1 *Bates v. State Bar of Ariz.*, 433 U.S. 350, 385 (1977).

2 *Id.* at 383.

3 *Id.* at 368. As "commercial speech," attorney advertising became subject to a four part test for evaluating whether regulations limiting such speech are constitutional: (1) is the speech lawful and not misleading; (2) is the government interest in regulating the speech substantial; (3) does the regulation actually advance the government interest; and (4) if the interest could be achieved by a more limited restriction on commercial speech, the limitation fails.

4 *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 630 (1985).

5 *Id.* at 631.

6 *Id.*

7 *Id.* at 632.

8 *Id.*

9 *Id.* at 641.

10 *See Chronological List of States Adopting Model Rules,* ABA, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_profession al_conduct/chrono_list_state_adopting_model_rules.html.

11 Colin Croft, *Reconceptualizing American Legal Professionalism: A Proposal for Deliberative Moral Community*, 67 N.Y.U. L. REV. 1256, 1306 (1992).

12 FINAL REPORT OF THE COMMITTEE ON CODE OF PROFESSIONAL ETHICS, Canon 27, *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/1908_canons_ethics.authcheckdam.pdf.

13 *Id.*

14 Model R. Prof. Conduct 7.2 (1983).

15 Model R. Prof. Conduct 7.3, 7.4 (1983).

16 See *Shapero v. Ky. State Bar*, 486 U.S. 466 (1988) (striking down Kentucky's rule regarding direct contact with prospective clients that was identical to the model rule); *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91 (1990) (holding that states may not impose restrictions that burden a lawyer's truthful statement that he or she is a specialist, certified by an organization).

17 Model R. Prof. Conduct 7.1.

18 *Id.*

19 Complaint ¶¶ 53–58, *Zimmer, Inc. v. Kresch/Oliver PLLC et al.*, No. 11CV00063, 2011 WL 767056 (N.D. Ind. Feb. 26, 2011); *see also* Erin Fuchs, *Knee Device Maker Sues Plaintiffs Firm Over Ads*, LAW360, http://www.law360.com/articles/284095/knee-device-maker-sues-plaintiffs-firm-over-ads (Nov. 7, 2011).

20 Complaint, *supra* note 30, ¶ 54.

21 *See id.* ¶ 70–104.

22 *Correcting the Record: Zimmer's Lawsuit,* ZIMMERFACTS, http://zimmerfacts.com/background/index.html (last visited Jan. 29, 2016).

23 Alex Nussbaum & David Voreacos, *Artificial-Knee Suits Targeting Zimmer Haunt Lawyers*, BLOOMBERGBUSINESS, http://www.bloomberg.com/news/articles/2011-08-09/artificial-knee-suits-targeting-zimmer-haunt-lawyers-correct- (Aug. 9, 2011).

24 Lanham Act § 43(a), 60 Stat. 441, codified at 15 U.S.C. § 1125(a).

25 *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1393 (2014) (internal quotation marks and citations omitted).

26 *Id.* at 1386 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

27 134 S. Ct. 1377.

28 *Id.* at 1392 (citing 11 U.S.C. § 1127).

29 *Id.* at 1392.

30 *Id.* at 1390.

31 *Id.* at 1391.

32 *Fed. Exp. Corp. v. United Parcel Serv., Inc.*, 765 F. Supp. 2d 1011, 1016–17 (W.D. Tenn. 2010) (quoting *Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery*, 185 F.3d 606, 613 (6th Cir. 1999).

33 *Am. Council of Certified Podiatric Physicians & Surgeons*, 185 F.3d at 614.

34 *Id.*

35 *Id.*

36 *Balance Dynamics Corp. v. Schmitt Indus., Inc.*, 204 F.3d 683, 694 (6th Cir. 2000) (citing *Porous Media Corp. v. Pall Corp.*, 110 F.3d 1329 (8th Cir. 1997)).

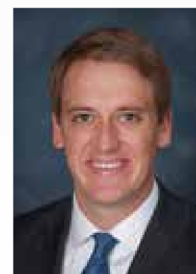
37 *Id.* at 616.

38 *Id.*

NEW AND NOTEWORTHY

LEARNED INTERMEDIARY

By Kyle R. Cummins



By Eric E. Hudson

As many of you may know, West Virginia has *finally* decided to jump onto the learned intermediary band wagon. From eliminating the learned intermediary rule completely in *State ex rel. Johnson & Johnson Corp. v. Karl*, 647 S.E.2d 899 (W. Va. 2007), to adopting the learned intermediary rule with the passage of W. Va. Code §55-7-30 (effective May 17, 2016), West Virginia can count itself among the clear majority of jurisdictions now. Perhaps this sea change will permanently remove West Virginia from the (far from coveted) number-one spot on the Drug and Device Law's blog post - *The Best and Worst of 2007: The Worst* – a dubious distinction which it earned with its *Karl* decision.

West Virginia's new statute is significant because it adopts the learned intermediary rule as it is seen in the Third Restatement of Torts, but *without any exceptions.* W. Va. Code §55-7-30:

> Adequate pharmaceutical warnings; limiting civil liability for manufacturers or sellers who provide warning to a learned intermediary.
>
> (a) A manufacturer or seller of a prescription drug or device may not be held liable in a product liability action for a claim based upon inadequate warning or instruction unless the claimant proves, among other elements, that:
>
> > (1) The manufacturer or seller of a prescription drug or medical device acted unreasonably in failing to provide reasonable instructions or warnings regarding foreseeable risks of harm to prescribing or other health care providers who are in a position to reduce the risks of harm in accordance with the instructions or warnings; and
> >
> > (2) Failure to provide reasonable instructions or warnings was a proximate cause of harm.
>
> (b) It is the intention of the Legislature in enacting this section to adopt and allow the development of a learned intermediary doctrine as a defense in cases based upon claims of inadequate warning or instruction for prescription drugs or devices.

Nonconformists to the learned intermediary rule are even more distinctly the "exception to the rule" now.

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Nonconformists to the learned intermediary rule are even more distinctly the "exception to the rule" now.

LEARNED INTERMEDIARY - CONT.

And contrary to the forecasts at the time, the "DTC advertising" exception to the learned intermediary rule in *Perez v. Wyeth Laboratories, Inc.*, 734 A.2d 1245 (N.J. 1999) ("when direct warnings to consumers are mandatory, the learned intermediary doctrine … drops out of the calculus"), and the ruling in *Karl*, were not harbingers of an anti-learned intermediary rule movement. In fact, despite their attempts, plaintiffs have been unsuccessful in pushing expansion of *Perez* and *Karl:* "not a single state's high court (or any other court, for that matter) has followed *Karl* down the path to perdition. And now *Karl* itself is history." *Renaissance of the Learned Intermediary Rule*, http://www.druganddevicelaw.blogspot.com (March 3, 2016). And "every state now has pro-learned intermediary precedent." Id.

It is almost as if the *Karl* decision launched a movement to avoid its ramifications, resulting in adoption or reaffirmance of the learned intermediary rule, because "recent precedent uniformly refutes" the proposition that the rule is obsolete or archaic. *See Id.*

The Drug and Device Law's blog has provided an excellent summary of the law in this area, and we encourage our readers to take a look. (http://www.druganddevicelaw.blogspot.com; http://druganddevicelaw.blogspot.com/search?q=renaissance). ■

It is almost as if the *Karl* decision launched a movement to avoid its ramifications, resulting in adoption or reaffirmance to the learned intermediary rule...

By Ashley J. Markham

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