
IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 31757

BERNARD BOGGS, as ADMINISTRATOR
AND PERSONAL REPRESENTATIVE
AND IN HIS OWN RIGHT,

Appellant,

v.

CAMDEN-CLARKE MEMORIAL HOSPITAL
CORPORATION, UNITED ANESTHESIA, INC.
AND MANISH I. KOYAWALA, M.D.,

Appellees.

From the Circuit Court of
Wood County, West Virginia
Civil Action No. 03-C-296

**BRIEF, AMICUS CURIE, SUBMITTED ON BEHALF OF
THE WEST VIRGINIA INSURANCE COMMISSIONER**

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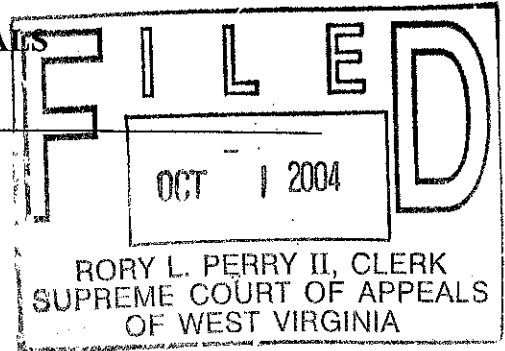


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INTRODUCTION

This amicus brief is submitted on behalf of the West Virginia Insurance Commissioner. The West Virginia Insurance Commissioner is an agency within the West Virginia Department of Revenue and is charged with enforcing the provisions of chapter thirty-three of the West Virginia Code.

The Insurance Commissioner tenders this brief to address certain assertions made by the appellant and amici, The Association of Trial Lawyers of America and the West Virginia Trial Lawyers Association. The appellant and amici have proffered the argument that the medical malpractice insurance "crisis" is a result of West Virginia's historic inability to effectively regulate the insurance industry. In order for the Court to have a practical point of reference, this brief provides a general overview of how insurance companies offering medical malpractice insurance are regulated in this state.

ARGUMENT

Throughout the years, government control over the insurance industry has grown in scope and complexity as the industry has evolved. The unequal bargaining power of insureds and the need to ensure that a supply of adequate information reaches consumers are among the many rationales that have been put forth in support of substantial government intervention. The objectives of state legislative regulation are essentially fourfold: (1) ensuring that consumers are charged fair and reasonable prices for insurance products; (2) protecting the solvency of insurers; (3) preventing unfair practices and overreaching by insurers; and (4) guaranteeing the availability of coverage to the public.

Today, every state and U.S. territory has a chief government official who is responsible for regulating insurance companies and markets. These regulators can often

exert considerable control over insurers' conduct through the admission and licensing process, as well as by exacting fines for regulatory violations. Most insurance departments are similar to the West Virginia Insurance Commission in that they have separate divisions that are responsible for market-related and financial-related matters.

I. WEST VIRGINIA'S MARKET REGULATION OF MEDICAL MALPRACTICE INSURANCE COMPANIES

Article twenty-b, chapter thirty-three of the West Virginia Code exclusively applies to ratemaking by medical malpractice insurance carriers. Insurers offering medical malpractice coverage must annually make a rate filing with the Insurance Commissioner regardless of whether the insurer is requesting a rate increase or decrease from the preceding year.¹ W. Va. Code § 33-20B-3(a). If an insurer fails to make the yearly rate filing, the company is prohibited from issuing any policy of medical malpractice insurance. W. Va. Code § 33-20B-3(c). The Insurance Commissioner has the duty of either approving or disapproving each and every rate filing. W. Va. Code § 33-20B-3(b).

A rate is an estimate of the expected value of future costs. The pricing of insurance is complicated because the insurance company does not know with certainty what its actual future costs will be. A company must combine the loss exposures of many policyholders so that the costs of the losses that do occur are shared by all insureds within that class. In other words, the company's actuary must develop a charge for an insured that when combined with the charges for other insureds, will create a pool that will pay for any losses sustained by the group, cover the expenses of the insurer and provide a reasonable profit.

¹ Prior to H.B. 2122 passed by the West Virginia Legislature in 2003, medical malpractice insurers were only required to make a rate filing if a rate revision was being requested.

It is necessary for an actuary to examine and analyze past experience statistics in minute detail during the ratemaking process. Consequently, one of the actuary's primary tasks is to study the experience to ascertain whether current rates are adequate to cover future costs.² Even with proper due diligence, unanticipated factors such as a series of large losses or an economic recession may cause a dramatic divergence from the actuary's forecast. If such factors become reality, the company invariably requests a rate increase to avoid becoming routinely unprofitable or, in the worst case, finding itself in a hazardous financial condition.

Rates are statutorily prohibited from being "excessive, inadequate, predatory or unfairly discriminatory."³ W. Va. Code § 33-20B-2(c). To determine whether a rate complies with the aforesaid statutory provision, the Insurance Commissioner's staff, which includes an actuary, examines certain information, most of which is furnished by the insurer at the time of the rate filing. Such information includes: "(i) [t]he experience or judgment of the insurer or rating organization making the filing; (ii) [the insurer's] interpretation of any statistical data the filing relies upon; (iii) the experience of other insurers or rating organizations; (iv) the character and extent of the coverage contemplated; . . . and (vi) any other relevant factors required by the commissioner." W. Va. Code § 33-20B-3(a).

The Insurance Commissioner may also consider the interests of any person or organization who expresses, in writing, support or opposition to the rate filing. W. Va.

² At the same time, companies must always be cognizant of keeping its rates competitive in the market.

³ Rates also cannot be "designed to gain market share." W. Va. Code § 33-20B-3a.

Code § 33-20B-3(a). Furthermore, the Insurance Commissioner is privy to other relevant information which she compiles pursuant to W. Va. Code § 33-20B-6.⁴

Accordingly, if an insurer requests a rate increase but the supporting information fails to demonstrate that such an increase is warranted, the Insurance Commissioner has clear statutory authority to disapprove the filing.⁵ Conversely, if the supporting data shows that a rate increase is prudent, the Insurance Commissioner will likely approve the filing.

To further examine this process, a return to the rate filings of Medical Assurance of West Virginia may prove helpful.⁶ According to Medical Assurance's rate filings for the years 2000 and 2001, the premium received between the years 1995 and 1999 was \$74,252,933. For that same period, the company paid out \$46,080,644 in settlements and jury verdicts including defense costs. However, the incurred losses, which include the actual claims paid as well as the current reserves for outstanding claims that have yet to be settled, were \$86,349,925 over the same time frame. As a result, the loss ratio (losses divided by the premium) for this experience is one hundred and sixteen percent (116%).

This does not take into account any operating expenses.

⁴ W. Va. Code § 33-20B-6(a) states that "[t]he commissioner shall review annually the rules, rates and rating plans filed and in effect for each insurer providing five percent or more of the malpractice insurance coverage in this state in the preceding calendar year to determine whether the filings continue to meet the requirements of this article and whether the filings are unfair or inappropriate given the loss experience in this state in the preceding year." Subsection (b) of that section lists fifteen (15) separate categories in which insurers must provide information to assist the Insurance Commissioner in fulfilling her duties described in subsection (a). *See also* 114 CSR 22 and 114 CSR 23.

⁵ If the insurer believes it to be aggrieved by the disapproval, the company may request a hearing on the matter. W. Va. Code § 33-20B-4(a). A public hearing must be held by the Insurance Commissioner with respect to any request for a rate increase of ten percent (10%) or more. W. Va. Code § 33-20B-4(d).

⁶ The Association of Trial Lawyers of America and West Virginia Trial Lawyers Association claimed in their amicus brief at pages 20-21 that the thirty-five percent (35%) rate increase of Medical Assurance in 2000 supports the premise that "insurers have imposed arbitrary and inappropriate insurance rates that do not reflect the competency and experience of health care providers."

The thirty-five percent (35%) rate increase that was requested by and granted to Medical Assurance in 2000 was supported, in part, by the following considerations. For the experience period of the rate review from 1995-98 (as of December 31, 1999), the estimated primary manual premium⁷ was \$61,556,517. The estimated primary loss and allocated loss adjustment expenses at a projected July 1, 2001 level was \$73,854,985. The projected loss ratio from the rate analysis calculates to one hundred nineteen point ninety-seven percent (119.97%). The company's variable expenses were provided to be twenty-three point one percent (23.1%) of premium.⁸ The variable expenses include, *inter alia*, agents' commissions, taxes, acquisition costs and unallocated loss adjustment expenses. Increasing the projected loss ratio to account for the variable expenses provides a combined ratio of one hundred forty-three point zero seven percent (143.07%). This translates to the experience of the review period demonstrating that for every dollar received in premium, there is an expectation to incur a dollar and forty-three cents in losses and expenses. Accordingly, the rate increase of thirty-five percent (35%) was reasonable and justified.

As the Medical Assurance rate analysis demonstrates, the Insurance Commissioner will approve a rate increase only where there is verifiable support for such a revision. Since 2001, the Insurance Commissioner has either declined or reduced the requested rate in ten (10) of the fifteen (15) rate filings that sought an increase. (See Medical Malpractice Insurance Rate History attached hereto as "Exhibit A.") The medical malpractice rates approved by the Insurance Commissioner are neither arbitrary

⁷ The estimated primary manual premium is an estimation of the premium associated with basic medical liability insurance excluding tail insurance and other endorsements.

⁸ A variable expense provision of twenty-three point one percent (23.1%) is well within the acceptable range for such provisions with respect to medical liability insurance.

nor inappropriate as the rates are principally based on discernable numbers and ratios that depict each company's experience.

II. WEST VIRGINIA'S FINANCIAL REGULATION OF MEDICAL MALPRACTICE INSURANCE COMPANIES

In addition to her responsibilities concerning rates, the Insurance Commissioner must continuously oversee the financial condition of a medical malpractice insurance company. W. Va. Code § 33-3-14(a) requires every insurer transacting insurance in this state to file a financial statement. The financial statement must be signed by the president or secretary of the company swearing to the accuracy of the statement. The form of the financial statement was developed by the National Association of Insurance Commissioners (the "NAIC") and is prepared in accordance with statutory accounting principals.

The financial statement serves as a tool for regulators to monitor the solvency of insurers operating in the state. Solvency is viewed as the adequacy of an insurer's net financial resources or its capital and surplus to support the nature and volume of the premiums written. For the ultimate protection of the policyholder, a company's solvency is meticulously scrutinized to assure that the insurer has the resources to pay claims.

An insurer is also required to file several other reports to assist the Insurance Commissioner in gauging the company's financial status. An "Actuarial Opinion" must be submitted in which an independent actuary opines as to the adequacy of the company's reserves. The "SVO Compliance Certificate" is required to confirm that all of a company's investments have been filed with the Securities Valuation Office. A document known as the "Management and Discuss Analysis" is a narrative report filed

by the company explaining its financial condition.⁹ A "Risk Based Capital Report" is an analysis of the various risks within the insurance company to measure the amount of statutory capital and surplus needed. W. Va. Code § 33-40-2. An "Annual Audited Financial Report" is required to be filed by an independent certified public accountant and is to address the financial position and results of operations of the insurer. W. Va. Code § 33-33-3.

Moreover, insurance companies are required under W. Va. Code § 33-4-14(c) to file their financial information with the NAIC as well. From this data, the NAIC develops Insurance Regulatory Information System ("IRIS") ratios. These IRIS ratios are used by regulators to identify a potential financially troubled insurer and also serve as "early warning" tests. The Insurance Commissioner is further authorized to conduct a financial examination of any company as often as she considers appropriate.¹⁰ W. Va. Code § 33-2-9(c).

Many other statutory provisions play an integral part in the financial regulation of insurance companies. For example, W. Va. Code § 33-3-5b provides that no insurer may become licensed in this state until it has fully paid in capital stock, if a stock insurer, or surplus, if a mutual insurer, of at least \$1 million dollars, along with having additional surplus funds of at least \$1 million dollars. Insurers must also deposit in trust with the state treasurer \$100,000 for the protection of its policyholders and creditors. W. Va. Code § 33-3-6. Dividends to stockholders are regulated pursuant to W. Va. Code §§ 33-5-17, 33-5-18, 33-5-19 and 33-27-5(c). Article eight, chapter thirty-three of the West

⁹ The "Actuarial Opinion," "SVO Compliance Certificate" and "Management and Discuss Analysis" are in accordance with the annual statement instructions handbook of the NAIC to which all financial statements filed in West Virginia must adhere. See W. Va. Code § 33-4-14(a).

¹⁰ The Insurance Commissioner must examine each domestic insurer at least once every five (5) years. W. Va. Code § 33-2-9(c).

Virginia Code is entirely devoted to regulating the investments of insurance companies. Just a cursory review of chapter thirty-three of the West Virginia Code reveals an abundance of other important statutes which are designed to ensure that an insurance company can and will fulfill its contractual obligations to its insureds.

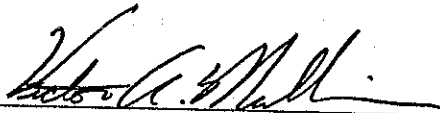
CONCLUSION

West Virginia's insurance laws provide vital regulatory tools to carefully monitor the market conduct and financial solvency of medical malpractice insurers in this state. The Insurance Commissioner is committed to using these tools to ensure the protection of consumers while at the same time promoting the growth of a healthy insurance market. The Insurance Commissioner respectfully requests that the Court take under advisement the information provided herein as it considers the broad assertions made by the appellant and amici that a lack of industry regulation has led to high premiums in medical malpractice insurance.

Respectfully Submitted,

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By Counsel

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Medical Malpractice Insurance Rate History

Medical Malpractice (Physicians & Surgeons)

Market Share as of 2003	Company	Effective date	%Requested	%Granted	WV #:
30.61%	Medical Assurance of WV, Inc.	10/20/2004	18.50%	14.50%	40721020
		10/3/2003	17.30%	13.00%	30623002
		7/1/2002	23.00%	16.00%	1611405
		9/14/2001	30.00%	18.00%	155255
Market Share as of 2003	Company	Effective date	%Requested	%Granted	WV #:
21.05%	St. Paul Fire & Marine	8/1/2001	15.00%	15.00%	153563
Market Share as of 2003	Company	Effective date	%Requested	%Granted	WV #:
15.97%	Health Care Indemnity Inc.	1/1/2004	6.70%	6.70%	31010020
		6/17/2003	Initial filing	Initial filing	30325009
Market Share as of 2003	Company	Effective date	%Requested	%Granted	WV #:
15.78%	NCRIC	9/1/2004	9.50%	9.50%	40818017
		3/1/2004	35.20%	9.88%	31001006
		2/1/2003	53.40%	22.70%	21107014
		1/1/2002	39.60%	19.70%	157730
		4/4/2001	?	0.00%	152471
Market Share as of 2003	Company	Effective date	%Requested	%Granted	WV #:
3.34%	National Fire Insurance Company of Hartford	7/2/2004	0.00%	0.00%	40610009
		5/17/2003	Initial filing	Initial filing	30428006
Market Share as of 2003	Company	Effective date	%Requested	%Granted	WV #:
2.97%	The Doctors Co., An Interinsurance Exchange	6/1/2004	4.90%	4.90%	40218038
		10/14/2003	3.10%	0.00%	30528010
		4/1/2003	45.70%	17.00%	21121000
		7/1/2002	87.30%	26.40%	159937
		12/1/2001	7.50%	7.50%	155338

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Appellees.

CERTIFICATE OF SERVICE

I, Victor A. Mullins, counsel for Jane L. Cline, West Virginia Insurance Commissioner, do hereby certify that I have served a copy of the foregoing "BRIEF, AMICUS CURIE, SUBMITTED ON BEHALF OF THE WEST VIRGINIA INSURANCE COMMISSIONER" upon the following by mailing a true and accurate copy of the same, by United States mail, postage prepaid, this 1st day of October, 2004, as follows:

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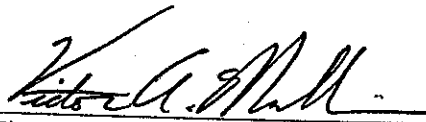
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