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 insureds.

In this particular installment you will find Daryl J. Douglas's article on *Tort Reform Update – Caps are Holding Ground.*

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

Tort Reform Update – Caps are Holding Ground

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

The 2nd Quarter 2014 edition of Insight & Perspectives discussed creative tort reform measures introduced in several states to reduce medical malpractice loss costs and also surveyed the status of challenges to the caps on non-economic damages. While there has been little in the way of passage of new tort reform measures, the caps have survived challenges in several states. This article provides an update on these challenges and on the evolving approaches of plaintiffs, defendants and insurers to damage trends in medical malpractice cases.

Updates on Challenges to Caps

Over the last six months proponents of non-economic damage caps received good news:

- In November 2014, the future of California's tort reform statutes (MICRA), which include a $250,000 cap on non-economic damages, was in the hands of voters, as a ballot initiative sought to raise the cap to about $1.1 million, adjusted for inflation each year. After an expensive battle, voters rejected the initiative, preserving the existing MIRCA caps.

- In May 2015, three years after the state's Supreme Court struck down caps as unconstitutional, Missouri's governor signed into law a measure that caps non-economic damages at $400,000 in most cases and $700,000 for catastrophic cases, increases the existing $350,000 cap in wrongful death cases to $700,000, and includes a 1.7% annual escalator. By specifying that medical malpractice cases are statutory and not common law causes of action, lawmakers are hopeful that the new caps will be backed by the courts.

- In March 2014, the Florida Supreme Court ruled in the McCall decision that the state's caps on non-economic damages were unconstitutional in wrongful death cases. Due to language in that opinion, most expected the same Court to hold that the caps on all personal injury cases were unconstitutional. Yet in May 2015, in Miles v. Weingrad, M.D., the Court issued its highly anticipated decision, holding that the statutory limits of non-economic damages in medical malpractice cases do not apply retroactively to incidents occurring prior to the enactment of the statutes on September 2003. Surprisingly, neither the majority, concurring, nor dissenting opinions addressed the constitutionality of the

Continued over

About Us

Our U.S. and Bermuda teams provide healthcare professional liability coverage to non-profit and for-profit hospitals and other healthcare organizations.

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

If you would like to subscribe to Insight & Perspectives, please email us at endurancecommunications@endurance.bm

caps raised in the McCall decision. Therefore, the current non-economic damage caps remain valid, however most legal observers believe that the next time the constitutionality of the caps is directly at issue, Florida's Supreme Court will throw them out.

Changing Damages Landscape

In recent years, legal, economic and legislative changes have influenced the damages landscape in medical malpractice, resulting in higher exposure for medical providers. In an effort to minimize the impact of the caps on non-economic damages, plaintiffs' attorneys have focused on inflating their clients' economic damages claims. A common strategy is to retain life care planners (who often are not physicians and do not meet with the plaintiff) that are willing to disregard the treatments recommended by plaintiffs' treating physicians, and the real-life costs of those therapies. In catastrophic cases, it is common to see life care plans costing over $20 million and, in some venues, over $50 million

Due to improved medical care and technology, patients are overcoming serious illnesses and living longer, thereby increasing future medical expenses. Patients coming out of comas and surviving severe infection, sometimes at the cost of losing some or all of their limbs, have become more common. These cases are more expensive to settle because medical inflation is increasing at a greater pace than investment returns. Structured settlements, a valuable tool for the defense in negotiating reasonable settlements, have also become more expensive. As a result, life companies have become more conservative with their medical underwriting as patients are out-living their predictions, and they are earning a lower rate of return due to low interest rates.

One strategy which creative defense attorneys have introduced to reduce claimed future medical expenses is to argue that the jury should be allowed to hear evidence on the cost of insurance premiums to cover future medical expenses under the Affordable Care Act (ACA). The premiums for a life time of care are often in the thousands of dollars, as opposed to the millions in damages that plaintiffs will present to a jury. Thus far, due to the uncertain future of the ACA, most jurisdictions have not allowed this evidence. One recent exception was the Jones v MetroHealth Medical Center impaired infant case in Cleveland. Pursuant to a specific Ohio statute, post-verdict collateral benefits are to be deducted from any award against a political subdivision. The jury returned a verdict of $14.5 million, including $8 million in future economic damages which the judge reduced to just under $3 million based on this evidence.

The evidence presented in this case was that the plaintiff's premium under the ACA would be $8,000 a year. After adjusting for the plaintiff's future life care plan expenses that will be covered by Medicare, and adding in the cost of care under the ACA until the baby becomes eligible for Medicare, the total future economic damage amount was substantially decreased. Because Ohio has a specific statute allowing post-verdict set-offs in cases against political subdivisions, this decision may have little precedential value outside of Ohio. Nevertheless, it's an argument the defense should advance in any catastrophic case.

Another method the defense should consider to mitigate the severity and the unpredictability of a jury verdict is to attempt to enter into a binding, high/low arbitration, if possible. An arbitrator's award is appealable only under very limited circumstances. Therefore, to avoid an aberrant award, defendants should attempt to persuade plaintiffs to agree to a high/low agreement, which guarantees plaintiff some amount of money (the low) even if the arbitrators return a defense verdict, in exchange for a cap (the high) on any award.

Conclusion

Despite non-economic damage caps withstanding attack in several states, a confluence of factors continues to increase physicians' and hospitals' exposures in medical malpractice cases. Time will tell if the upward trend can be reversed – either by a change in the political make-up of the legislatures following the 2016 elections, or if the ACA becomes accepted by trial judges and juries as the law of the land. Until then, defendants will need to look for creative ways to limit the increasing damage exposures to hospitals and physicians. ◄