

Insight and Perspectives

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Welcome

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.

We appreciate your continued support of Endurance U.S. Healthcare.

Yours Truly,



Kim Willis

About Us

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

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Healthcare Providers and Their Insurers – Caught Between Continued Severity and Tort Reform Erosions

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In our January 2009 edition of “Insights and Perspectives,” Endurance speculated on the sustainability of the tort reform measures that had been passed in several states from 2003 through 2005. While some legislative actions have yielded positive change, overall, recent court decisions and cases on file challenging tort reform suggest the pendulum is swinging back against health-care providers and their insurers. At the same time, juries across the country continue to hand down multi-million dollar verdicts against hospitals. If these legal trends continue, healthcare providers and state legislatures will need to develop and implement processes and solutions to avoid a continued increase of tort costs.



TORT REFORM REMAINS A WILDCARD

There have been some isolated points of light in the tort reform efforts. At the national level, President Obama allocated \$25 million to fund programs aimed at reducing medical malpractice lawsuits and the practice of defensive medicine. Tort reform legislation at the state level, often establishing caps on the amount juries can award for non-economic damages in medical liability cases (and in some states, economic damages as well), has been credited as a driver of at least some of the improved results and significant reductions in the filing of medical malpractice lawsuits. In the last few years, some 35 states have passed “I’m sorry” laws which allow doctors to apologize to patients for medical mistakes without allowing the admission to be used against them in court².

On the state level, Oklahoma recently passed comprehensive tort reform measures, including a \$400,000 cap on non-economic damages, unless there are exceptional circumstances such as gross negligence or disfigurement as a result of an injury. In such exceptional cases, the award will be paid by a \$20 million reinsurance policy purchased by the state. Some medical malpractice defense lawyers in Oklahoma predict that the “exceptional circumstances” provision will be interpreted by trial judges and appellate courts to include any case involving serious or permanent injuries. If this occurs, the cap will not be effective in limiting exposure and lowering the costs of settlements in high exposure cases.

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1 This publication provides information and commentary on legal issues and developments of interest to our clients and friends. The foregoing is not intended to provide legal advice and is not a comprehensive treatment of the subject matter covered.

2 Annals of Internal Medicine, Volume 149, Number 11, p. 812 (Dec 2, 2008)

It is uncertain whether recent tort reforms enacted by a number of state legislatures will remain in place. Court challenges to state caps have had mixed results. State courts in Alaska and Ohio have upheld restrictions. Most recently, in September, 2010, Maryland's highest court upheld the state's limit on jury awards for pain and suffering in personal injury suits, affirming their prior rulings in 1992 and 1995 that the caps were constitutional. The Maryland Supreme Court concluded that plaintiffs had failed to show why the precedent should be set aside and also to demonstrate that its state lawmakers had no rational basis to limit the damages that could be collected by severely injured residents. The majority opinion rejected the argument that the caps denied plaintiffs a right to a trial by jury because plaintiffs will still have a jury determine the facts and assess liability. On the other side of the coin, in February 2010, in a decision that surprised almost no one in the industry, the Illinois Supreme Court struck down the cap on non-economic damages. The next month, the Georgia Supreme Court followed suit, ruling the state's \$350,000 statutory limit on non-economic damages deprived the citizens of their Constitutional right to a jury trial. Cases challenging non-economic damage caps have also been filed in Indiana, Mississippi, West Virginia and South Carolina. There does not appear to be a consensus on how the high courts will rule in those states.

Recently, Missouri and Kansas have also been the targets of efforts by plaintiffs' lawyers to undo legislation placing caps

on non-economic awards. There is widespread concern that the Supreme Courts in those two states are poised to strike down the non-economic caps.

SEVERITY CONTINUES TO RISE

While the non-economic caps designed to reduce volatility of damage payments are being struck down in some states, jury verdicts and settlement costs continue to rise. Towers Perrin forecasts tort costs to increase by 4% in 2010 and 6% in 2011, supported by a pendulum swing away from cost-saving tort reform measures³. According to jury verdict research, million dollar-plus awards across all liability types rose from 13% of all awards during 2001-2003 to 17% in 2006-2007, with the largest increases attributed to medical malpractice and government negligence cases⁴. A national healthcare broker's 2009 study examining data from more than 100 healthcare organizations representing 1,500 facilities found the size of claims continues to increase 4% annually⁵.

The significant issue of cost volatility for the medical professional liability community is further illustrated by Endurance's informal tracking of large verdicts and settlement of medical malpractice cases. From January 1, 2009 through July 1, 2010, there have been at least 33 cases with settlements or verdicts of \$10 million or more. Of those 33 cases, three paid

\$50 million or more, ten paid between \$20 and \$49 million, and twenty paid between \$10 and \$19 million. Some of these cases arose in traditionally volatile venues such as New York, but others occurred in venues that most would consider more conservative, such as Minnesota, Milwaukee, WI, and Dayton, OH.

Although many of the verdicts may have been subject to caps, limited by high/low agreements, or settled while on appeal for less than would have been awarded in court, the pattern of juries awarding such large sums combined with the lack of any caps on verdicts in many jurisdictions, creates upward pressure on settlement costs and loss ratios.

FUTURE CHALLENGES LIE AHEAD

While there have been some tort reform successes at the federal and state level from 2003 to 2005, after a brief respite in tort costs and lower frequency of lawsuits the pendulum appears to be swinging back against hospitals and their insurers. How far and how fast it will swing is not clear. However, in light of the struggling economy, the political climate following the November 2008 elections, the plaintiff-friendly civil court system present in many venues and increased price competition, the medical industry is likely to face difficult challenges in the months and years ahead. ◀

3 Conning Midyear 2010 Medical Professional Liability Report, p. 12

4 JVR; Insurance Information Institute

5 2009 Hospital Professional Liability and Physician Liability Benchmark Analysis, Aon Benfield.



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