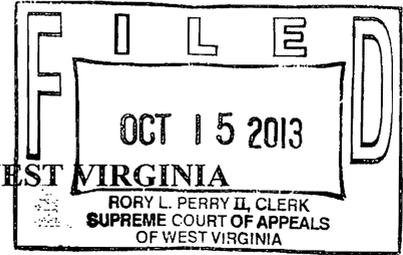


NO. 13-0692

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



WEST VIRGINIA MUTUAL INSURANCE COMPANY,

Defendant Below, Petitioner,

v.

BETTY J. ADKINS, RAYETTA D. BAUMGARDNER, DIANA L. BOERKE,  
LATHA A. BOLEN, CHARLOTE L. DEAL, CONSTANCE L. DEVORE,  
TERESSA D. HAGER, LORENNNA D. HANKINS, TAMMY H. CLARK,  
PAMELA K. HATFIELD, MARCIE J. HOLTON, LINDA L. JONES, PATTY S. LEWIS,  
TERESA LOVINS, MARTHA J. MARTIN, LOUELLA PERRA, SHERRY L. PERRY,  
JANICE PETIT, KIMBERLY A. ROE, JANICE ROUSH, REBECCA SMITH,  
BEULAH STEPHENS, AND DEBRA L. WISE,

Plaintiffs Below, Respondents.

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From the Circuit Court of Kanawha County, West Virginia  
Civil Action No. 10-C-2282

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BRIEF OF THE WEST VIRGINIA INSURANCE FEDERATION  
AS *AMICUS CURIAE* IN SUPPORT OF BRIEF OF PETITIONER  
WEST VIRGINIA MUTUAL INSURANCE COMPANY

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## **I. INTRODUCTION**

The intentions of the parties to a contract are paramount. The West Virginia Insurance Federation (the “Federation”) files this brief as *amicus curiae* in support of Petitioner West Virginia Mutual Insurance Company.<sup>1</sup> This case has significant implications for insurers in West Virginia, the interpretation and application of insurance contracts generally, and the application of the parties’ intentions when a contract’s integration fails to coincide with the parties’ intent, allowing inequity to pervade.

## **II. STATEMENT OF INTEREST**

The Federation is the state trade association for property and casualty insurance companies doing business in West Virginia. Its members insure approximately 80% of the automobiles and homes in West Virginia and more than 80% of the workers’ compensation policies insuring West Virginia’s employees. The Federation is widely regarded as the voice of West Virginia’s insurance industry and has served the property and casualty insurance industry for more than thirty years. It has a strong interest in promoting a healthy and competitive insurance market in West Virginia to ensure that insurance is both available and affordable to West Virginia’s insurance consumers. The Federation files this brief in support of WV Mutual’s petition to underscore the importance of honoring the true intentions of the parties to an insurance contract.

The Federation understands the legal issue of the construction of the policy’s limiting language, whether the aggregate limit is calculated by the year in which the claim is filed versus

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<sup>1</sup> Pursuant to Rule 30(b) of the Rules of Appellate Procedure, the Federation provided notice on September 25, 2013 to all parties of its intention to file an *amicus curiae* brief, and it received the written consent of all parties via E-mail communication on October 8, 2013 as required by Rule 30(a). Moreover, the undersigned counsel authored this brief in its entirety. Neither party nor their respective counsel contributed to or made a monetary contribution specifically intended to fund the preparation or submission of this brief. This disclosure is made pursuant to Rule 30(e)(5).

when the covered medical incident occurs.<sup>2</sup> The Federation leaves this construction issue to the parties, but in actuality this issue is irrelevant because of the sharing endorsement. The Federation argues that the Circuit Court was incorrect in concluding that *any* additional coverage was available because the parties intended for the Practice to be a Sharing Party for the Mesh Claims and the WV Mutual has already paid the shared limit of \$3,000,000.

### **III. BACKGROUND**

The Federation will largely rely on the parties' recitation of the facts and procedural history, but it will detail the history and revisions to the insurance policy over the years to help the Court trace the coverage history.

West Virginia Mutual Insurance Company ("WV Mutual") is appealing a summary judgment order of the Circuit Court of Kanawha County in a declaratory judgment action. The order ended a phase of a medical malpractice case that 33 plaintiffs filed against WV Mutual, one of its insured medical practices, and one of the medical practice's former employed physicians arising from the implantation of transvaginal mesh in 2006 and 2007 ("Mesh Claims" and "Mesh Claimants"). The primary issue the Circuit Court faced was the limit of insurance coverage available for the medical practice entity for the Mesh Claims above the \$3,000,000 WV Mutual already paid to settle the Mesh Claims against the former employed physician. The Court concluded an additional \$6,000,000 was available.

The Mesh Claimants originally filed the declaratory judgment action against WV Mutual; United Health Professionals, Inc. (the "Practice"), a medical practice specializing in obstetrics, gynecology, and family practice; and one of the Practice's former employed physicians, Mitchell Nutt, M.D. WV Mutual issued claims-made medical professional liability policies to the Practice and its employed physicians beginning in 2005. A claims-made

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<sup>2</sup> *Id.* at 443.

insurance policy “indemnif[ies] against all **claims made during a specified period, regardless of when the incidents that gave rise to the claims occurred.**”<sup>3</sup> Compare to an occurrence policy, which “indemnif[ies] for any loss from **an event that occurs within the policy period, regardless of when the claim is made.**”<sup>4</sup>

The policy language generally has remained the same over the years, although the type of liability limits and the employees insured have changed to reflect employment changes. Certain insureds shared liability limits (“Sharing Parties”); other insureds had separate liability limits (“Separate Parties”). The policies contained “per aggregate” limits, which refer to the total coverage limit for all covered medical incidents during a particular policy period. Compare to “per incident” limits, which refer to the coverage limit for one discrete covered medical incident. “Per aggregate” limits are at issue in this case because the Mesh Claims are multiple covered medical incidents.

To illustrate, if two Sharing Parties were sued for multiple covered medical incidents and the shared limit were \$3,000,000 per aggregate, the maximum insurance coverage would be \$3,000,000 regardless of multiple defendants in the case. If two Separate Parties were sued for multiple covered medical incidents and each had per aggregate limits of \$3,000,000, however, the maximum insurance coverage would be \$6,000,000 because two Separate Parties were defendants.

Which insureds were Separate versus Sharing Parties and **for which covered medical incidents** they were Separate or Sharing Parties are central to understanding this case. The policies’ expressions of who was a Separate or Sharing Party and the operative dates can be

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<sup>3</sup> Black’s Law Dictionary 665 (Bryan A. Garner ed., 8th ed. abridged.) (Emphasis added).

<sup>4</sup> *Id.*

confusing. The Federation endeavors to provide a clear view. The first policy year was 2005, which is where the Federation begins:

- **2005: The beginning of coverage.**

In 2005, the Separate Parties were 5 physicians each with limits of \$1,000,000 per incident/\$3,000,000 per aggregate, as indicated on the schedule of insureds:<sup>5</sup>

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SCHEDULE OF INSUREDS

Allan S. Chamberlain, MD	\$1,000,000 per incident / \$3,000,000 per aggregate	01/01/2002
Amber L. Kuhl, MD	\$1,000,000 per incident / \$3,000,000 per aggregate	09/01/2004
Melin J. Moses, MD	\$1,000,000 per incident / \$3,000,000 per aggregate	01/01/2002
Mitchell E. Nutt, MD	\$1,000,000 per incident / \$3,000,000 per aggregate	10/28/2002
Kathy L. Saber, MD	\$1,000,000 per incident / \$3,000,000 per aggregate	01/01/2002

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This means that if all five physicians were named in one lawsuit involving multiple covered medical incidents (multiple transvaginal mesh implantations, for example), the maximum insurance coverage would be \$15,000,000. The Sharing Parties were not specifically listed in 2005, but under a “Shared Limit Endorsement – Insured Organization/Paramedical Employees,”<sup>6</sup> the insured organization generally (i.e., the Practice) and paramedical employees generally (e.g., nurses) were Sharing Parties. Thus, if the Practice, two nurses, and one of the Separate Parties (one physician) were sued for multiple covered medical incidents, the maximum insurance coverage would be \$3,000,000. But if the Practice, two nurses, and *two* Separate Parties (two physicians) were sued for multiple covered medical incidents, the maximum insurance coverage would be \$6,000,000. Additionally, the declarations page stated, “The

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<sup>5</sup> Appendix 335. The Federation’s will cite the WV Mutual’s Appendix.

<sup>6</sup> *Id.* at 336.

corporation [i.e. the Practice] shares in the limit with the insured physicians listed under this policy.”<sup>7</sup> The shared-separate issue is relatively straightforward here.

- **2006: More of the same.**

In 2006, the Separate Parties were 4 physicians each with limits of \$1,000,000 per incident/\$3,000,000 per aggregate.<sup>8</sup>

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SCHEDULE OF INSUREDS

Allan S. Chamberlain, MD	\$1,000,000 per incident / \$3,000,000 per aggregate	01/01/2002
Amber L. Kuhl, MD	\$1,000,000 per incident / \$3,000,000 per aggregate	09/01/2004
Melin J. Moses, MD	\$1,000,000 per incident / \$3,000,000 per aggregate	01/01/2002
Mitchell E. Nutt, MD	\$1,000,000 per incident / \$3,000,000 per aggregate	10/28/2002

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Similar to 2005, under a “Shared Limit Endorsement – Insured Organization/Paramedical Employees,” the insured organization generally (i.e., the Practice) and paramedical employees generally (i.e., nurses, technicians) were Sharing Parties.<sup>9</sup> Like 2005, 2006 is straightforward regarding Sharing and Separate Parties.

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<sup>7</sup> *Id.* at 334.

<sup>8</sup> *Id.* at 353.

<sup>9</sup> *Id.* at 354.

- **2007: Sharing Parties identified in the schedule of insureds and appearance of retroactivity for the Practice.**

In 2007, the Separate Parties were, again, 4 physicians each with \$1,000,000/\$3,000,000:<sup>10</sup>

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SCHEDULE OF INSURED

Named Insured	Limit of Liability	Retroactive Date
Benjamin Lee Allan, MD	\$1,000,000 per incident / \$3,000,000 per aggregate	07/17/2006
Allan S. Chamberlain, MD	\$1,000,000 per incident / \$3,000,000 per aggregate	01/01/2002
Amber L. Kuhl, MD	\$1,000,000 per incident / \$3,000,000 per aggregate	09/01/2004
Mitchell E. Nutt, MD	\$1,000,000 per incident / \$3,000,000 per aggregate	10/28/2002
United Health Professionals, Inc.	*	01/01/2002
Rebecca Conway, NP	*	01/01/2002
Regina D. Grome, PA-C	*	01/01/2002
Patricia Hackney, CNM	*	01/01/2002
Susan C. King-Watts, CNM	*	01/01/2002
Klara M Kovacs, CNM	*	01/01/2002

\* Shares in the limit of liability with the named insured

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This 2007 policy, however, specifically identified the Sharing Parties. In addition to including a “Shared Limit Endorsement – Insured Organization/Paramedical Employees,”<sup>11</sup> providing that the Practice *generally* and paramedical employees *generally* were Sharing Parties, the schedule of insureds specified “United Health Professionals, Inc.” and the paramedical employees as Sharing Parties instead of relying only on the Shared Limit Endorsement’s general reference to the “insured organization” and “paramedical employees.” For the first time, an asterisk (\*) appeared on the schedule of insureds next to the Practice and the paramedical employees under the “Limit of Liability” column to signify that they “share[d] in the limit of liability with the named insured” (i.e., that they were Sharing Parties).

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<sup>10</sup> *Id.* at 377.

<sup>11</sup> *Id.* at 378.

Also different in 2007 is the presence of a retroactive date on the schedule of insureds for the Practice: 01/01/2002. Pursuant to the policy language,<sup>12</sup> this is a **coverage** retroactive date, meaning that if a covered medical incident occurs on or after 01/01/2002 and is claimed against the Practice in 2007, insurance coverage exists with shared limits. This is the sole meaning of this retroactive date on the schedule of insureds throughout this case.

- **2008: A significant change in Separate Parties and Dr. Nutt’s tail insurance.**

In 2008, the Separate Parties were 5 physicians each with \$1,000,000/\$3,000,000. The 2008 policy specifically listed the Sharing Parties (the Practice and its paramedical employees), like the 2007 policy, and used asterisks (\*) again to indicate that the Sharing Parties “share[d] in the limit of liability with the named insured.” This was the 2008 policy as issued:<sup>13</sup>

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SCHEDULE OF INSURED

Insured	Limit of Insurance	Retroactive Date
Benjamin Lee Allan, MD	\$1,000,000 per incident / \$3,000,000 per aggregate	07/17/2006
Allan S. Chamberlain, MD	\$1,000,000 per incident / \$3,000,000 per aggregate	01/01/2002
Jason A. Hudak, MD	\$1,000,000 per incident / \$3,000,000 per aggregate	10/15/2007
Amber L. Kuhl, MD	\$1,000,000 per incident / \$3,000,000 per aggregate	09/01/2004
Mitchell E. Nutt, MD	\$1,000,000 per incident / \$3,000,000 per aggregate	10/28/2002
United Health Professionals, Inc.	*	01/01/2002
Rebecca Conway, NP	*	01/01/2002
Regina D. Grome, PA-C	*	01/01/2002
Patricia Hackney, CNM	*	01/01/2002
Susan C. King-Watts, CNM	*	01/01/2002
Klara M Kovacs, CNM	*	01/01/2002

\* Shares in the limit of liability with the named insured

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<sup>12</sup> *Id.* at 383 and 390. (See §§ II and VI).

<sup>13</sup> *Id.* at 266.

In January 2008 after WV Mutual issued the 2008 policy, the Practice desired to change from a Sharing Party to a Separate Party but only for medical incidents that occurred on or after January 1, 2008. Its President and CEO arranged the switch by communicating with WV Mutual and the Practice's insurance agent. The Practice wanted separate limits effective January 1, 2008, and WV Mutual inquired regarding claims known to the Practice since January 1, 2008—but not before.<sup>14</sup> Of course, any claims or medical incidents before January 1, 2008, were irrelevant for underwriting purposes because coverage before this date was not being expanded.

The resulting increase in premium to switch the Practice from a Sharing to a Separate Party (more liability coverage → higher premium) with a separate limit of liability only for medical incidents occurring on or after January 1, 2008 was \$42,847. Thus, the parties amended the 2008 policy with an Amendatory Endorsement issued January 30, 2008.<sup>15</sup> In effect, the Amendatory Endorsement removed the asterisk (\*) from beside the Practice's name on the schedule of insureds and replaced it with "\$1,000,000 per incident / \$3,000,000 per aggregate."

The Amendatory Endorsement had no effect on liability **coverage**, the response of the insurance policy to loss, for the Practice. It affected only the limits. It had, therefore, no effect on the retroactive date of **coverage**, which remained 01/01/2002. The Mesh Claimants may contend that the retroactive date of 01/01/2002 listed on the schedule of insureds refers to both the retroactive date of coverage (response of the policy to loss) *and* the retroactive date of the Practice's status as a Separate Party. But the Practice's status as a Separate Party applied only to medical incidents that occurred on or after January 1, 2008. Had the Separate Party status retroactive date in fact been 01/01/2002, the resulting change in premium would have been

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<sup>14</sup> *Id.* at 231, 258-259.

<sup>15</sup> *Id.* at 263.

approximately \$209,793 to account for expanded, separate limits for medical incidents that occurred in 2002-2007 for which the Practice was actually a Sharing Party.<sup>16</sup>

In addition, the Practice cancelled coverage effective March 14, 2008, for a Separate Party physician, Dr. Nutt, who was the physician allegedly involved in the Mesh Claims.<sup>17</sup> The WV Mutual issued an Extended Reporting Endorsement (aka tail insurance) effective the same day.<sup>18</sup> The tail insurance insured covered medical incidents that occurred between his retroactive date of coverage (10/20/02) and the cancellation date of the policy even if claimed after the cancellation date of the policy (i.e., it extended the time within which claimants may make their claims). Dr. Nutt was a Separate Party under his tail insurance for \$1,000,000/\$3,000,000.

- **2009: Amendatory Endorsement unnecessary.**

In 2009, the Separate Parties were 4 physicians and the Practice. The 2009 policy was merely a renewal of the 2008 policy minus Dr. Nutt:<sup>19</sup>

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SCHEDULE OF INSURED

Insured	Limit of Insurance	Retroactive Date
United Health Professionals, Inc.	\$1,000,000 per incident / \$3,000,000 per aggregate	01/01/2002
Benjamin Lee Allan, MD	\$1,000,000 per incident / \$3,000,000 per aggregate	07/17/2006
Allan S. Chamberlain, MD	\$1,000,000 per incident / \$3,000,000 per aggregate	01/01/2002
Jason A. Hudak, MD	\$1,000,000 per incident / \$3,000,000 per aggregate	10/15/2007
Amber L. Kuhl, MD	\$1,000,000 per incident / \$3,000,000 per aggregate	09/01/2004
Rebecca Conway, NP	*	01/01/2002
Regina D. Grome, PA-C	*	01/01/2002
Patricia Hackney, CNM	*	01/01/2002
Susan C. King-Watts, CNM	*	01/01/2002

\* Shares in the limit of liability with the named insured

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<sup>16</sup> *Id.* at 222-224.

<sup>17</sup> *Id.* at 113.

<sup>18</sup> *Id.* at 114-115.

<sup>19</sup> *Id.* at 289.

The 2008 Amendatory Endorsement was unnecessary in 2009 because the Practice was a Separate Party from policy issuance but with a retroactive date of such status only for medical incidents that occurred on or after January 1, 2008. Again, the retroactive date of **coverage** (not Separate Party status) is indicated on the schedule of insureds as 01/01/2002. The Court will also note the 2009 “Shared Limit Endorsement – Insured Paramedical Employees,” which now provides that only the paramedical employees are Sharing Parties.<sup>20</sup>

- **2010: The year in issue.**

In 2010, all the foregoing came to a head. The Mesh Claimants made their claims against Dr. Nutt and the Practice for alleged covered medical incidents (the Mesh Claims) that occurred in 2006 and 2007, for which the Practice was a Sharing Party. The Mesh Claims triggered Dr. Nutt’s Extended Reporting Endorsement, and those parties have already settled for that \$3,000,000 per aggregate limit. The Mesh Claimants have persisted that, notwithstanding the Practice’s Separate Party status only for medical incidents that occurred on or after January 1, 2008, a separate \$6,000,000 in coverage exists for medical incidents that occurred before then. They are wrong. The Practice was a Sharing Party for the Mesh Claims, which occurred in 2006 and 2007, because the Practice’s Separate Party status did not apply to medical incidents that occurred before January 1, 2008.

#### **IV. ARGUMENT**

**A. The parties’ intended the Practice to be a Separate Party only for medical incidents that occurred on or after January 1, 2008, not 01/01/2002.**

In 2008 when WV Mutual issued the Amendatory Endorsement switching the Practice from a Sharing Party to a Separate Party, the parties intended the Practice to be a Separate Party only for medical incidents that occurred on or after January 1, 2008, the effective

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<sup>20</sup> *Id.* at 290.

date of the Amendatory Endorsement. For medical incidents that occurred before January 1, 2008, the parties intended the Practice to be a Sharing Party as it had always been. The retroactive date identified on the schedule of insureds of 01/01/2002 merely reflects the retroactive date of coverage and does not indicate the effective dates of Sharing versus Separate Party status.

The amount of increased premium supports the parties' intent for the Practice to be a Separate Party only for medical incidents that occurred on or after January 1, 2008, but to be a Sharing Party for earlier medical incidents. The Practice's premium increased \$42,847 under the Amendatory Endorsement. Had the Practice and WV Mutual bargained for and intended the Practice to be a Separate Party for medical incidents that occurred on or after 01/01/2002, the retroactive date of coverage, the increased premium would have been \$209,793 to account for covered medical incidents occurring in 2002-2007 for which the Practice was a Sharing Party.<sup>21</sup> More, separate limits increase premiums after all.

The parties' communications around the relevant time also support the parties' intent for the Practice to be a Separate Party only for medical incidents that occurred on or after January 1, 2008, but to be a Sharing Party for earlier medical incidents. Specifically, on January 24, 2008, WV Mutual confirmed the Practice's request for separate liability limits with its broker in an E-mail message, writing:

If Dr. Chamberlain wishes to have the corporation [the Practice] limits changed to separate effective 1/1/08 there are a couple things we would need. If it is Dr. Chamberlain's desire to change the corporation limits to separate limits first we would need a letter signed by Dr. Chamberlain regarding his wishes to change to separate corporate limits effective 1/1/08. Also we would need a signed no known claims statement in reference to claims against the physicians and/or corporation since 1/1/08.<sup>22</sup>

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<sup>21</sup> *Id.* at 222-224.

<sup>22</sup> *Id.* at 258-259.

Dr. Chamberlain confirmed the Practice's intentions by letter dated January 25, 2008, which stated:

Please be advised that we are changing our corporation limits to "separate corporation limits" effective [January 1, 2008].

Also be advised, there have been no known claims against the physicians and/or the corporation since [January 1, 2008].<sup>23</sup>

WV Mutual did not ask the Practice to state "no known claims" since 01/01/2002 or any other date earlier than January 1, 2008. For this would have been unnecessary because WV Mutual had already underwritten the risk for those years with the Practice as a Sharing Party and was not extending any new coverage or expanding previous coverage for medical incidents that occurred before January 1, 2008. The only medical incidents with expanded coverage were those occurring on or after January 1, 2008; hence, the request for a statement that there were no known claims since that date.

Dr. Chamberlain's November 26, 2012 Affidavit further supports the parties' intent for the Practice to be a Separate Party only for medical incidents that occurred on or after January 1, 2008, but to be a Sharing Party for earlier medical incidents. It provides in pertinent part:

1. I am the President and Chief Executive Officer of United Health Professionals, Inc. ("UHP").
2. United Health Professionals, Inc. ("UHP") and its employed physicians, nurse practitioners, physician assistants and nurse midwives, have been insured for medical professional liability by the West Virginia Mutual Insurance Company ("the Mutual") in successive annual policy periods beginning on January 1, 2002.
3. In my capacity as President and Chief Executive Officer of UHP, I am authorized to make all decisions regarding medical professional liability insurance coverage for UHP and its employees.

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<sup>23</sup> *Id.* at 231. (Quotations in original.)

4. Prior to 2008, UHP desired and received medical professional liability insurance coverage on shared limits of liability basis with a retroactive date of January 1, 2002.
5. It was my intention to change UHP's insurance coverage in 2008 from shared limits of liability to separate limits of liability. I further intended for this insurance coverage to only cover claims for medical incidents that occurred on or after January 1, 2008, and did not intend or desire to purchase insurance coverage with separate limits of liability for medical incidents that occurred prior to January 1, 2008.
6. In January of 2008, I requested on behalf of UHP through both UHP's insurance agent Terry Slusher of Wells Fargo Insurance Services and directly that UHP to amend the policy with a policy period of January 1, 2008 to January 1, 2009, to provide UHP with separate limits of liability with a retroactive date of January 1, 2008.
7. I understood and was fully aware of my payment of a premium of \$42,847, amended UHP's limits of liability under the policy with a policy period of January 1, 2008 to January 1, 2009, from shared limits of liability to separate limits of liability with a retroactive date of January 1, 2008. I also understood and was fully aware that UHP retained insurance coverage with shared limits of liability from January 1, 2002 to January 1, 2008.
8. I understood and was fully aware that had UHP desired to amend its limits of liability for the policy period of January 1, 2008 to January 1, 2009 from shared limits of liability to separate limits of liability with a retroactive date of January 1, 2002, that the premium charged to amend the policy would have cost significantly more.
9. It was my intent to purchase and receive coverage identical to the amended policy with a policy period of January 1, 2008 to January 1, 2009 for the policy periods of January 1, 2009 to January 1, 2010 and January 1, 2010 to January 2011.
10. In accordance with this intent, I understood and was fully aware that the coverage I intended to purchase on behalf of UHP for the aforementioned policy periods provided UHP with insurance coverage with separate limits of liability to only cover claims for medical incidents that occurred on or after January 1, 2008. I further understood and was fully aware that the coverage I intended to purchase for the aforementioned policy periods

provided coverage with only shared limits of liability for any medical incident that occurred between January 1, 2002 and January 1, 2008 and did not provide coverage for this period on separate limits of liability basis.

11. Based on this intent, I renewed the amended policy for the policy period of January 1, 2008 to January 1, 2009 for the policy periods of January 1, 2009 to January 1, 2010 and January 1, 2010 to January 1, 2011 paying premiums of \$258,687 and \$230,743 respectively.<sup>24</sup>

The 2010 policy stated a retroactive date for the Practice of 01/01/2002, but this retroactive date applied only to coverage. The operative trigger and date for the Practice as a Separate Party were for medical incidents that occurred on or after January 1, 2008, not the coverage retroactive date of 01/01/2002. The lack of clarity regarding the 01/01/2002 coverage retroactive date versus the January 1, 2008 Separate Party status date in the 2010 policy was a mistake and does not adequately or fully reflect the parties' true intentions. The parties intended the Practice to be a Separate Party only for medical incidents that occurred on or after January 1, 2008, which does not include the Mesh Claims. The Circuit Court's conclusion that any additional coverage beyond the \$3,000,000 already paid is incorrect.

**B. The Court should apply the Parties' true intentions by reforming the contract because the parties' intentions are paramount and a stranger to the contract cannot dictate the parties' intentions.**

Although the retroactive date of coverage of 01/01/2002 for the Practice is clearly stated, WV Mutual and the Practice did not intend 01/01/2002 to apply to the Practice's Sharing Party status. As such, the Court should reform the policy to clarify the parties' intentions.

This Court has held that:

[t]he general rules applying to the reformation of other written contracts apply to contracts of insurance, the courts will reform an insurance policy, like any other instrument, to effectuate the

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<sup>24</sup> *Id.* at 167-169.

intention of the parties, and make it set forth correctly the contract upon which the minds of the parties met, and equity jurisdiction applies to insurance policies as well as to other agreements. And, like other contracts, fraud, mutual mistake, or accident may give good ground for reformation.

Ohio Farmers Ins. Co. v. Video Bank, 200 W. Va. 39, 43, 488 S.E.2d 39 (1997) (emphasis added).

Here, WV Mutual and the Practice intended the Practice to be a Separate Party only for medical incidents that occurred on or after January 1, 2008, not before. The only reason this issue is before the Court is that **coverage** retroactivity versus Separate Party status retroactivity was not clarified in the Policy with an asterisk or otherwise.

In 2007 and 2008, the Practice is identified on the schedule of insureds with a retroactive date of “01/01/2002” and with an asterisk indicating Sharing Party status. Thereafter, in January 2008 the Practice requested Separate Party status only for medical incidents that occurred on or after January 1, 2008. It stated that it was not aware of any claims that had occurred since January 1, 2008—a critical date because this representation confirms the parties’ understanding of the medical incidents for which the Practice would be a Separate Party.

When the parties renewed in 2009 and 2010, the Practice was identified as an insured with **coverage** retroactive to 01/01/2002 and for the first time identified on the schedule of insureds as a Separate Party. The parties inadvertently overlooked, unfortunately, that the policy did not clarify with an asterisk or otherwise that the Practice’s separate limits applied only to medical incidents occurring on or after January 1, 2008. Indeed, the parties would have erred in updating the coverage retroactivity date from 2002 to 2008 because the Practice’s **coverage** was in fact retroactive to 2002. Its Separate Party status was retroactive only for medical incidents that occurred on or after January 1, 2008, however.

In West Virginia, our Supreme Court has established three prerequisites for reformation of an insurance policy on the ground of mistake: (1) a bargain between the parties; (2) a written instrument supposedly containing the terms of the bargain; and (3) a material variance between the mutual intention of the parties and the written instrument. *Id.* at 44 (citing Covington, Reformation of Contracts of Personal Insurance, 1964 Ill.L.F. 543, 459).

First, there can be no dispute as to the parties' intentions here. Specifically, on January 24, 2008, WV Mutual confirmed the Practice's request for separate liability limits with its broker in an E-mail message, writing:

If Dr. Chamberlain wishes to have the corporation [the Practice's] limits changed to separate effective 1/1/2008 there are a couple things we would need. If it is Dr. Chamberlain's desire to change the corporation limits to separate limits first we would need a letter signed by Dr. Chamberlain regarding his wishes to change to separate corporate limits effective 1/1/2008. Also we would need a signed no known claims statement in reference to claims against the physicians and/or corporation since 1/1/08.<sup>25</sup>

Dr. Chamberlain confirmed the Practice's intentions by letter dated January 25, 2008, which stated:

Please be advised that we are changing our corporation limits to "separate corporation limits" effective [January 1, 2008].

Also be advised, there have been no known claims against the physicians and/or the corporation since [January 1, 2008].

Dr. Chamberlain did not advise there were no known claims since January 1, 2002, 2005, or any other date, and WV Mutual did not ask him to. No, Dr. Chamberlain attested that no known claims existed against the physicians or the Practice since January 1, 2008. This established the Practice's and WV Mutual's intent for the Practice to be a Separate Party for

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<sup>25</sup> *Id.* at 258-259.

covered medical incidents occurring on or after this date but for the Practice to be a Sharing Party for earlier covered medical incidents.

Dr. Chamberlain's November 26, 2012 Affidavit further supports the insured's and insurer's intent:

4. Prior to 2008, UHP desired and received medical professional liability insurance coverage on shared limits of liability basis with a retroactive date of January 1, 2002.
5. It was my intention to change UHP's insurance coverage in 2008 from shared limits of liability to separate limits of liability. I further intended for this insurance coverage to only cover claims for medical incidents that occurred on or after January 1, 2008 and did not intend or desire to purchase insurance coverage with separate limits of liability for medical incidents that occurred prior to January 1, 2008.<sup>26</sup>

Here, WV Mutual and the Practice bargained and paid for separate liability limits only for medical incidents that occurred on or after January 1, 2008. The 2009 and 2010 policies accurately reflected the retroactive dates for the Practice's coverage but neglected to adequately reflect the distinction from the retroactive date for liability limits. This mistake materially varies from the parties' intention. As explained above, the Practice's premiums, the parties' correspondence, and WV Mutual's underwriting activities all support the parties' intent for the Practice to be a Separate Party only for medical incidents that occurred on or after January 1, 2008 but to be a Sharing Party for earlier medical incidents.

The United States Circuit Court of Appeals for the Fourth Circuit has held that in these situations, the court must reform the policy to conform to the parties' mutual intentions, unless a third party relied to its detriment on the written agreement. American Employers Ins. Co. v. St. Paul Fire & Marine Ins. Co., 594 F.2d 973, 978 (4th Cir. 1979).<sup>27</sup> In American

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<sup>26</sup> *Id.* at 167-169.

<sup>27</sup> Applying Illinois law.

Employers, three vessels were involved in an accident. Each vessel was primarily insured under different policies with different limits, each less than \$654,400. The vessels' owner secured a \$10,000,000 umbrella policy covering all three vessels with American Employers. It required underlying coverage of \$654,400 per occurrence. This rendered each vessel uninsured for the difference between its particular primary liability limit (each less than \$654,400) and the \$654,400 threshold of the American Employers umbrella policy. The vessels' owner, therefore, negotiated with St. Paul Fire & Marine Insurance Company to fill the gap between the primary (less than \$654,400) and umbrella policies (\$654,400 threshold), but the printed policy provided for "per vessel coverage . . . as per the schedule," which indicated coverage was far greater than \$654,400. But the parties intended for the St. Paul policy to cover only up to \$654,400, when the American Employers umbrella policy would kick in and cover the vessels.

American Employers disputed the parties' intentions and argued that it detrimentally relied on the St. Paul policy, believing that St. Paul would provide more insurance than \$654,400, which would reduce the amount American Employers would have to pay. The Fourth Circuit summarily dismissed these arguments:

American, of course, was not a party to the St. Paul policy. American's umbrella policy, specifying \$654,400 of underlying coverage, was bound 13 days before the start of negotiations that led to MelJoy's [the vessels' owner's] purchase of the St. Paul excess insurance. . . . Not until after the explosion did American learn that St. Paul's policy nominally provided underlying coverage totaling far more than \$654,400. Within a matter of days after American made this discovery, St. Paul told American that St. Paul's maximum exposure was actually \$654,400. During that short interval, American did not act to its detriment in reliance on the St. Paul policy.

Id. at 978-79.

The third-party exception to reformation is not applicable here. Obviously, the Mesh Claimants were not parties to the 2010 policy and were not even privy to its terms until they filed claims in 2010—two years after the Amendatory Endorsement and one year after the 2009 policy did not distinguish between the retroactive date for coverage and the retroactive date of the Practice’s Separate Party status. Thus, they could not have relied on any notion that the Practice was a Separate Party for medical incidents that occurred before January 1, 2008, which it was not. Reformation is proper to effect the parties’ intentions.

**C. The premium paid for coverage has to match the risk assumed because otherwise imbalance occurs in the insurance market.**

Insurance is about pooling resources (premiums) to cover all of the projected payments (claims) for the entire pool. Each policyholder represents a certain degree of risk for an insurer, and insurers evaluate certain risk factors that help determine if that insurer can accept or decline that risk and, in turn, what premium to collect to cover that policyholder’s share of the premium pool. If the premium collected does not accurately reflect the coverage offered, then the insurance market will become unbalanced, either through decreased competition, increased insurer solvency, or an inability by insurers to pay claims when required.

In this case, the Practice paid an additional \$42,847 to WV Mutual for shared limits of liability for medical incidents that occurred on or after January 1, 2008. It did **not** pay a premium commensurate with shared limits of liability retroactive to 01/01/2002, the retroactive date of **coverage**. That premium would have been \$209,793. It is important that the Practice paid only \$42,847, not \$209,793, in connection with its Amendatory Endorsement in 2008 because it represents the bounds of coverage it intended to purchase. This limit on payment of claims for medical incidents occurring only **on or after January 1, 2008** prevents total claim

payments from exceeding the insurer's financial capacity. The higher \$209,793 premium would have decreased the risk assumed by WV Mutual if it were to pay for medical incidents occurring before January 1, 2008, but it did not collect this higher premium because it did not intend—and therefore did not underwrite—any such claims.

Additionally, the Practice chose this coverage with a January 1, 2008, retroactive date over an earlier retroactive date because the price was right. This was the premium that the Practice was willing to pay, as Dr. Chamberlain explained,

I understood and was fully aware that had UHP desired to amend its limits of liability for the policy period of January 1, 2008 to January 1, 2009 from shared limits of liability to separate limits of liability with a retroactive date of January 1, 2002, that the premium charged to amend the policy would have cost significantly more.<sup>28</sup>

The premium collected must match the risk insured. That was done here, consistent with the parties' intentions. An argument that separate limits extend to medical incidents that occurred before January 1, 2008 would require coverage for medical incidents not contemplated by the premium collected. This would be a result that harms not only WV Mutual here but also all insurers and their policyholders from a general market perspective. Reliability and predictability in underwriting a specific risk and assigning the appropriate premium to that risk are critical to a competitive and efficient insurance market.

## V. CONCLUSION

The Practice and WV Mutual intended for the Practice to be a Separate Party only for medical incidents that occurred on or after January 1, 2008, which excludes the Mesh Claims. The 01/01/2002 retroactive date on the schedule of insureds applies only to coverage, the response of the policy to loss, for the Practice. The 2010 policy did not adequately or fully

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<sup>28</sup> *Id.* at 167-169. (Emphasis added.)

reflect the parties' intentions for the contract, and this Court has the power and should reform the policy to adequately and fully reflect their intentions. The overall limit of liability available for the Mesh Claims is \$3,000,000, which has already been paid, and no further coverage is available. For these reasons, the West Virginia Insurance Federation asks the Court to apply the parties' true intentions, reform the WV Mutual's insurance policy consistent with the parties' intentions, and reverse the order of the Circuit Court of Kanawha County.

**WEST VIRGINIA INSURANCE FEDERATION**

**BY DINSMORE & SHOHL, LLP**



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NO. 13-0692

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

WEST VIRGINIA MUTUAL INSURANCE COMPANY,

Defendant Below, Petitioner,

v.

BETTY J. ADKINS, RAYETTA D. BAUMGARDNER, DIANA L. BOERKE,  
LATHA A. BOLEN, CHARLOTE L. DEAL, CONSTANCE L. DEVORE,  
TERESSA D. HAGER, LORENN A. HANKINS, TAMMY H. CLARK,  
PAMELA K. HATFIELD, MARCIE J. HOLTON, LINDA L. JONES, PATTY S. LEWIS,  
TERESA LOVINS, MARTHA J. MARTIN, LOUELLA PERRA, SHERRY L. PERRY,  
JANICE PETIT, KIMBERLY A. ROE, JANICE ROUSH, REBECCA SMITH,  
BEULAH STEPHENS, AND DEBRA L. WISE,

Plaintiffs Below, Respondents.

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From the Circuit Court of Kanawha County, West Virginia  
Civil Action No. 10-C-2282

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BRIEF OF THE WEST VIRGINIA INSURANCE FEDERATION  
AS *AMICUS CURIAE* IN SUPPORT OF BRIEF OF PETITIONER  
WEST VIRGINIA MUTUAL INSURANCE COMPANY

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of the *Brief of the West Virginia Insurance Federation as Amicus Curiae in Support of Brief of Petitioner West Virginia Mutual Insurance Company* upon all parties to this matter by depositing a true copy of the same in the U.S. Mail, postage prepaid, properly addressed to the following:

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This 15th day of October, 2013.

  
\_\_\_\_\_  
Jill Cranston Rice (WV State Bar No. 7421)