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.....  
**A Transition in  
 Leadership:  
 Mutual CEO to Retire**  
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David Rader, who has been the President and CEO of the Mutual since it began in 2004, is stepping down as CEO at the end of 2011. Mr. Rader will continue with the Mutual for a while, retiring on December 31, 2012.

R. Austin Wallace, MD, current Chairman of the Board, will succeed Mr. Rader as president and chief executive officer effective Jan. 1, 2012. Dr. Wallace has served on West Virginia Mutual's Board of Directors since its formation and is also the current Medical Director of the Mutual.

"This is a natural transition of this successful, physician-owned company," Mr. Rader said. "By working together, the health care community has created an environment of stability for health care in West Virginia," he said. "Dr. Wallace is committed to continuing that valuable and important work."

In 2010 the Mutual's physician-led Board of Directors finalized a succession plan after reviewing a variety of options and evaluating

the management structure of other physician-owned medical professional liability companies.

"Physicians relate better to physicians," said Mr. Rader. "This transition continues the evolution of the Mutual and ensures the company will continue its Mission to provide medical professional liability insurance to West Virginia physicians on a sound and enduring basis."

The Mutual has a track record of success in the services it delivers to its policyholders and has delivered significant premium relief to its policyholders. Physician premiums, depending on specialty, are one-third to one-half less than they were in 2004 and more than seventy-five percent of the physicians insured by the Mutual have been involved in at least one the Mutual's risk management programs.

"I have thoroughly enjoyed my tenure here in West Virginia," Mr. Rader concluded. "It's probably the most pleasant of the stops I have had in my career."

# QUARTERLY SUMMER 2011 COVERAGE



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## Letter from the Chairman



There is now a new generation of West Virginia physicians that have no memory of the medical liability crisis in our state in the early years of the past decade. Many physicians left the state and many, yours truly included, were considering this draconian option if the situation did not improve. Fortunately, with our WVSMA in the lead, we West Virginia physicians were

the beneficiaries of excellent civil justice reforms that resulted in the formation of the West Virginia Mutual Insurance Company. We all knew that the plaintiffs' bar would continue to attack these excellent reforms. These efforts culminated in the recent case just decided by the Supreme Court in our favor, with a well reasoned opinion that reaffirms the authority of our Legislature to enact such legislation, thereby curtailing judicial activism. This is great news for the physician community and, indeed, for all West Virginians. Between 2003 and 2009, our state went from the worst place to practice medicine to (almost) first—West Virginia placed ninth in a rankings of the best states to practice in a Medical Economics survey published on July 10, 2009.

Elsewhere in this issue, there is an excellent summary of the Supreme Court majority opinion affirming our non-economic damages cap passed in 2003 written by Thomas Hurney, Esq. of Jackson Kelly, who was one of two attorneys that argued the case before the Court on behalf of the medical community.

In the majority opinion, Chief Justice Workman took the unusual step of thanking those that submitted amicus curiae briefs on both sides. Prominently listed on the defense side alongside the WVSMA's brief, among others, was your Mutual's brief submitted on our behalf by Michael Farrell, Esq., another

excellent malpractice defense attorney your Mutual often retains (along with Mr. Hurney and the other members of our carefully chosen defense panel). Although there are several companies who have begun writing medical liability insurance in the last decade, I defy you to find any of these companies listed on the opinion that spent the money to submit an amicus curiae brief on this critical issue. Although hardly surprising, yet again your Mutual is alone in standing up for West Virginia physicians, even those who have forgotten the lessons of the recent past (PIE, ICA, St. Paul, etc.) and inadvisedly placed their business with one of our no-show competitors. The West Virginia Mutual Insurance Company is proud to stand with the others participating in this Supreme Court effort that worked so magnificently for the physicians of West Virginia. We continue to stand strong as **Physicians Insuring Physicians.**

Sincerely,

R. Austin Wallace, M.D.

## To view the complete Supreme Court of Appeals Opinion on the cap case:

**1 Go to:**  
<http://www.state.wv.us/wvsca/Spring2011.htm>

**2 Click on:**  
James D. and Debbie MacDonald v. City Hospital and Sayeed Ahmed, M.D.

## Court Finds Mandatory Arbitration Unenforceable

At the end of June, the West Virginia Supreme Court determined that binding arbitration clauses in nursing home contracts were unenforceable. The Court said that when such contracts are "... offered on a take-it-or-leave-it basis... there was no meaningful opportunity to change or negotiate terms." The Court explained that mandatory arbitration clauses "... eliminate a fundamental constitutional right, the right of the parties to have a jury trial."

This philosophical approach has appeared in medical malpractice cases. Strict enforcement of filing deadlines and screening certificates of merit have been softened in cases involving healthcare tort reforms. The Court has deemed access to the courts more important than

technical filing requirements. While the West Virginia Court was not ruling on a malpractice claim in this recent decision, it is not difficult to extrapolate their rationale to medical matters.

There have been insurance initiatives in other states that require a person to sign binding arbitration agreements before becoming a physician's patient. The underlying belief has been that arbitration will lead to more efficient, more rational, resolution of malpractice claims as compared to traditional litigation processes.

Based on this recent decision, the West Virginia Supreme Court would, more than likely, not look favorably on such an Agreement.

## PIAA Praises West Virginia Supreme Court Decision to Uphold Cap on Non-economic Damages in Medical Liability Lawsuits

Rockville, MD – June 23, 2011 – The Physician Insurers Association of America (PIAA), the national insurance industry trade association representing medical professional liability (MPL) insurance companies, today applauded a ruling by the West Virginia Supreme Court of Appeals that sustains the state's cap on non-economic damages in medical liability lawsuits.

McDonald v. City Hospital challenged the state constitutionality of the West Virginia non-economic damage cap. The West Virginia Supreme Court of Appeals' decision, which was issued yesterday, preserves the non-economic damage cap that was passed by the West Virginia state legislature and signed into law by Governor Bob Wise in 2003.

"We are very pleased with this decision," said PIAA President Lawrence E. Smarr. "This is

a tremendous victory for the preservation of affordability and accessibility of healthcare for the citizens of West Virginia."

"The PIAA was ardently opposed to the cap challenge and participated in an amicus brief filed in support of our members operating in West Virginia as well as numerous other healthcare organizations located in the state," Smarr continued. "Preserving non-economic damage caps is critical in deterring the lawsuit abuse that continues to plague our healthcare system, and this decision has the potential to bolster similar defense efforts in other states as they may arise."

"We have seen clear evidence in states like California and Texas that the enactment of proven, effective reforms has improved patient access to care, lowered healthcare costs, and curbed

non-meritorious lawsuits. Many other states are facing similar constitutional challenges—and we hope that the courts in these jurisdictions will come to the same conclusion as the West Virginia Supreme Court," stated Smarr.

The PIAA is the national insurance trade association representing medical liability insurance companies. PIAA members insure more than 60 percent of America's private practicing physicians as well as dentists, hospitals, and other healthcare practitioners.

# Damages Cap Upheld by Supreme Court

Thomas J. Hurney, Jr., Jackson Kelly PLLC

The limit on noneconomic damages in the Medical Professional Liability Act is constitutional. So held the Supreme Court of Appeals in the long awaited opinion in *MacDonald v. City Hospital*, released on June 22, 2011. As stated by the Court, West Virginia is now “squarely with the majority of jurisdictions in holding that caps on noneconomic damages in medical malpractice cases are constitutional.”

In *MacDonald*, the patient and his wife sued his doctor and the hospital where he was a patient, claiming he contracted rhabdomyolysis due to drugs ordered for him as an inpatient. The plaintiffs claimed the doctor negligently ordered medications and failed to monitor for side effects, and the hospital’s pharmacy failed to alert the physician of possible adverse reactions. The jury awarded a substantial verdict, which included \$1 million to the patient for pain and suffering and \$500,000 to his wife for loss of consortium. The trial judge, applying the “cap” contained in West Virginia Code § 55-7B-8(b), reduced the noneconomic award to \$500,000, which eliminated any award to the wife.

The plaintiffs appealed and raised several constitutional challenges to the statute. Following two decisions in which it affirmed the former “cap” of one million dollars, *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 soundly rejected all of the plaintiffs’ arguments.

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. In addition, to claim the protection of the cap, a health care provider must have at least one million dollars in insurance. The Court also gave deference to the Legislature’s finding, contained in the

language of the statute, that the reforms were necessary, 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. 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.” The opinion thus makes clear that the Court will defer and not second guess the Legislature as it relates to noneconomic damages limitations.

As to the plaintiffs’ constitutional arguments, the Court squarely held the legislature has the power to create and repeal causes of action, including limitations on damages. Thus, the caps do not violate the right to trial by jury, or the separation of powers. As to the jury trial argument, the Court also found the caps did not violate the provision that prohibits “reexamination” of facts, because that clause does not apply to the legislature.

The plaintiffs argued the statute 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 Court rejected this 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 refused

to second guess the Legislature, stating “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 “the 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 well reasoned opinion in *MacDonald* was authored by Chief Justice Margaret Workman, with only one dissent from Circuit Judge Ronald Wilson, sitting for Justice McHugh, who recused himself. *MacDonald* is a firm endorsement of the Legislature’s power to enact reasonable limitations on tort law where there is an important legislative goal. The opinion makes clear the Court will not second guess the Legislature where the problem is clearly enunciated and narrowly addressed in the statute. By affirming this legislative power for the third time, the Court in *MacDonald* lays to rest for good any argument that limitations on noneconomic damages are unconstitutional.