Click to return to Table of Contents

West Virginia Medical Professional Liability Review 2011-12[1]

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Introduction

This article reviews developments in Medical Professional Liability in West Virginia for the past year. Two issues stand out. First, the noneconomic damages limitations, or caps, passed in 2003, were upheld by the Supreme Court of Appeals of West Virginia as constitutional in *MacDonald v. City Hospital*. Second, the decision of the Supreme Court of Appeals of West Virginia striking down provisions in nursing home agreements requiring arbitration was vacated by the United States Supreme Court. On tap in the Supreme Court of Appeals are cases involving dismissal for failure to file certificate of merit, ostensible agency under West Virginia Code 55-7B-9, and the first appellate salvo from the recent $91 million dollar verdict against a nursing home.

MPLA Quick Review

Consideration of medical negligence cases in West Virginia must occur against the backdrop of the Medical Professional Liability Act (MPLA). The MPLA, first passed in 1986 and amended in 2001 and 2003, governs all "medical professional liability actions" which are broadly defined to include any actions in tort or contract against health care providers by patients arising from health care.[2]

The 1986 MPLA (MPLA I), which applied to injuries occurring after June 6, 1986,[3] defined the elements of an MPL action, established a one million dollar cap on non-economic damages,[4] and limited joint and several liability.[5] MPLA I also restricted the statement of damages in *ad damnun* clauses,[6] require expert testimony and set forth qualifications of expert witness,[7]

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1 This paper is an update of the law which follows a series of prior papers. For West Virginia law prior to the enactment of the original MPLA in 1986, read Mike Farrell's seminal article, The Law of Medical Malpractice in West Virginia, 82 W.VA. L. REV. 251 (1979). For review of the MPLA, see Thomas J. Hurney, Jr. & Robby J. Aliff, Medical Professional Liability in West Virginia, 105 W.Va. L. REV. 369 (Winter 2003), and Thomas J. Hurney, Jr. and Jennifer Mankins, Medical Professional Liability in West Virginia, Part II, 114 W.Va. L. REV 573 (2012). See also, Thomas J. Hurney, Jr., Hospital Liability in West Virginia, 95 West Virginia Law Review 943 (1993).

2 W.Va. Code § 55-7B-2(d) (1986).

3 W.Va. Code § 55-7B-9 (1986). Under the original version of § 55-7B-9, only defendants present at verdict are considered by the jury in its apportionment. See, Rowe v. Sisters of the Pallotine Missionary, 211 W.Va. 16, 560 S.E.2d 491 (2001).

4 W.Va. Code § 55-7B-8 (1986).

5 W.Va. Code § 55-7B- 9 (1986).

6 W.Va. Code § 55-7B-5 (1986).

7 W.Va. Code § 55-7B-7 (1986).

established a shortened statute of limitations for claims by minors[8] and a ten year statute of repose,[9] and various pretrial procedures.[10]

MPLA II (H.B. 601), passed in 2001, applies to *actions filed after* March 1, 2002,[11] and required Notice of Claim and Certificate of Merit as a mandatory prerequisite to filing suit;[12] mandatory mediation;[13] exchange of medical records;[14] management and scheduling directives designed to expedite actions;[15] voluntary summary jury trials;[16] an increase in the number of jurors from six to twelve with nine required to prevail;[17] and elimination of third party claims under the Unfair Trade Practices Act.[18]

MPLA III, (H.B. 2122) applies to *actions filed after* July 1, 2003,[19] and added provisions for expedited resolution of cases;[20] limitations on the use of "loss of chance";[21] elimination of joint and several liability;[22] collateral source adjustment;[23] expert qualifications;[24] restrictions on ostensible agency;[25] limits on actions against health care providers by third parties;[26] lowering of the non-economic caps to $250,000, and $500,000 for more serious cases;[27] and an overall $500,000 cap on all damages (both economic and non economic) in "trauma" cases.[28] H.B. 2122 also created a patient compensation fund.[29]

The MPLA and its amendments have been the subject of a variety of challenges. The MPLA I provision setting qualifications for experts was struck down as an unconstitutional legislative intrusion into the Court's rule-making power[30] as was the twelve person jury established in

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8 W.Va. Code § 55-7B- 4(b) (1986).

9 W.Va. Code § 55-7B-4(a) (1986).

10 W.Va. Code § 55-7B-6 (1986) (This section, as amended, is now §55-7B-6b).

11 W.Va. Code § 55-7B-10(a) (2001).

12 W.Va. Code § 55-7B-6 (2001).

13 W.Va. Code § 55-7B-6b(b) (2001).

14 W.Va. Code § 55-7B-6a (2001).

15 W.Va. Code § 55-7B-6b (2001).

16 W.Va. Code § 55-7B-6c (2001)

17 The twelve person jury was struck down as unconstitutional in *Louk v. Cormier*, 218 W.Va. 81, 622 S.E.2d 788 (2005).

18 W.Va. Code § 55-7B-5(b). A health care provider can still file a first party action against a carrier but not until after the underlying matter is resolved. *Id.*, § 55-7B-5(c).

19 W.Va. Code § 55-7B-10(b) (2003).

20 W.Va. Code § 55-7B-6d (2003).

21 W.Va. Code § 55-7B-3(b) (2003).

22 W.Va. Code § 55-7B- 9 (2003).

23 W.Va. Code § 55-7B- 9a (2003).

24 W.Va. Code § 55-7B- 7 (2003).

25 W.Va. Code § 55-7B- 9a(g) (2003).

26 W.Va. Code § 55-7B-9b (2003).

27 W.Va. Code § 55-7B-9c (2003).

28 W.Va. Code § 55-7B-9c (2003).

29 W.Va. Code § 29-12C-1 (2003). Other statutes offer liability protection in specific circumstances to health care providers (and others), advancing a policy to encourage the provision and improvement of medical care. See, W. Va. Code § 30-3C-2(a)(1)(peer review protection); W.Va. Code § 30-3-10A(a)(Good Samaritans); W.Va. Code § 55-7-15, 19 (retired physicians with special volunteer medical license who provide care without pay for the indigent, absent gross negligence or willful misconduct); W. Va. Code § 55-7-23(a)(Innocent Prescribers Act); W.Va. Code § 30-5-12 (protection for pharmacists and pharmacies who dispense medications unchanged); West Virginia Code §55-7-11(b)(1)(Expressions of sympathy or apology by a healthcare provider).

30 *Mayhorn v. Logan Medical Foundation*, 193 W.Va. 42, 454 S.E.3d 87 (1994).

MPLA II.[31] While the pre-suit requirement of Notice of Claim and Certificate of Merit has been challenged several times, the Court has declined to strike it down on constitutional grounds. The Court's opinions, however, demonstrate it is reluctant to affirm dismissal of complaints where plaintiffs fail to comply with W.Va. Code § 55-7B-6d.[32] The original one million dollar "cap" on noneconomic loss was affirmed as constitutional on two occasions, and the 2003 amendments were upheld last year, in *MacDonald v. City Hospital*, 715 S.E.2d 405 (2011).

Non Economic Damages Cap Upheld

In 2003, the West Virginia legislature passed significant amendments to the Medical Professional Liability Act which including a reduction in the existing $1 million dollar limitation on non economic damages from one million. As amended, W. Va. Code § 55-7B-8 provides:

> (a) In any professional liability action brought against a health care provider pursuant to this article, *the maximum amount recoverable as compensatory damages for noneconomic loss shall not exceed two hundred fifty thousand dollars per occurrence*, regardless of the number of plaintiffs or the number of defendants or, in the case of wrongful death, regardless of the number of distributees, except as provided in subsection (b) of this section.
>
> (b) The plaintiff may recover compensatory damages for noneconomic loss in excess of the limitation described in subsection (a) of this section, but not in excess of *five hundred thousand dollars* for each occurrence, regardless of the number of plaintiffs or the number of defendants or, in the case of wrongful death, regardless of the number of distributees, where the damages for noneconomic losses suffered by the plaintiff were for: *(1) Wrongful death; (2) permanent and substantial physical deformity, loss of use of a limb or loss of a bodily organ system; or (3) permanent physical or mental functional injury that permanently prevents the injured person from being able to independently care for himself or herself and perform life sustaining activities.*

W. Va.Code § 55-7B-8 (2003) (Repl.Vol. 2008).

The Supreme Court of Appeals of West Virginia upheld § 55-7B-8 as constitutional in *MacDonald v. City Hospital*, 715 S.E.2d 405 (2011),[33] coming "squarely with the majority of jurisdictions in holding that caps on noneconomic damages in medical malpractice cases are constitutional."

Facts of MacDonald

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[31] *Louk v. Cormier*, 218 W.Va. 81, 622 S.E.2d 788 (2005).

[32] *See*, *State ex rel Miller v. Stone,* 216 W.Va. 379, 607 S.E.2d 485, 2004 W.Va. Lexis 174 (2004); *Boggs v. Camden Clark Memorial Hospital,* 216 W.Va. 656, 609 S.E.2d 917, 2004 W.Va. Lexis 217 (2004)*; Hinchman v. Gillette*, 217 W.Va. 378, 618 S.E.2d 387, 2005 W.Va. Lexis 102 (2005); *Gray v. Mena,* 218 W.Va. 564, 625 S.E.2d 326 (2005)..

[33] Disclosure: Author represented City Hospital on appeal in *MacDonald.*

In *MacDonald*, the patient and his wife claimed he contracted rhabdomyolysis from a combination of medications ordered for him by the defendant physician while he was a patient at the defendant hospital. They asserted (successfully at trial) that the physician negligently ordered the medications and failed to monitor for side effects, and the hospital's pharmacy failed to alert the physician of possible adverse reactions.

At trial, where liability and damages were vigorously challenged, the jury found for the plaintiffs, apportioning 70% of the liability to the physician and 30% to the hospital. The verdict was substantial, and included $1 million to the patient for pain and suffering and $500,000 to his wife for loss of consortium. The circuit court, applying West Virginia Code § 55-7B-8(b), reduced the non economic award to $500,000, finding the plaintiff "suffered a permanent and substantial physical deformity warranting application of the higher cap amount…." The reduction eliminated completely the consortium award to the wife. The plaintiffs appealed.

The Opinion: Constitutional Challenges

On appeal, the Supreme Court of Appeals affirmed the constitutionality of West Virginia Code § 55-7B-8.[34] Following two decisions in which it affirmed the prior one million dollar limitation, *Robinson v. Charleston Area Medical Center, Inc.*, 186 W. Va. 720, 414 S.E.2d 877 (1991) and *Verba v. Ghaphery*, 210 W. Va. 30, 552 S.E.2d 406 (2001), the Court again rejected a variety of constitutional challenges to the statute.

The *MacDonald* opinion reflects deference to Legislature. On review of the findings set forth in the statute regarding the necessity for the enacted reforms, the Court stated "[t]he Legislature could have rationally believed that decreasing the cap on noneconomic damages would reduce rising medical malpractice premiums and, in turn, prevent physicians from leaving the state thereby increasing the quality of, and access to, healthcare for West Virginia residents. While one or more members of the majority may differ with the legislative reasoning, it is not our prerogative to substitute our judgment for that of the Legislature, so long as the classification is rational and bears a reasonable relationship to a proper governmental purpose." It was important to the Court that while lower than the former million dollar limit, the current caps automatically increase each year to account for inflation and to claim the protection of the cap, a health care provider must have at least one million dollars in insurance.

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[34] *MacDonald* was a 4-1 vote. Of interest, two Justices recused themselves. Justice McHugh stepped aside voluntarily because of his position as Chairman of the Board of Trustees of a Charleston hospital. Plaintiffs moved to recuse Justice Ketchum based on statements made during his campaign for election to the Court that he believed the "caps" were constitutional. Motion for Disqualification, Sept. __, 2010. Justice Ketchum initially declined recusal, but reconsidered after his order immediately appeared on an internet blog site, stating he would not permit the court to be publicly maligned. See, Memorandum, Justice Menis Ketchum, Sept. 27, 2010. The case was therefore heard by three Supreme Court justices and two circuit judges, Thomas Evans, Jackson County, and Ronald Wilson, Ohio County, appointed to sit by the Chief Justice. Justice Wilson penned a vigorous dissent from the majority opinion.

The Court found no violation of the right to trial by jury, rejecting plaintiffs' reliance upon *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218 (Ga. 2010). The Court found that Georgia's constitutional provision – which states the right to jury trial is "inviolate" - was substantially different than West Virginia's provision. Instead, "the right of jury trials in cases at law is not impacted. Juries always find facts on a matrix of laws given to them by the legislature and by precedent, and it can hardly be argued that limitations imposed by law are a usurpation of the jury function." The Court also rejected the argument that by setting limits on damages, the statute violated the constitution's "reexamination" clause. The Court held that the reexamination clause, which states "[n]o fact tried by a jury shall be otherwise reexamined in any case than according to the rule of court or law…," did not apply to actions of the Legislature.

The Court found no equal protection violation. The plaintiffs argued that section 55-7B-8 violated equal protection, claiming "there was no factual basis for the Legislature to conclude that lowering the cap … would accomplish the legislative goals of attracting and keeping physicians in West Virginia and reducing medical malpractice premiums…." The plaintiffs also argued the statute particularly impacted women, noting the elimination of the consortium award. The Court rejected the argument, stating "[t]he Legislature could have rationally believed that decreasing the cap on noneconomic damages would reduce rising medical malpractice premiums and, in turn, prevent physicians from leaving the state thereby increasing the quality of, and access to, healthcare for West Virginia residents." Given this rational basis, the Court stated "the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." The Court similarly found no violation of the "certain remedy" guarantee in the West Virginia Constitution, stating

> [T]he impact of the statute at issue is limited to a narrow class–those with noneconomic damages exceeding $250,000. Furthermore, the Legislature has not imposed an absolute bar to recovery of noneconomic damages. Instead, the Legislature has merely placed a limitation on the amount of recovery in order to effectuate the purpose of the Act as set forth in W. Va. Code § 55-7B-1. Because the legislative reasons for the amendments to the Act are valid, there is no violation of the certain remedy provision and, thus, no merit to the MacDonalds' argument.

The Court found it was in the mainstream. "Several other jurisdictions have also concluded that controlling malpractice insurances costs, and in turn healthcare costs, through the enactment of a cap on noneconomic damages is a legislative policy choice that cannot be second-guessed by courts, but rather, must be upheld as rationally-related to a legitimate government purpose."[35] The court concluded "[w]e note that our decision today is consistent with the majority of jurisdictions

[35] The Court cited other jurisdictions reaching similar conclusions. *Evans ex. rel Kutch v. State*, 56 P.3d 1046, 1053, 1055 (Alaska 2002); *Judd v. Drezga*, 103 P.3d 135, 140 (Utah 2004); *Estate of McCall v. United States*, No. 09-16375, 2011 WL 2084069 (11th Cir. May 27, 2011); *Zdrojewski v. Murphy*, 657 N.W.2d 721, 739 (Mich.App. 2002).

that have considered the constitutionality of caps on noneconomic damages in medical malpractice actions or in any personal injury action."[36]

Application of W. Va. Code § 55-7B-8(b)

The *MacDonald* court also addressed the circuit court's application of the $500,000 limitation in W. Va. Code § 55-7B-8(b). On cross appeal, the defendants' argued the evidence did not support the trial judge's finding that plaintiff had a "permanent and substantial physical deformity…."

The Court afforded "great deference" to the trial judge's factual finding "that Mr. MacDonald's injuries constituted a 'permanent and substantial deformity' because 'the rhabdomyolysis has essentially caused the complete deterioration of his leg muscles…," thereby satisfying the criteria set forth in W. Va. Code § 55-7B-8(b). In a footnote, the Court suggested the issue was a "factual determination that clearly should have been made by the jury" via special interrogatories.

Causation

The *MacDonald* court also affirmed the denial of the hospital's motions for summary judgment and judgment as a matter of law at trial. The hospital argued that because the physician testified he knew of and weighed the risks of the medications before prescribing them, there was no causal link between the hospital's failure to advise him of the risks and the plaintiff's injury. The court found the evidence, including plaintiffs' expert's testimony that the hospital's failure to advise of drug interactions was a breach of the standard of care, along with introduction of hospital policies, was sufficient to raise a jury issue. As to causation, the Court found the jury could have concluded the physician, despite his testimony, did not "in fact" know or appreciate the possible drug interactions and "might have actually taken a different course of action had he been alerted of the possible drug interaction by the hospital pharmacy." Causation was therefore a jury issue the Court would not overturn.

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[36] The Court cited *Davis v. Omitowoju*, 883 F.2d 1155, 1158-65 (3d Cir. 1989); *Estate of McCall v. United States*, No. 09-16375, 2011 WL 2084069 (11th Cir. May 27, 2011); *Federal Express Corp. v. United States*, 228 F.Supp.2d 1267 (D.N.M. 2002); *Evans ex. rel v. State*, 56 P.3d 1046 (Alaska 2002); *Fein v. Permanente Medical Group*, 695 P.2d 665 (Cal. 1985); *Garhart ex rel. Tinsman v. Columbia/Healthtone, L.L.C.*, 95 P.3d 571 (Colo. 2004); *Kirkland v. Blaine County Medical Center*, 4 P.3d 1115 (Idaho 2000); *Samsel v. Wheeler Transport Services, Inc.*, 789 P.2d 541 (Kan. 1990), overruled on other grounds, *Bair v. Peck*, 811 P.2d 1176 (Kan. 1991); *Murphy v. Edmonds*, 601 A.2d 102 (Md. 1992); *Zdrojewski v. Murphy*, 657 N.W.2d 721 (Mich.App. 2003); *Schweich v. Ziegler*, 463 N.W.2d 722 (Minn. 1990); *Adams v. Children's Mercy Hospital*; 832 S.W.2d 898 (Mo. 1992); *Gourley ex rel. Gourley v. Nebraska Methodist Health System, Inc.*, 663 N.W.2d 43 (Neb. 2003); *Arbino v. Johnson*, 880 N.E.2d 420 (Ohio 2007); *Judd v. Drezga*, 103 P.3d 135 (Utah 2004); *Pulliam v. Coastal Emergency Services of Richmond, Inc.,* 509 S.E.2d 307 (Va. 1999).

Arbitration Provisions in Nursing Home Contracts

On February 21, 2012, the United States Supreme Court vacated a decision by the Supreme Court of Appeals of West Virginia which struck down pre-dispute agreements requiring arbitration of claims of personal injury or wrongful death against nursing homes.

In *Brown v. Genesis Healthcare Corporation*, Nos. 35494, 35546, 35635 (W.Va. June 19, 2011), the Supreme Court of Appeals of West Virginia issued an opinion in a trio of cases concerning the enforceability of arbitration clauses in nursing home agreements. Ultimately, the court held that the arbitration clauses were unconscionable and therefore unenforceable as a matter of law. Central to the court's ruling was the fact that these arbitration agreements were entered into by the resident or resident's representative at the time of the resident's admission to the nursing home, or, in other words, prior to the alleged negligence and injury.

In a lengthy opinion, authored by Justice Menis E. Ketchum, the court concluded that while the Federal Arbitration Act requires courts to honor arbitration agreements, the agreements in questions were unconscionable and therefore unenforceable under West Virginia law. The Court agreed found the Federal Arbitration Act ("FAA") preempted section 5(c) of West Virginia's Nursing Home Act, which effectively prohibits arbitration clauses. However, "after considering the history and purposes of the FAA," the court determined:

> Congress did not intend for the FAA to apply to arbitration clauses in pre-injury contracts, context of pre-injury nursing home admission agreements, we do not believe that such arbitration clauses are enforceable to compel arbitration of a dispute concerning negligence that results in a personal injury or wrongful death.

The court declined to enforce the agreements, holding "as a matter of public policy under West Virginia law, an arbitration clause in a nursing home admission agreement adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, shall not be enforced to compel arbitration of a dispute concerning the negligence." The Court, therefore, held the FAA did not preempt West Virginia's public policy against "pre-dispute arbitration agreements that apply to claims of personal injury or wrongful death against nursing homes."

The nursing homes sought certiorari in the United States Supreme Court. In *Marmet Health Care Center, Inc. v. Clayton Brown*, 565 U.S. ____ (2012), the Court found "[t]he West Virginia Court's interpretation of the FAA was both incorrect and inconsistent with clear instruction and the precedence of this Court." Analyzing its prior cases, the Court concluded that state laws which prohibit outright arbitration of a particular type of claim are subject to the FAA. Accordingly, "West Virginia's prohibition against pre-dispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes as a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA."

The Supreme Court also addressed the West Virginia Court's alternate holding that the arbitration clauses were "unconscionable." Finding the decision unclear, the Supreme Court vacated

it and remanded the case for the Supreme Court of Appeals of West Virginia to "consider whether, absent that general public policy, the arbitration clauses in . . . are unenforceable under state common law principles that are not specific to arbitration and preempted by the FAA."

The Supreme Court of Appeals of West Virginia scheduled oral arguments in the three cases on June 6, 2012. In an order entered April 3, 2012, the Court scheduled oral argument on a limited issue "Was this Court's determination that the arbitration clauses were unconscionable influenced by its categorical holding that pre-dispute agreements to arbitrate personal injury or wrongful death claims are not governed by the Federal Arbitration Act."

On the Docket

On April 25, the Court heard argument in *Cline v. Kresa-Reahl* where the plaintiff challenges the dismissal of an MPLA action for failure to provide a certificate of merit as required by W. Va. Code § 55-7B-6. Plaintiff relied on the exception in § 55-7B-6(c), arguing that their claim was based on lack of informed consent, and therefore did not require an expert. The circuit Court ruled that experts are required in informed consent cases and the plaintiff failed to cure the deficiency after written objection by the defense. *Loretta Cline, Executrix of the Estate of Henry Cline v. Kiren Jean Kresa-Reahl, M.D.*, No. 11-0351. http://www.courtswv.gov/supreme-court/calendar/2012/dockets/april-17-12ad.html. Under *Hinchman v. Gillette*, 618 SE 2d 387, 217 W. Va. 378 (2005), defendants are required to put the plaintiff on written notice of deficiencies in the notice of claim and certificate of merit, or waive them. Other than in *State ex rel. Stone v. Miller,* 216 W.Va. 379, 607 S.E.2d 485 (2004), the Court has not upheld a dismissal with prejudice in a notice of claim case. This case appears to present the ultimate issue, which is whether failure of the plaintiff to "cure" can result in dismissal.

On April 27, 2012, the Court issued a Rule to show cause returnable without argument Show in *SER Manor Care, Inc., et al. v. Honorable Paul Zakaib, Jr., Judge, et al.*, No. 12-0443 (Original Prohibition). The Writ arises from post trial motions in an action where a Kanawha County jury returned a $91.5 million dollar verdict against a nursing home and related corporations. At issue is the Circuit Judge's refusal to allow the defendant's proposed jury verdict form, which the court refused in favor of plaintiff's order, to be formally filed post trial with the circuit clerk.

The Court has on the docket for argument May 23 *Cunningham v. Herbert J. Thomas Memorial Hospital Association*, No. 11-0398, which addresses the limitation on ostensible agency contained in the West Virginia Code § 55-7B-9.

Commentary

MacDonald appears to lay to rest the issue of whether the Legislature can enact limitations on non economic damages. The Court's opinion recognizes the legislature's power to enact reasonable limitations on tort law, and makes clear courts should not second guess these efforts. Of significance is the Court's deference to the express findings set forth in the statute by the Legislature. The availability of higher limits for death and serious injury, the adjustment of the limitations for inflation and the requirement that physicians procure insurance to gain the benefit of the limitation,

appear to have added to the comfort with the legislative decision. The court also recognized that the majority of jurisdictions have affirmed non economic damages limitations, placing its decision in the mainstream.

The arbitration cases are interesting. The opinion of the United States Supreme Court sent a strong message that the FAA preempts statutory prohibitions against pre-injury arbitration agreements. The narrow area for decision by the West Virginia court is whether the West Virginia common law of unconscionability, in and of itself, precludes such agreements. That decision on remand will be of great significance to nursing homes or others who are either using or considering the use of pre injury arbitration clauses as this saga continues to unfold.

Finally, the post trial motions in *Douglas v. Manor Care*, in which a $91 million dollar verdict was awarded against a nursing home, center in part on whether the MPLA applies to all or a part of the verdict. The current Writ of Prohibition perhaps presages further appellate review of this issue.