

## **COURT WATCH**

FROM THE OFFICES OF FLAHERTY, SENSABAUGH & BONASSO, PLLC.

*Blankenship v. Ethicon, Inc.*, Appeal No. 33224

Appeal from the Circuit Court of Kanawha County to the West Virginia Supreme Court of Appeals

**TOPIC:           Whether the MPLA is the sole remedy for a products liability claim against a hospital?**

On October 12, 2007, the West Virginia Supreme Court of Appeals filed its opinion in *Blankenship v. Ethicon, Inc.* The plaintiffs alleged that they did not have to file their class action suit against two hospitals in accordance with the Medical Professional Liability Act (“MPLA”) because they were asserting a products liability claim based on faulty sutures, not a medical negligence claim. The hospitals alleged that the exclusive remedy for any tort or breach of contract claim arising out of health care services rendered by the hospitals should be governed by the MPLA.

The West Virginia Supreme Court of Appeals agreed with the hospitals and found that plaintiffs should have filed suit in accordance with the pre-suit requirements of the MPLA. The Court stated that “implantation of sutures is the classic example of health care.” The Court reasoned that since sutures are implanted during the course of medical treatment, the MPLA applies. The Court went on to state that “[w]here tortious acts or omissions are committed by a health care provider within the context of rendering ‘health care’ . . . , the Act applies regardless of how the claims have been pled.”

The West Virginia Supreme Court of Appeals did not dismiss the plaintiffs’ suit, despite finding that the plaintiffs failed to file their suit properly, but remanded the case to allow plaintiffs to start over and comply with the requirements of the MPLA.

The Court’s decision in *Blankenship* does not negate the Court’s previous decisions in *Boggs v. Camden-Clark Memorial Hospital* and *Gray v. Mena*. In *Boggs*, the Court found that the MPLA did not apply to intentional torts or acts outside the scope of health care services, such as fraud, spoliation of evidence, or negligent hiring. In *Gray*, the Court clarified its ruling in *Boggs* by stating that “where the allegedly offensive action was committed within the context of rendering health care, the statute applies.” In *Blankenship*, the Court extended the scope of its decisions in *Boggs* and *Gray* by indicating that failure to plead a claim under the MPLA does not preclude the application of the MPLA to the case when the facts support an MPLA claim.