a seaman’s settlement with a third-party defendant on other claims cannot encompass maintenance-and-cure payments, which redress a distinct injury, and a shipowner’s claim to recoup maintenance-and-cure payments from that third party thus is not an attempt to obtain indemnity for the same injury covered by the third party’s settlement. See *Bertram*, 35 F.3d at 1015-16; *United States v. Tug Manzanillo*, 310 F.2d 220, 222 (9<sup>th</sup> Cir. 1962). These cases thus provide no support for Grant Thornton’s untenable position.

### 3. The Fraud Cases Grant Thornton Relies Upon Are Inapplicable

Because Grant Thornton can no longer deny its own negligence, it now attempts to evade the consequences of its wrongdoing by portraying itself as an “easily gulled” fraud victim. Grant Thornton points to fraud cases holding that contributory negligence is not a defense to a fraud claim. *E.g., Bradley v. Appalachian Power Co.*, 163 W. Va. 332, 345, 256 S.E.2d 879, 887 (1979); *Cenco, Inc. v. Seidman & Seidman*, 686 F.2d 449, 454 (7<sup>th</sup> Cir 1982). (Supp. Brief, p. 14). In addition, Grant Thornton quotes the holding of *Mayer v. Spanel Int’l, Ltd.*, 51 F.3d 670, 675 (7<sup>th</sup> Cir. 1995), that “[t]olerating fraud by excusing deceit when the victim is too easily gulled” increases the volume of fraud. *Id.* at 15.

None of these cases cited by Grant Thornton involve a joint tortfeasor, whose acts combined with a settling tortfeasor to cause alleged damages to a third party, seeking to shift its liability to the settling party. The cases are thus inapplicable. Significantly, Grant Thornton is a national accounting firm hired by Keystone when an investigation into its banking activities revealed major errors in the Bank’s accounting records that financially jeopardized the Bank. Following this investigation, the Office of the Comptroller of the Currency required Keystone to hire a nationally recognized independent accounting firm to audit the Bank’s operations. *Grant Thornton v. FDIC*, 2011 WL 2420264 at \*2. As the Fourth Circuit noted, “Grant Thornton was hired to perform the audit, not in the ordinary course, but at the insistence of federal regulators who were closely watching Keystone.” *Id.* at \*5. The Grant Thornton auditors who performed the audit testified that Grant Thornton had characterized the audit as “highest maximum risk” and at the time of the engagement, “their fraud antenna were up as high as they could get.” *Id.* Despite these facts, the Bank violated GAAS and performed an audit that, as noted by the Fourth

Circuit, has been described as “strikingly incompetent.” *Id.* at \*2. To now attempt to portray itself as a victim who was “too easily gulled” into committing its own wrongful acts is preposterous.

In support of its position, Grant Thornton cites *United States v. Berman*, 21 F.3d 753 (7<sup>th</sup> Cir. 1994), *overruled on other grounds*, *United States v. McIntosh*, 198 F.3d 995 (7<sup>th</sup> Cir. 2000). The portion of *Berman* relied upon by Grant Thornton is dicta and completely inapplicable. *Berman* involved criminal defendants convicted of converting funds pledged to a federal agency and their court-ordered restitution payments. One of the criminal defendants objected to paying restitution to certain creditors, arguing that those creditors had been made whole through their civil action against the bank for negligently allowing the funds to be stolen. The Seventh Circuit rejected the defendant’s position that it could avoid making restitution payments on that ground, stating that, at most, the beneficiary of the restitution funds had been misnamed and should have been the bank rather than the creditor “as even if the bank was negligent, it would be entitled to restitution from a deliberate wrongdoer.” *Id.* at 757. Since the bank had, however, assigned any right of restitution it may have had to unsecured creditors of the company whose funds had been stolen, the court did not even need to reach that issue. The court noted that under federal law, the victim of a crime is allowed to name an alternate beneficiary of court-ordered restitution, as the bank had done. *Berman*, involving the recipient of the court-ordered restitution payments of a convicted criminal, has nothing to do with a joint tortfeasor attempting to recover the amount for which it has been found liable from a settling co-defendant. Indeed, no law supports that proposition.

**C. Allowing Grant Thornton's Claim Would Chill Good-Faith Settlements.**

West Virginia has long favored good-faith settlements between plaintiffs and defendants. *See, e.g.*, 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.”). As the Circuit Court found in its Summary Judgment Order, allowing Grant Thornton’s claim to proceed would “place a chilling effect on settlements, and they would cease to exist.” (S.J. Order, p. 14).

In the proposed syllabus points in its Supplemental Brief, Grant Thornton attempts to carve out a self-serving exception to the good-faith settlement bar for attorneys and their clients’ auditors. Despite the confusion Grant Thornton attempts to create, the issues presented in this case are common to any case involving multiple defendants where one or more joint tortfeasors settles with the plaintiff. Under Grant Thornton’s analysis, such settlements could always be negated by disguising what are really contribution or indemnity claims as so-called “independent” claims by and among joint defendants. For example, substituting “asbestos manufacturer” for “attorney,” “premises owner” for “independent auditor” and “asbestos worker” for “client,” Grant Thornton’s proposed syllabus point 2 would read as follows:

A settlement between an asbestos manufacturer and an asbestos worker does not extinguish direct claims by the premises owner against the manufacturer, when those direct claims are based on the asbestos manufacturer’s fraudulent or negligent acts against the premises owner.

In such a case:

1. Where an injured worker sued an asbestos manufacturer claiming that the manufacturer made intentional misrepresentations about its product and also sued the premises owner; and
2. The manufacturer settled with the injured worker; and

3. The premises owner chose to go to trial and was found liable for its own misconduct;
4. The premises owner could then bring a so-called “direct” action against the manufacturer, claiming that the manufacturer breached an “independent” duty owed to the premises owner in concealing the hazardous nature of its product and was liable for all of the owner’s adjudicated liability, costs and attorney fees.

Although one loss was involved—the alleged injury to the asbestos worker—settlement by the manufacturer or any co-defendant would be precluded by the possible assertion of such specious “direct” claims. A manufacturer (or any joint tortfeasor) would not settle under such a scenario because the settlement would not buy peace, but instead would spawn satellite litigation, in which the non-settling defendants would attempt to recover all of their liability and costs from the settling defendant. The same circumstances arise in virtually any multi-defendant case, including medical malpractice claims (doctor/hospital), drug and medical device claims (doctor/manufacturer) and products claims (seller/manufacturer). Settlements would break down and injured parties would not receive compensation. There is simply no legal or practical reason to apply a different rule or special law to a claim involving an accountant and an attorney.

A *bona fide* direct claim, which Grant Thornton does not have, arises when one co-defendant’s fraud causes another co-defendant to suffer a distinct harm, separate from his liability to the plaintiff. In such a case, the injured co-defendant may bring a claim. For example, a co-defendant in a stock fraud suit who *himself* bought shares due to his co-defendant’s fraud and who suffered his own, discrete loss as a result could sue to redress that injury. *See, e.g., Biben v. Card*, No. 84-0844-CV-W-6, 1991 WL 272848 at \*5 (W.D. Mo. 1991). Unlike the defendant in the stock fraud case, Grant Thornton has no damages separate from those amounts for which it has been found liable to the FDIC, and thus has no direct claims

against Kutak. Under settled law, a co-defendant who is an adjudicated wrongdoer cannot use alleged fraud (or any other label) to end-run the effect of his co-defendant's good-faith settlement and seek reimbursement of the damages he owes due to his own liability to the plaintiff, as Grant Thornton attempts to do in this case. No law supports such a claim by an adjudicated wrongdoer.

As the Circuit Court found, allowing Grant Thornton to create a new and ambiguous exception to the good-faith settlement bar would have devastating consequences. Even where only one individual loss was involved, a joint tortfeasor would not settle with an injured plaintiff when the settlement would not buy peace but would subject it to years of additional litigation with joint tortfeasors who assert sophisticated "direct claims." *See Cook v. Stansell*, 186 W. Va. 189, 191, 411 S.E.2d 844, 846 (1991) (explaining that *Zando* reasoned that "no defendant would want to settle when he remains open to contribution in an uncertain amount to be determined on the basis of a judgment against another in the suit which is to follow"). Indeed, although the District Court found Kutak's \$22 million settlement with the FDIC to be in good faith, nearly a decade later, Kutak is still in litigation with Grant Thornton. If Grant Thornton were to prevail, settlements would cease and injured plaintiffs would wait years to receive compensation.

Moreover, contrary to Grant Thornton's suggestion, barring disguised indemnity claims against co-defendants who settle in good faith does not enable joint tortfeasors to defraud one another "with impunity." Supp. Brief, p. 18. Kutak settled with the FDIC for \$22 million, and the District Court confirmed that Kutak's settlement was made 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. As previously noted, the process provides—and Grant Thornton obtained—a dollar-

for-dollar credit for the amount of Kutak's settlement attributable to the common losses, which Grant Thornton and Kutak, as joint tortfeasors, caused the Bank to suffer. Further, as this Court has underscored, judicial determination of whether settlements are made in good faith provides a backstop against abuse, preventing one co-defendant from colluding with the plaintiff to shift liability to another co-defendant. *See Zando*, 182 W. Va. at 606, 390 S.E.2d at 805 (observing that the good-faith requirement "carries its own safeguards," as "[i]t is highly unlikely that a plaintiff will make a minimal settlement with a defendant who has the financial ability to pay and whose liability is substantial"). The system hardly provides a means for Kutak to act with impunity.

**D. Because Grant Thornton is an Adjudicated Wrongdoer, Any Claim for Attorneys' Fees and Costs is Barred.**

Under the "American Rule," a party in litigation, no matter how successful, bears its own attorneys' fees and costs. An exception to this rule is the "tort of another" doctrine which, as its name implies, provides that one who "through the *tort of another* has been required to act in protection of his interests by bringing or defending an action against a third person is entitled to recover reasonable compensation for loss of time, attorneys' fees and other expenditures thereby suffered or incurred . . ." *Restatement (Second) of Torts* (1979) § 914(2) (emphasis added). In addition to the underlying judgment against it, Grant Thornton remarkably invokes the "tort of another" doctrine in trying to shift to Kutak the attorneys' fees it incurred in its failed effort to defend the FDIC lawsuit and in bringing actions against joint tortfeasors. No law supports such an action by an adjudicated wrongdoer. As found by the Fourth Circuit, Grant Thornton was brought into the litigation and incurred attorneys' fees due to its *own tort*—its negligent audit in violation of GAAS.

In *Cortec Industries, Inc. v. Sum Holding L.P.*, 1994 WL 722708 at \*4 (S.D.N.Y. 1994) (unpublished), a case directly on point, the United States District Court for the Southern District of New York discussed the “tort of another doctrine,” which it referred to as “wrongful involvement in litigation.” *Cortec* involved an attempt by an auditor, Ernst & Young, who declined to participate in a global settlement, to proceed against the settling defendants if Ernst & Young was found to be without fault in the underlying action. The *Cortec* court noted that “Ernst & Young’s ‘tort of another’ claim *assumes that Ernst & Young is free from fault.*” *Id.* at \*2 (emphasis added).<sup>7</sup> This does not describe Grant Thornton, of course, which has already been adjudicated a wrongdoer.

In *Cortec*, the underlying action against the accounting firm alleged inaccuracies in an audit and failure to point out to the company’s management its poor controls and inadequate reporting procedures. Rejecting the accounting firm’s attempt to proceed against the settling defendants, *even if found not guilty*, the district court noted that to state a viable claim for attorneys’ fees against the settling defendants, Ernst & Young must trace its injury (*i.e.*, the fees incurred) to torts committed by those defendants against it. But in the case at bar, the fees that Grant Thornton incurred were “paid on account of liability to the underlying plaintiffs or the risk thereof,” *HealthSouth Corp. Secs. Litig.*, 572 F.3d at 864-65, not on account of a tort that Kutak

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<sup>7</sup> The Court noted that:

At first, even at second blush, it seems strained to try to fit the expense of defending one’s own conduct within the narrow boundaries of the *Restatement*, § 914(2), which requires the showing that “[o]ne who through the tort of *another* has been required to act in the protection of his interests . . .” (emphasis added).”

*Id.* at 3.

committed against Grant Thornton. *Id.* at 864 (concluding that “Scrushy’s claim for attorneys’ fees clearly cannot be considered to be independent of his liability to the underlying plaintiffs”).

Finally, while the accounting firm in *Cortec* alleged a breach of duty by the settling defendant, the court found such allegations of duty to be “conclusory and unsupported by pertinent authority.” *Cortec*, 1994 WL 722708 at \*5. Significantly, the court noted that an independent auditor is retained to pass competent professional judgment upon the accuracy of corporate financial statements and to issue related documents. “If an auditor, in the performance of those tasks, acts fraudulently, recklessly, or negligently, it has breached its own professional duties, and cannot transform those breaches into, or mask them behind, breaches of duties allegedly owed to the auditor by the keepers of the books the auditor was retained to audit.” *Id.* at \*8. The court thus concluded:

Ernst & Young may defend with complete success against plaintiffs’ claims that Ernst & Young committed torts. But even should it do so, Ernst & Young has no viable claim based upon a tort of another theory; or, to use the alternative phrase, it has no viable claim that the conduct of others wrongfully involved Ernst & Young in this litigation with plaintiffs.

*Id.*

The accounting firm in *Cortec*, even if found innocent of wrongdoing, was not permitted to proceed against settling co-defendants for expenses incurred in defending the allegation made against it for its own actions. Grant Thornton’s position that, as an adjudicated wrongdoer, it can pass the costs of its fruitless defense to another contravenes the law in West Virginia and elsewhere dealing with the tort of another doctrine. *See Thomason v. Mosrie*, 134 W. Va. 634, 60 S.E.2d 699 (1950). Like the auditors in *Cortec*, Grant Thornton was brought into the

litigation and incurred attorneys' fees and costs singularly based upon its own wrongful acts as alleged and as conclusively proven by the FDIC.

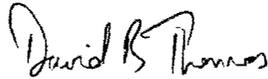
### III. CONCLUSION

Allowing Grant Thornton's claims against Kutak to proceed would re-write settled West Virginia law on the good-faith settlement bar. There is in fact no exception to that bar for accounting firms, especially those found to have negligently caused their clients millions of dollars in damages. The Circuit Court's opinion must be affirmed and Grant Thornton's ten-year quest to elude the just consequences of its own wrongdoing must finally end.

KUTAK ROCK LLP,

Respondent/Defendant,

BY COUNSEL:



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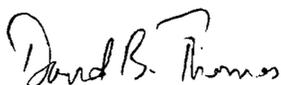
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**CERTIFICATE OF SERVICE**

I, David B. Thomas, counsel for Kutak Rock LLP, do hereby certify that the foregoing "Response of Kutak Rock LLP to Supplemental Brief" has this day been served upon counsel of record, this the 29<sup>th</sup> day of July, 2011, addressed as follows:

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