# Insight and Perspectives

a publication of Endurance Insurance's Healthcare Practice

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 brokers and insureds.

This installment features Phillip Ashley's article on *Tort Reform: A Mixed Bag*, highlighting a number of recent tort reform cases.

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

## About Us

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

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## Tort Reform Update: A Mixed Bag

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### Damages Caps: Easy Come, Easy Go

While tort reform has been a hot topic in state legislatures for several years, its importance has waned more recently. There has been little real change over the past year. One bright spot is Missouri where the governor signed into law a new set of non-economic damages caps and the Supreme Court upheld the caps in wrongful death cases. In Florida, we are still waiting for the other shoe to drop as the Supreme Court there has thrown out the caps related to wrongful death cases and a decision is pending in another case which may affect the broader, non-economic caps in that state.

On May 8, 2015, three years after Missouri's Supreme Court struck down non-economic damages caps as unconstitutional, the governor signed into law a measure that: a) caps non-economic damages at $400,000 in most cases and $700,000 for catastrophic cases; b) increases the existing $350,000 cap in wrongful death cases to $700,000; and c) includes a 1.7% annual escalator. By specifying in this legislation that medical malpractice cases are a statutory and not a common law cause of action, lawmakers hope the new caps will be backed by the courts.

On April 19, 2016, the Missouri Supreme Court held in *Dodson v. Ferrara* that the $350,000 non-economic damages cap in section 538.210 does not violate the right to jury trial in wrongful death cases. The Court also held that this cap also does not violate separation of powers or equal protection. The Court differentiated wrongful death actions which are creatures of statute and were not available at common law when Missouri adopted its Constitution, from other personal injury actions which were available at common law.

In contrast, the Florida Supreme Court declared the non-economic damages caps enacted in 2003 unconstitutional in wrongful death cases. In *McCall v. United States*, the Court held that because the statute is arbitrary as applied to wrongful death cases and because it lacks a rational relationship to the alleged medical malpractice crisis in Florida, the cap violates the Equal Protection Clause of the Florida Constitution.

On June 9, 2016, *North Broward Hospital District v. Kalitan* was argued before the Florida Supreme Court and addressed the constitutionality of the broader personal injury caps. Given the previous decision in *McCall*, most Florida practitioners are expecting the Court to make a similar decision in the pending case. The *North Broward* case came to the Florida

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Supreme Court from the Fourth District Court of Appeals which declared the caps unconstitutional in accordance with *McCall*. While there is no time limit on when the decision must be made, it could be handed down in just a few months. So, while the caps still exist in other districts in Florida, it may only be a matter of months before the caps are abolished statewide.

## The ACA: Concrete Results and Other Minor Victories

It has long been argued that the Affordable Care Act (ACA) should limit future medical expense damages in medical malpractice and other personal injury suits. Although support from the courts has been limited, more recently, there have been some positive results. In early 2015, an Ohio Court of Common Pleas' judge in *Jones v. Metrohealth* allowed application of the ACA to reduce a verdict for future medical expense damages.The cost of plaintiff's life care plan was $8 million. Defense experts established that the premiums for health insurance under the ACA were between $2000 and $8000 per year, and that the maximum out of pocket expenses were between $6300 and $6500 per year. The court used these parameters to reduce the cost of future medical expenses. The jury verdict at trial was $14.5million and the court reduced that verdict by $11 million, including about $6M related to future medical expenses.

Then in July 2015, a California Federal District Court in *Brewington v. United States of America* also applied the ACA to reduce an award of future medical expenses. In this case, the plaintiff had the wrong drug injected in his eye and developed blindness, pain and opioid intolerance. Liability was essentially admitted and the case was tried to the court on damages. The court awarded just over $725,000 for future medical expenses, against a life care plan that cost $2.6 million. The court said that should the Plaintiff choose not to continue to receive care from the VA, then the ACA ensures that the plaintiff will have access to insurance covering his future medical care needs. While the court took the ACA into account, and did not award the full cost of his life care plan to plaintiff, it was not clear from the opinion exactly how the court applied the ACA plan premiums and out of pocket costs in arriving at the reduced award.

The decisions in these two cases may be limited by the collateral source laws particular to those states. There have been other incremental "wins" in California, Michigan, Illinois, Ohio and other states, in several unpublished decisions and favorable rulings on motions in limine. However, there still have not been any decisions of precedential value from the Federal Courts of Appeals or State Supreme Courts.

## "Judicial Hellholes" for 2015-16

At the end of 2015, The American Tort Reform Foundation issued its *2015-2016 Judicial Hellholes®* report. The list pertains to civil litigation generally, not just medical professional liability. The following jurisdictions made the list this year.[1]

At the top of the list is California, described as hyper-litigious. Rounding out the list are: New York City's Asbestos Court, ranked number 1 last year; consistently plaintiff-friendly state courts in Florida and Missouri; the asbestos lawsuit capital of America, Madison County, Illinois; Louisiana for the growing influence of the personal injury-bar; both a county and a federal court in Texas – Hidalgo County and the U.S. District Court for the Eastern District of Texas – citing bias against civil defendants; and the procedures and rules in Newport News, Virginia, that appear to guarantee asbestos plaintiffs a win if their cases go to trial.

At the top of the Watch List is West Virginia—alleging its high court is controlled by a liability-expanding majority. Also on the Watch List are Philadelphia, where mass tort cases are ticking up again; New Jersey, with its own mass tort dockets, consumer protection and medical liability suits, and a growing hostility to lawful arbitration agreements; and Pottawatomie County, Oklahoma, due to the perceived pro-plaintiff agenda of a particular judge.

In summary, while new tort reforms, specifically damages caps, have stalled out and may actually be back-sliding in some places, the application of the ACA to reduce future medical expense awards is gaining traction. We can continue to support such efforts by encouraging defense counsel to consistently file timely motions so that either helpful rulings are secured or strong cases can be appealed. ◄

1. This summary was quoted originally from American Tort Reform Association president Tiger Joyce on 12/17/15. It is paraphrased here and shortened for length.