Insight and Perspectives

a publication of Endurance Healthcare

We are pleased to offer our latest installment of *Insight and Perspectives*. This newsletter is dedicated to sharing healthcare news, trends and developments impacting our broker and insured customers.

In this particular installment you will find Daryl J. Douglas's article on Tort Reform Updates.

As always, we appreciate your continued support and thank you for allowing Endurance to be a part of your risk and insurance programs.

About Us

Endurance U.S. Healthcare offers healthcare professional liability coverage to community-based hospitals and large-physician groups.

Endurance Bermuda Healthcare offers excess liability coverage for large multi-hospital systems, academic medical centers and specialty hospitals.

Contact Us

Kim Morgan
Senior Vice President, Healthcare Practice Leader – Bermuda
kmorgan@endurance.bm
+1.441.278.0923

Kim Willis
Senior Vice President, Healthcare Practice Leader – U.S.
kwillis@enhinsurance.com
+1.636.681.1205

Tort Reform Update – More Innovative Approaches

By Daryl J. Douglas, J.D.
Wagstaff & Cartmell LLP
ddouglas@wcllp.com

In the Spring 2013 edition of Insight & Perspectives, Endurance reported on incremental tort reform measures as well as the status of challenges to damage caps in various states. In the last year, rather than focusing on capping jury verdicts in medical malpractice cases, legislatures in several states have introduced bills with more creative approaches that, if passed into law, have the potential to significantly reduce medical malpractice loss costs. This article will describe these proposed reforms, which include medical review panels, birth injury funds and early resolution programs, and provide an update on challenges to various states' non-economic caps.

Medical Review Panels

In Georgia and Kentucky, coalitions of health care providers and business organizations are pushing for legislation that would create medical review panels to evaluate proposed claims against health care providers. These are modeled after medical panels used in other states (e.g., Indiana, Montana) which have been effective in weeding out meritless cases and reducing the courts' backlog.

In Kentucky, the Senate passed a bill in which the parties would present their case to a review panel of three medical experts before patients could pursue their case in court. The panel would issue a non-binding opinion on whether the defendants violated the standard of care. The opinion would be admissible in court unless new substantial evidence surfaced later. The measure now goes to the Democratic-run House where it faces a much tougher challenge.

In Georgia, legislators have proposed a bill that would take medical malpractice cases out of the courts and into a no-fault administrative system in which patients would present their claims to a panel of physicians. Following a 60 day investigative period, an independent medical review panel would issue a decision, which can be appealed.

Advocates of the Georgia bill argue health care providers would be encouraged to report medical errors through a transparent system which ensures patients' complaints are heard

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quickly and resolved without costly and lengthy litigation. Opponents believe the bill would unconstitutionally deprive patients of their right to a jury trial and result in more claims, higher costs, more cumbersome reporting requirements, and higher taxes, ultimately borne by physicians and hospitals.

Birth Injury Funds

Prompted by recent multi-million dollar medical malpractice verdicts (primarily in Baltimore City), Maryland lawmakers are pushing to create a fund similar to New York's successful Medical Indemnity Fund (MIF) to help pay for treating infants who suffer neurological injuries during birth. Patients would apply directly to the fund which would be overseen by an executive director and a board. An administrative judge would decide if a child is eligible for compensation. Parents could still sue in court if they can persuade the trial judge that the healthcare provider acted maliciously. Fees paid by doctors, hospitals, and insurers would finance the initiative.

Early Resolution

In Oregon, legislation has been passed establishing a voluntary early resolution program modeled after one adopted successfully by the University of Michigan. Set to begin in July 2014, healthcare providers and patients can have a confidential conversation, with the option of having a mediator present, to determine whether conflicts from medical errors and adverse events can be resolved outside of the courtroom. By allowing physicians and patients deemed to have legitimate injuries to work out their differences before a suit is filed, the program aims to reduce the likelihood of litigation.

Updates on Cap Challenges

Caps on non-economic damages continue to be in a state of flux.

- **Florida** – On March 13, 2014, the Florida Supreme Court (the "Court") issued its long-awaited decision in the McCall, et al. v. USA, which challenged the constitutionality of the non-economic damage cap. The Court declared the cap unconstitutional in medical malpractice actions involving wrongful death, holding the cap violates the right to equal protection. Although this decision eliminates the cap only in wrongful death cases, the plaintiffs' bar will certainly challenge the cap in non-death cases in the near future.
- **California** – California's tort reform statutes (MICRA), which include a $250,000 cap on non-economic damages, have withstood unsuccessful challenges in the courts and the Legislature since 1975. However, it appears likely proponents of increasing the cap will gain enough signatures to include it on a November ballot with an initiative to raise the cap to about $1.1 million, adjusted for inflation each year. Both sides have already raised tens of millions in what promises to be an expensive battle.
- **Kansas** – the Kansas legislature plans to introduce a bill in 2014 to raise Kansas' $250,000 limit on non-economic damages to $300,000. This is in response to a Kansas Supreme Court decision in 2012 that upheld the cap, but warned that a failure to increase the cap could increase the likelihood subsequent challenges would be successful.

- **Mississippi** – a federal judge in Mississippi upheld the state's $500,000 non-economic cap, relying on the 5th Circuit's ruling in February 2013 that rejected the plaintiff's challenge to the caps.
- **Missouri** – Subsequent to the 2012 Missouri Supreme Court decision declaring Missouri's caps unconstitutional, a House committee has recently endorsed legislation to cap non-economic damages in medical malpractice cases to $350,000. Previous bills passed the House but have not made it through the Senate.

Conclusion

Only time will tell whether the creative reforms working their way through the legislative process will be passed into law, and have the intended effect of reducing the frequency and costs of medical malpractice lawsuits. However, it is apparent that the healthcare industry understands the need to push through reforms that will improve care while reducing the heavy financial burdens and losses being sustained under the current litigation system. ◄

For more information please visit:
www.enhinsurance.com

Endurance U.S. Healthcare
16052 Swingley Ridge Road, Suite 130
St. Louis, MO 63017
United States
Phone: +1.636.681.1220

Endurance Bermuda Healthcare
Wellesley House, 90 Pitts Bay Road
Pembroke, HM 08
Bermuda
Phone: +1.441.278.0400