

Insight and Perspectives

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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 Douglas' article discussing recent changes in Tort Reform legislation.

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.

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Tort Reform Update – Will Incremental Changes Prove Helpful?

By Daryl Douglas, J.D., CPCU

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In the fall 2010 edition of Insights & Perspectives, Endurance addressed the uncertainty surrounding the then current state of tort reform in the U.S. Since that report, the results have been mixed. No state has enacted caps on non-economic damages (i.e., subjective damages, such as pain and suffering). Non-economic damage caps remain under attack in several states, with decisions likely to come down in a handful of states in 2013. On the positive side, with one notable exception, tort reform has not suffered any significant setbacks, and several states have passed incremental reforms. It remains to be seen whether the various state reforms can stem the tide of the upward creep of severity.

Recent Rulings on Non-Economic Damage Caps – Mixed Results

Over the last 18 months, various state supreme courts throughout the country have upheld caps on non-economic damages, with the exception of Missouri, which gave both sides of the tort reform debate something to cheer about in 2012. In April, Missouri's Supreme Court ruled in *Sanders v. Ahmed* that the state's non-economic damages cap for wrongful death medical malpractice cases was constitutional, basing its decision on the fact that the right to bring a wrongful death lawsuit was a statutorily created cause of action. Yet in October, the same court in *Watts v. Cox* struck down the state's \$350,000 limit on non-economic damages for cases other than wrongful death, holding that the cap "infringes on the jury's constitutionally protected purpose of determining the amount of damages sustained by an injured party."

Missouri's tort reform advocates have not given up hope. Republicans that hold a supermajority for the 2013 session have stated their intention to attempt to restore liability limits in order to control health care costs and keep doctors from crossing into Kansas, where that state's Supreme Court recently handed down a decision (*Miller v Johnson*²) reaffirming

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caps in personal injury cases, including medical malpractice. Those in Missouri supporting the reinstatement of the 2005 damage caps have discussed constitutional amendments or passing legislation that would eliminate the common law right to file a lawsuit over healthcare services while replacing it with a statutory right to sue.

Constitutionality of Caps – The Uncertainty Continues

The plaintiffs' bar continues to challenge the constitutionality of caps on non-economic damages in several states, with inconsistent outcomes. Texas is the latest state to address caps on damages. In August 2012, in *Prabhakar, v. Fitzgerald*, a Texas appellate court validated the caps under the state's constitution, and in March 2012 the Supreme Court of Louisiana reaffirmed the state's \$500,000 limit on medical liability damages. Decisions regarding the constitutionality of caps are pending in a few other states. In February 2012, Florida's Supreme Court heard oral arguments on the constitutionality of Florida's cap in *Estate of Michelle Evette McCall v. U.S.* The U.S. Court of Appeals for the 5th Circuit will soon address the constitutionality of Mississippi's \$1 million cap on non-economic damages for civil cases after the state's high court declined to answer the question in *Sears, Roebuck & Co. v. Learmonth*.

Finally, plaintiffs' attorneys are launching legal challenges to the caps in California and Indiana (*Matthews v. Lipton*). It is anyone's guess on the outcomes of these cases, as there does not appear to be a consensus on how the high courts will rule.

Points of Light in Tort Reform Efforts

There has been some positive tort reform news from a handful of states. Although the reforms have not included damage caps, the laws include incremental measures that should help reduce loss costs.

- Effective October 11, 2011, New York established a Medical Indemnity Fund (MIF) to pay for the future health care costs for "birth-related neurological injuries". As hospitals and their carriers are no longer responsible for paying the portion of any settlement or judgment allocated to future medical expenses, settlement costs in birth-injury cases have reportedly declined by about 30 to 40 percent.
- Massachusetts enacted reforms in August 2012 that make doctors' apologies inadmissible in court in most instances, require claimants to file "letters of intent" before suing, and impose a six-month waiting period to allow doctors and patients to work out the matter.

- In July 2012, New Hampshire's legislature overrode Governor John Lynch's veto of the state-sponsored "early-offer" malpractice reform. This is a voluntary program in which providers and patients can settle medical liability claims out of court within 90 days to receive payment for their medical expenses and lost wages, while forgoing payment for lost earning capacity or pain and suffering.
- Michigan's Governor signed a tort reform package in January 2013 that a) clarifies that loss of society or companionship constitutes non-economic damages subject to the state's caps, b) provides guidance on how future damages are calculated to prevent judicial errors in reducing awards to present value, c) limits the time period for suing on behalf of deceased persons, and d) bans prejudgment interest on costs and attorney fees incurred during the time before a judgment is issued.

A Finger in the Dam

Juries continue to return multi-million dollar verdicts across the country every month. Hopefully, the caps currently under attack will be upheld, and the recent reforms designed to provide healthcare providers with reasonable and fair protections from runaway verdicts will help to minimize some of the adverse effects such verdicts can have on the healthcare industry. ◀