COURT WATCH
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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?**

In *Blankenship v. Ethicon, Inc.*, the plaintiffs filed a punitive class action suit against two hospitals alleging injuries out of the use of defective Vicryl surgical sutures.[1] The plaintiffs claimed that the hospitals distributed the sutures to its patients, even though the hospitals knew the sutures were contaminated. The hospitals moved to dismiss the claims, alleging 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 Medical Professional Liability Act ("MPLA"). The circuit court agreed with the defendant hospitals' argument and dismissed the plaintiffs' action for failure to comply with the pre-suit requirements of the MPLA.

In July 2004, the plaintiffs filed their first petition for appeal with the West Virginia Supreme Court of Appeals. The West Virginia Supreme Court of Appeals ordered the circuit court to reconsider its decision granting the defendants' motion to dismiss in light of the Supreme Court of Appeals' opinion in *Boggs v. Camden-Clark Memorial Hospital* and *Gray v. Mena*.[2] Upon reconsideration, the circuit court found that it properly dismissed the plaintiffs' complaint against the hospitals. Once again, plaintiffs appealed.

On September 11, 2007, the West Virginia Supreme Court of Appeals heard the parties' arguments. Plaintiffs allege that the hospitals are distributors of the sutures because patients have no choice as to the surgical supplies that the hospital uses. Plaintiffs further allege that the hospitals have an affirmative duty, once informed of defective devices or supplies being used in a patient, to make reasonable efforts to inform the patient. Finally, the plaintiffs claim that according to the Supreme Court's holdings in *Boggs* and *Gray*, the MPLA does not apply to other claims that may be contemporaneous or related to the alleged act of medical professional liability. Therefore, plaintiffs assert that the hospitals should not have been dismissed from the suit.

The hospitals maintain that the MPLA is the exclusive remedy for filing a suit against them, and, therefore, the plaintiffs must abide by the MPLA's pre-suit requirements. The hospitals further claim that hospitals involved in transfer of material, like sutures, to a patient are not conducting a sale nor are the hospitals sellers in the chain of distribution of a product. The hospitals allege

[1] Plaintiffs' original suit included the suture manufacture and alleged suppliers and distributors. Only the hospital defendants were part of the appeal to the West Virginia Supreme Court of Appeals.
[2] *Boggs v. Camden-Clark* was decided by the West Virginia Supreme Court of Appeals on December 4, 2004. *Gray v. Mena* was decided by the West Virginia Supreme Court of Appeals on November 30, 2005. The West Virginia Supreme Court of Appeals' holdings in both cases attempted to define the parameters of the MPLA.

they do not have a duty to advise their former patients of product recalls, such as the recall issued for the sutures in this case.

The West Virginia Supreme Court of Appeals has not yet rendered a decision in this matter. Additional Court Watch summaries will be provided as the *Blankenship* case develops.