No. 26364 -- *State of West Virginia ex rel. The Affiliated Construction Trades Foundation, a division of the West Virginia Building and Construction Trades Council, AFL-CIO, and all those similarly situated v. William F. Vieweg, Commissioner, Bureau of Employment Programs, and Compensation Programs Performance Council*

McGraw, Justice, dissenting:

Wrong, wrong, wrong!

Three days before leaving office in 1977, a former Governor settled the State of West Virginia's lawsuit against Pittston Coal for its culpability in the Buffalo Creek disaster, thereby depriving the people of West Virginia of their day in court against a coal company that had betrayed the public trust and ignored its obligations to society.[1]

[1]Jack McCarthy, *A Man-made Disaster*, Sunday Gazette Mail, Feb. 23, 1977 (marking the 25th anniversary of the tragedy). The article also described the event:

> Water and coal refuse, 30 feet high and 550 feet across, burst through its hillside location after two days of rain, cascading more than 15 miles down Buffalo Creek in Logan County. Moving at 5 miles per hour, the water took about three hours to wash out a succession of small coal towns and reach the confluence of Buffalo Creek and the Guyandotte River at Man.
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> The disaster killed 125 people, injured 1,000, and left 4,000 homeless. Five hundred and seven houses were lost or demolished 44 mobile homes were destroyed another 273 houses were severely damaged, while nearly 663 houses

suffered damage to varying degrees. In addition, 30 businesses, 1,000 vehicles, 10 bridges, and power, water and telephone lines were destroyed, and the county road and the rail lines servicing the valley's coal mines were severely damaged.

The flood also left an indelible scar on the survivors. In many ways, it damaged all West Virginians.

No lives were lost in the cases presently at issue before this Court, but Commissioner Vieweg's decision to drop these lawsuits against various coal companies deprives the citizens of their day in court, just as surely and just as unfairly as did the decision of a former Governor over 25 years ago.

In this context, of special concern to me is the dark cloud hanging over the whole transaction. Commissioner William Vieweg, as he tells in his affidavit to this Court, is the self-same William Vieweg who, for ten years in which the allegedly improper practices were occurring, was employed by one of the defendants, Island Creek Coal, as a "manag[er] for all insured and self-insured compensation programs for Island Creek Employees. . . ."[2]

[2]*See also* Editorial, *Workers' Comp, Court Should Dump Vieweg*, The Charleston Gazette, July 3, 1999 (noting that during Vieweg's tenure, contract miners for Island Creek "ran up $47.5 million in delinquencies, the largest amount owed by any company [sued]").

And this is one of the most troubling aspects of this case to me, for the majority seems to miss what must be so readily apparent to thousands of West Virginians - this deal just doesn't pass the smell test. Even if I were to agree that the Commissioner had the right to drop these suits--and I don't--I would still be concerned about the conflict of interest. Such conflicts erode the public's confidence in government.[3]

My grandparents, who were not lawyers, but farmers, may not have understood the complexities of our workers' compensation law, or the legal

[3]Some scholars have debated this issue, in the context of the actions of members of the legislative branch of government, but the argument applies as well to the executive:

> Admonitions to legislators that they have an ethical obligation to avoid actions that could result in public disapproval fit naturally into discussions of congressional ethics. One of the central goals of the ethics codes, after all, is to promote public confidence in the legislative branch and thereby to reinforce the legitimacy of government. The same point can be put in terms of institutional loyalty and responsibility: unseemly behavior by a few members makes it harder for their colleagues to do their own jobs. Professor Andrew Stark, in an illuminating analysis, has explained the rationale for subjecting officeholders to the constraints of an appearance of impropriety disciplinary standard: its purpose is "to heighten their democratic representativeness–in order to ensure that officials perceive reality the way the public does and are sensitive to norms that the public harbors."

Ronald M. Levin, *Congressional Ethics and Constituent Advocacy in an Age of Mistrust*, 95 Mich L. Rev. 1, 99-100 (1996) (quoting Andrew Stark, *The Appearance of Official Impropriety and the Concept of Political Crime*, 105 Ethics 326, 349 (1995)).

underpinnings of these suits, but had an expression for the current state of affairs, for even they knew that it is not a wise decision to "let the fox guard the hen house."

Another issue of grave concern is the fundamental unfairness of Commissioner Vieweg's decision. It shifts the burden of paying some $250,000,000 in coal company debt to the other employers in West Virginia, who have never engaged in any charades to avoid paying their workers' compensation premiums. As so proudly pointed out by the Chamber of Commerce, 97% of all West Virginia business are small businesses, and "the Chamber" is "the voice of business in West Virginia." If the chamber truly represents the feelings of 97% of the dry cleaners, restaurants, convenience stores, and other small businesses, I am simply incredulous that this "voice" is not crying out and demanding that Commissioner Vieweg take these suits to trial. Because it is indeed the other, honest businesses in West Virginia, including those coal company's that did not employ defaulting contract miners, who must bear this cost.

Commissioner Vieweg maintains that a new plan of the Division will recoup the $200 to $250 million by imposing a surcharge on other coal companies, and this plan, therefore, means that only coal companies will be responsible for paying back the debt. Beyond the continuing unfairness to those coal companies which paid their own way, this argument makes no sense to me. If the Workers' Compensation Fund made decisions over the last 10 to 15 years about rasing rates for other employers or reducing workers' benefits, (which it did) then the Fund must have figured into those

rates the fact that there was a huge deficit, at least a quarter of a billion of which comes from the payment-dodging coal companies being sued.

That is to say, even though there is apparently some new scheme now whereby "only" coal companies will pay back the $250 million, those bad debts, which have piled up over 20 years, have had an impact on the rates of every employer and the benefits of every injured employee. In his affidavit, Vieweg, states that:

> On May 20th, 1997 . . .the Council unanimously approved a premium rate-making plan and base premium rates designed, among other things, to eliminate a staggering deficit and return the workers' compensation system to a sound financial basis, including elimination of across-class subsidies *on a prospective basis* for underground coal mining and certain other classes of business and industry;

Vieweg affidavit at ___ (emphasis added). Since prospective means, "in the future only," I don't see what this says about what has occurred over the last 25 years.

Also, I feel it is important to note that historically, the Fund has been subject to changing political winds, like all of government. There is nothing that would prevent the Fund, in the event of a massive recovery from the defendant coal companies, from eventually *lowering* premiums in all categories. Indeed political pressure from all the other employers would probably demand such a change, if such a reduction in the deficit were to occur. So it is disingenuous to argue that coal has been forever "walled off." Reducing the $1.9 billion deficit by $250 million would eventually have to benefit

all the employers and employees in this state, including Affiliated Construction Trades Foundation and the employees and employers it represents.

The majority glosses over the fact that we are talking about one quarter of a *billion* dollars. To place this in perspective, according to figures supplied by the Governor for the fiscal year ending June 30, 1998, the entire amount of tuition and fees received by institutions of higher education in West Virginia totaled only $194, 834, 000.[4] I can't see that every family of every child attending college in West Virginia would like to donate a year's worth of tuition and fees to coal companies.

The majority is simply incorrect. This Court should grant a Writ of Mandamus compelling Commissioner Vieweg to proceed with the lawsuits, at least until such a time as the likelihood of recover may be more readily determined. To not do so would essentially throw away a very reasonably chance at an extremely large recovery, and do a great disservice to the people of the State of West Virginia. We have defined our procedures regarding mandamus:

> "A writ of mandamus will not issue unless three elements coexist--(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy." Syllabus Point 2, *State*

[4]West Virginia Comprehensive Annual Financial Report, Year Ending June 30, 1998 at 19.

> *ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969).

Syl. pt. 1, *State ex rel. West Virginia Reg'l Jail and Correctional Facility Auth. v. West Virginia Inv. Management Bd.*, ___ W. Va. ___, 508 S.E.2d 130 (1998). We have not always been so timid in the application of our constitutional derived power of mandamus:

> The trend in this Court has been to enlarge the scope of mandamus. *State ex rel. Smoleski v. County Court of Hancock County*, 153 W.Va. 307, 168 S.E.2d 521 (1969), especially where there is an urgent question of public policy or where there is no reason for delaying adjudication of the issue by the highest court of the State.

Walls v. Miller, 162 W. Va. 563, 566, 251 S.E.2d 491, 495 (1978) (footnote omitted).[5] We have not been hesitant in the past in granting extraordinary relief where an administrative official has refused to initiate litigation on behalf of the State. For example, in *State ex rel. Ginsberg v. Naum*, 173 W. Va. 510, 318 S.E.2d 454 (1984), we

[5]We felt compelled to note in *Wells*, which concerned the application of mine safety rules, that the industry has not always been kind to its workers:

> Furthermore, in this case we are not concerned with a mere point of law in routine civil litigation, but rather with the lives and limbs of countless thousands of living, breathing, human beings who, along with their families, have suffered needless loss since time out of mind in an industry which appears inevitably to suck the life's blood from the miner as he takes the coal from the earth. The Legislature intended that this needless suffering should stop, and it is our duty to effect the legislative purpose by such means as will best accomplish that end.

Wells, 162 W. Va. at 567, 251 S.E.2D AT 496.

held that a county prosecutor had a nondiscretionary duty to prosecute welfare fraud cases. I would posit that Commissioner Vieweg has a similar duty to prosecute the actions at issue in this case, based upon his fiduciary duty to protect the assets and financial integrity of the Fund. *See Dadisman v. Moore*, 181 W. Va. 779, 384 S.E.2d 816 (1989) (awarding mandamus based upon, *inter alia*, breach of fiduciary duty to administer retirement fund).

Furthermore, in this case we are not concerned with a mere point of law in routine civil litigation, but rather with the lives and limbs of countless thousands of living, breathing, human beings who, along with their families, have suffered loss as a result of the alleged conduct of the defendants in these cases. The Legislature intended that this needless suffering should stop, and it is our duty to effect the legislative purpose by such means as will best accomplish that end.

Affiliated Construction Trades Foundation has a clear legal right. Affiliated Construction Trades Foundation, as an employer that pays premiums into the fund, has been affected in the past by the deficit, and specifically by the impact of the missing $250 million in question, and has paid, is paying, or will pay higher premiums than it otherwise would because of the alleged actions of the defendant coal companies. Affiliated Construction Trades Foundation also brings suit on behalf of its employees who have likewise been affected. Therefore, both Affiliated Construction Trades

Foundation and the employees it represents have a clear legal right to see the Commissioner perform his duties under the law to manage the Fund so as to "fix and maintain the lowest possible rates of premium taxes."

Vieweg has a legal duty to follow the law and properly manage the Fund, fixing the lowest rates possible and bearing in mind his fiduciary obligation to the fund. West Virginia Code, § 23-2-4 states:

> (a) The commissioner, in conjunction with the compensation programs performance council, is authorized to establish by rule a system for determining the classification and distribution into classes of employers subject to this chapter, a system for determining rates of premium taxes applicable to employers subject to this chapter, a system of multiple policy options with criteria for subscription thereto, and criteria for an annual employer's statement providing both benefits liability information and rate determination information.
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> (2) The rule shall be consistent with the duty of the commissioner and the compensation programs performance council *to fix and maintain the* ***lowest possible rates*** *of premium taxes consistent with the maintenance of a solvent workers' compensation fund and the reduction of any deficit that may exist in such fund and in keeping with their* ***fiduciary obligations*** *to the fund;*

W. Va. Code § 23-2-4(a)(2) (1995) (emphasis added). There is no question that adding an additional $250 million to the Fund's coffers will help to fix the lowest possible rates and reduce the deficit.

The petitioner has no other adequate remedy. One might argue that mismanagement of the Fund should be dealt with directly by the voters, who are free to

remove Commissioner Vieweg from his position by choosing to vote against the Governor in the next election.[6] However, by the time the voters have another say, the suits will have been dropped and the chance to recover the $250,000,000, a tremendous sum of money, will have been forever lost.

There has been much ado about the amount of money expended thus far in the pursuit of these cases. The majority, relying upon the Commissioner's information, quotes the following:

> WHEREAS, it appears that the amount of defaulted premium due and owing approximates $95 million and the interest and penalties thereon also approximate $95 million and *further accumulating at the rate of $3 million per **MONTH***; and
> WHEREAS, outside limitation expenses to date have totaled $3 million; and
> WHEREAS, the Division may expect to incur ongoing outside litigation expenses of $30,000 per month . . . .

Majority at 4 (emphasis added). Even my basic mathematical powers tell me that $30,000 per month is only *one percent* of the $3,000,000 *increase* in penalties and interest accruing each month, and that the total amount spent to date represents only *one month of such accruals.* Clearly, the Commissioner has refused to consider the amount expended in the context of the recovery at stake, and the majority has been seduced by this logic.

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[6]In fact, a member of the majority had been quoted saying as much. *See* Paul J. Nyden, *Vieweg Has Discretion to Kill Suits, Court Told, But Unions Say He Has Duty to Protect Workers' Comp.*, The Charleston Gazette, June 30, 1998.

Finally, I must again point out the hypocrisy of the Commissioner's decision to drop the suits. Even Commissioner Vieweg himself, perhaps in an earlier, more simple time, held forth the importance of reducing the Fund's deficit, and working together to see that all West Virginia business owners pay their fair share, and no more:

> When I was appointed by to the Office of the Commissioner of the Bureau of Employment Programs by Governor Underwood on February 13, 1997, I committed to restoring the Workers' Compensation division to a sound, financial condition. I would like to share with you what the Compensation Programs Performance Council and the Bureau, working together, are doing to achieve this objective. . . .
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> Vision 1. First, reduce and then eliminate the $2.2 billion deficit, which now burdens the creation of jobs and limits economic growth and development in West Virginia. . . .
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> Vision 3. Aggressively *prosecute* claimant and employer *fraud* in workers [sic] compensation because fraud reduces funds available to support legitimate claims and increases the employer burden. . . .
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> Positive results are being achieved and we will continue to build effectively and broadly on these results. I must issue a warning, a serious caveat. Any missteps or initiatives to reverse this fragile process will cripple the well-structured goals and objectives and could destroy the process altogether. Our job is to "stay the course" and this together we will do.

William F. Vieweg, *An Open Letter to All West Virginia Employers*, West Virginia Workers' Compensation, Inside Look, Nov. 1997 (emphasis in original). These words now ring hollow.

Just as a former Governor's decision to let Pittston off the hook left the people of West Virginia with the expense of cleaning up[7], this decision of the present administration leaves the honest employers and business owners of West Virginia cleaning up somebody else's mess. The defendants in question have allegedly acted with callous disregard for the rule of law and the common good. To allow the executive branch to reward this activity is simply unconscionable, and so I must, respectfully, dissent.

[7] The taxpayers of West Virginia eventually had to pay the United States government almost $10 million for the clean up efforts, plus interest. See United States of America v. State of West Virginia, 764 F.2d 1028 (4th Cir.1985), aff'd 479 U.S. 305, 107 S.Ct. 702, 93 L.Ed.2d 639 (1987).