A report of insurance activity especially designed for our clients

By: Thomas J. Hurney, Jr., Jackson Kelly, PLLC

In 2003, West Virginia enacted a single $500,000 limit on the total amount of damages recoverable in “trauma” cases. West Virginia Code §55-7B-9c, entitled “Limit on liability for treatment of emergency conditions for which patient is admitted to a designated trauma center; exceptions; emergency rules” states:

(a) In any action brought under this article for injury to or death of a patient as a result of health care services or assistance rendered in good faith and necessitated by an emergency condition for which the patient enters a health care facility designated by the office of emergency medical services as a trauma center, including health care services or assistance rendered in good faith by a licensed EMS agency or an employee of an licensed EMS agency, the total amount of civil damages recoverable shall not exceed five hundred thousand dollars, exclusive of interest computed from the date of judgment.

Although West Virginia’s general non-economic damages cap was ruled constitutional in MacDonald v. City Hospital, 715 S.E.2d 405 (W.Va. 2011), the West Virginia Supreme Court has not addressed the trauma cap, and there are few opinions offering any guidance as to how it applies.

In 2006, the plaintiff in Queen v. Cabell Huntington Hospital filed a declaratory judgment action, seeking to have the cap ruled unconstitutional, arguing that if the cap applied to the case, there could be no recovery because the medical and other expenses exceeded the $500,000 statutory limit. The circuit court dismissed the action, and the Supreme Court of Appeals declined to hear a Writ of Prohibition.

More recently, an order entered by Judge Charles Chambers in the Supreme Court of Appeals declined to hear a Writ of Prohibition.

The same court issued an October 30, 2012 order in Watts v. St. Mary’s Hospital, et al, granting plaintiffs motion for partial summary judgment that West Virginia Code § 55-7B-9c did not apply, or, that it did apply, was unconstitutional. Judge Chambers granted the motion, finding the care at issue – a head injury without loss of consciousness – did not rise to the level of “trauma” care as defined in the statute and the standardized criteria for triage set forth in the State Trauma and Emergency Care System Emergency Health Care Procedures and Triage Procedures for Designated Trauma Centers. Noting the patient was categorized in the ED as non urgent, Judge Chambers found “it would be incongruous to afford [the hospital] the protection of the liability cap for emergency care when it did not consider Mr. Watts as an emergency patient. It is the actual classification [the patient] was given that must control whether the statute applies or not.”

Responding to the argument that the patient was misclassified by the nursing staff, Judge Chambers stated that since the hospital “wrongly classified [the patient] as a Category IV when he clearly should have been classified as a Category III under the written protocols, the cap also does not apply by virtue of the statutory language itself.”

Mr. Hurney, a health care litigator, is the leader of the Health Care & Finance Practice Group at Jackson Kelly PLLC. For a copy of the Watts opinion visit the Agency’s web-page at www.wvmia.com.
HARTFORD RECOGNIZED BY J.D. POWER & ASSOCIATES

The Hartford Small Commercial Operations, which includes business owners and workers’ compensation insurance provided by the West Virginia Medical Insurance Agency, has been recognized by J.D. Power & Associates in 2012 for “An Outstanding Customer Service Experience.”

Not only do we recommend The Hartford for the quality of their insurance products, which have a target emphasis for medical practices, but we appreciate the quality of service they provide. Learn more about The Hartford’s business owners and workers’ compensation insurance options designed for medical practices by calling Steve Brown, Agency Manager, at 800-257-4747 ext 22 (or 304-925-0342 ext 22) or by email at steve@wvmia.org or check us out on-line at www.wvmia.com (see our online offerings for both business owners and workers’ compensation insurance).

CME REQUIREMENTS FOR ANY PRESCRIBER/DISPENSER OF CONTROLLED SUBSTANCES

The WVSSMA has received several calls with questions/concerns regarding West Virginia’s new law (SB 437) that requires continuing education for any prescriber/dispenser of controlled substances, and the rules being proposed by the Board of Medicine and Board of Osteopathic Medicine to meet this new statutory requirement.

In 2012, the West Virginia Legislature enacted SB 437, a comprehensive piece of legislation aimed at battling the prescription drug abuse, misuse and diversion problem. The new law is comprehensive piece of legislation aimed at battling the prescription drug abuse, misuse and diversion problem. The new law is designed to ensure that prescribers are knowledgeable about the medications they prescribe and the rules being proposed by the Board of Medicine and Board of Osteopathic Medicine to meet this new statutory requirement.

In anticipation of this new requirement, the WVSSMA has joined with the WV Osteopathic Medical Association and the two medical boards to develop a continuing education program that fully meets the requirements of the proposed rules. We are offering a daily statewide conference on “Best Practice Prescribing of Controlled Substances and Drug Diversion Training” on Friday, November 30, 2012 at the Embassy Suites in Charleston, WV. Any physician or physician assistant who attends this conference may apply the continuing education hours toward the proposed 3 hour requirement upon their first licensure renewal after May 1, 2014.

The WVSSMA and the WVOMA will also be producing easy to access and view on-line, on-demand continuing education programs to assist physicians in obtaining their continuing education credits. For additional information, please visit the WVSSMA web-site at www.wvssma.org.

SAVE THESE DATES!

February 15 & 16, 2013
Physician Practice Conference & Annual Business Meeting
Charleston Marriott, Charleston, WV

For more information see the enclosed flyers for each event.

2012 WEST VIRGINIA INSURANCE COMMISSIONER’S “MEDICAL MALPRACTICE REPORT INSURERS WITH 5% MARKET SHARE” (FOR YEAR 2011 RESULTS)

The following are “summary observations” from the 2012 report:
- WV continues to demonstrate favorable results; overall loss ratio 61.2%, with slight increase in reported premium volume.
- Countrywide overall results marginally favorable at 99.8%.
- WV Mutual Insurance Company, the key volume writer in WV and the rules being proposed by the WVOMA will also be producing easy to access and view on-line, on-demand continuing education programs to assist physicians in obtaining their continuing education credits. For additional information, please visit the WVSSMA web-site at www.wvssma.org.

2012/2013 AMERICAN TORT REFORM FOUNDATION’S “JUDICIAL HELLHOLE” REPORT


The news release stated the following: “Lingering troubles with an unbalanced playing field earn West Virginia the second place ranking, though the electoral defeat of the state’s long-sitting attorney general in November indicates voters there oppose the pro-lawsuit status quo.”

In its Executive Summary, ATRF reports the following on #2 ranking West Virginia: “West Virginia is feared by business defendants, who feel that some Mountain State judges tip the scales of justice against them. The lack of a full right of appeal adds to their anxiety. The state’s personal injury law remains out-of-the-mainstream, although its high court deserves recognition for some sound rulings. The electoral defeat of West Virginia’s long-serving Attorney General Darrell McGraw, Jr., in November, came too late to affect the state’s ranking, but could contribute to a fairer legal environment in the years ahead. AG McGraw was known for partnering with plaintiffs’ lawyers to sue businesses on a contingent-fee basis and using settlement money for his own favored causes and self-promotion.”

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- Countrywide overall results marginally favorable at 99.8%.
- WV Mutual Insurance Company, the key volume writer in WV, experienced a favorable 2011 with a pure direct loss ratio of 31.31%.
- During 2011, medical malpractice rates in WV declined only slightly (2.4%).
- Loss Adjustment Expenses (defense costs) were 19.7% of premium, with the associated volatility remaining an item of concern for the future.
- The WV medical malpractice marketplace improved again slightly in its loss of concentration, maintaining the general absence of competition.
- The small size of the medical malpractice marketplace in WV (with only 3,946 actively practicing physicians) inherently lends itself toward volatility.
- West Virginia Board of Medicine data reveals:
  1. Number of paid claims generally declined in 2011.
  2. 30% of claims filed are being dismissed.
  3. Number of claims filed in 2011 (191) is about half of that experienced in 2001 (375).
  4. Approximately 8% of claims filed go to court.
  5. 61% of claims are settled out of court.
  6. No clear and credible pattern of escalating jury awards, although the small number of awards does not, provide a credible data base for determination.
- The number of failed actions in WV have been increasing over the past couple of years.
- Examination of the 5% market companies data found no areas of concern.

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More recently, an order entered by Judge Charles Chambers in a federal district court in Huntington approved a two defendant settlement in a medical negligence action, noting the settlement was reasonable because the trauma cap limited the damages recoverable to $500K and that the economic loss alone exceeded that amount. The actual order is subject to a motion to seal as it involved a minor; however, the approval was reported in the press (the West Virginia Record).

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WEST VIRGINIA’S OTHER “CAP”: TRAUMA CASES

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