

Insight and Perspectives

January | 2009

a publication of Endurance U.S. Healthcare

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 brokers and insured customers. In this particular installment you will find an article written by Phil Ashley, an attorney at Wagstaff & Cartmell, discussing the current status of tort reform and what the future may hold.

Thank you for the positive feedback on the newsletter to date. Many of you have asked if it is possible to forward Insight and Perspectives to your prospects and clients. We appreciate your interest and fully support your efforts to use our newsletter as an opportunity to connect with customers and prospects.

We appreciate the support you've given Endurance U.S. Healthcare and we welcome your feedback, requests and suggestions for future issues.

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.

Contact Us

Kim Willis

Senior Vice President
kwillis@enhinsurance.com
636-681-1205

David Flick

Vice President Underwriting
dflick@enhinsurance.com
770-752-4162

The Current Status of Tort Reform and What Might Happen in the Near Future: Anyone Have A Ouija Board?

By Phillip P. Ashley, JD, CPCU
Wagstaff & Cartmell, LLP

Did tort reform hit its peak in 2003? Nearly 30 states have adopted some form of non-economic damages cap.¹ In the past few years, however, there has been some waxing and waning in the support of tort reform by various state supreme courts. This article will discuss the current status of tort reform and explore what might be on the horizon.



President George W. Bush's proposal for Federal tort reform, which included a national non-economic damages cap of \$250,000, had significant support, but never received enough votes in Congress to pass. The Clinton/Obama MEDiC plan discussed below was not adopted either. Currently there is no realistic prospect for national level tort reform.

With the election of Barack Obama and a Democratic majority in both houses of Congress the prospect of any meaningful federal tort reform measure from an insurance industry and insured perspective does not appear likely. President-Elect Obama's campaign statements suggested that he supported tort reform and that he voted against his party on at least one tort reform measure. However, in an article proposing legislation authored by Hillary Clinton and President-Elect Obama, it appears that they see tort reform mainly as a quality improvement opportunity rather than a damage controlling prospect: "... the discussion should center on a more fundamental issue: the need to improve patient safety."² Their proposal was a plan called MEDiC which had as one of its main goals to "ensure patients access to fair compensation for legitimate medical injuries." Exactly what constitutes a "legitimate medical injury" and "fair compensation" under this proposal remains unclear, and it appears that few people agree upon the meaning of these terms. Now that Mr. Obama will be the next President, it is possible we will see a rebirth of MEDiC.

Despite the failure thus far of both political parties to enact meaningful federal tort reform, tort reform legislation does appear to be faring pretty well in the states. The high profile tort reforms passed in Texas and Ohio in 2003 continue to reap benefits for those States.³ In Texas, one physician medical malpractice insurer just announced a 6.2% rate reduction—its sixth rate reduction in four years—for an average 4 year total reduction of over 37%.⁴ In Ohio, in 2003 when tort reform was passed, there were only five medical malpractice liability carriers in the State. Now there are 15 carriers.⁵

In stark contrast to what has happened in Texas, premiums for medical malpractice insurance have nearly tripled since 2000 in Connecticut, New Jersey and Pennsylvania—three states with little or no significant tort reform, according to the AMA. In New York, after a 14% increase in rates in July 2007, most doctors are paying as much as 80% more for their liability insurance than they were in 2002.⁶

In Ohio, the survivability of tort reform is thought to be closely tied to the composition of its Supreme Court. A previous edition of the Court repeatedly struck down legislative attempts at tort reform. The current Ohio law limiting non-economic and punitive damages was upheld by the current, more conservative, Court in 2007. Two of the more conservative Justices ran for reelection in November 2008 and both retained their seats on the Court. So, it appears that tort reform is safe in Ohio, at least for the next few years if the composition of the court remains the same.⁷

The AMA espouses a system of “Health Courts.”⁸ These would be specialized courts with medically trained judges that would handle all medical negligence actions. A state level task force is recommended to run and review the program for each state. Trials would be to the Court, or possibly a jury. Non-economic damages would be limited, but on a sliding scale, similar to schedules in a worker’s compensation program.

More cases challenging tort reform have been making their way to the supreme courts in several states.⁹ Oregon has a \$500,000 non-economic damages cap

in wrongful death cases. Recently, the constitutionality of that cap was tested in a case where the jury verdict for non-economic damages was \$1 million, or two times the cap. In February of 2008, the Oregon Supreme Court upheld this cap as constitutional.¹⁰

At the end of 2007, The Oregon Court, however, struck down a provision that capped the liability of employees of public or quasi-public entities, including health-care providers.¹¹ In that case, a young child suffered severe brain injury after surgery to correct a congenital heart defect. The law at issue capped the defendants’ liability at a total of \$200,000, while the family sought more than \$12M in damages, including lifetime care. The Court said that while the legislature has the authority to define a legal remedy, that authority is not unlimited. Here, the Court said, the

legislature basically eliminated the plaintiff’s right to recover for his injuries.

There are currently tort reform challenges pending in several other states including a case pending in the Supreme Court of Illinois.^{12,13} Many observers expect tort reform enacted in Illinois to be struck down.

The tort reform movement is under pressure and facing challenges coordinated by plaintiff oriented advocacy groups at both the state and national level. More will undoubtedly come. Oregon upheld its non-economic damages cap in wrongful death cases. But many challenges—especially to the constitutionality of non-economic damages caps—are pending in various states. The next couple of years may be telling indeed. ◀

¹ R. Davis, *More reforms needed for medical liability system*, American Medical Association January 17, 2008, www.ama-assn.org/ama/pub/category/18264.html

² H. Clinton and B. Obama, *Making Patient Safety the Centerpiece of Medical Liability Reform*, 354 *New England Journal of Medicine* 2205 (2006), <http://content.nejm.org/cgi/content/full/354/21/2205>

³ American Tort Reform Association, *How Tort Reform Works*, http://atra.org/wrap/files.cgi/7964_howworks.html

⁴ T. Phinisee, *MedPro cuts medical malpractice rates in Texas*, *San Antonio Business Journal*, October 16, 2008, www.bizjournals.com/sanantonio/stories/2008/10/13/daily34.html

⁵ R. Davis, *More reforms needed for medical liability system*, American Medical Association January 17, 2008, www.ama-assn.org/ama/pub/category/18264.html

⁶ R. Davis, *More reforms needed for medical liability system*, American Medical Association January 17, 2008, www.ama-assn.org/ama/pub/category/18264.html

⁷ J. Adler, *Justice on the Ballot*, *National Review Online*, October 28, 2008, <http://article.nationalreview.com/?q=YTQ3MmY2NjgxYmNmYWZlNjhlZTUwNDJlODFINGE4NDE=>

⁸ American Medical Association, H-435.951 *Health Court Principles*; http://www0.ama-assn.org/apps/pf_new/pf_online?_f_n=resultLink&doc=policyfiles/HnE/H-435.951.HTM&s_t=health+court+principles&catg=AMA/HnE&catg=AMA/BnGnC&catg=AMA/DIR&&

⁹ The American Medical Association website has several good resources concerning tort reforms. This chart, last updated in February 2008, shows tort reform challenges in all states. <http://www.ama-assn.org/ama1/pub/upload/mm/378/concha1statecap.pdf>

¹⁰ *Hughes v. PeaceHealth*, 2008 Ore. LEXIS 60 (Ore.S.Ct. 2008)

¹¹ P. Wong, *Government liability cap is overruled; Public agencies, and taxpayers, may face more expensive lawsuits*, *Statesman Journal*, December 29, 2007

¹² *Lebron v. Gottlieb Memorial Hospital* (Ill. S.Ct.); A. Sachdev, *Judge Rejects Medical Suit Caps*, *Chicago Tribune* 11/14/07 (2007 WLNR 22484594)

¹³ On the eve of oral argument to the Georgia Supreme Court in *Park v. Wellstar Health System* (Ga. S.Ct.), a case challenging the constitutionality of the Georgia non-economic damages caps, the parties settled the underlying suit. Therefore, the caps in Georgia appear safe, at least until the next case is ripe for decision.



Endurance U.S. Healthcare Insurance Services Corporation

ICO Endurance American Specialty Insurance Company
16253 Swingley Ridge Road, Suite 200
St. Louis, MO 63017
United States
Phone: 636.681.1220
Fax: 636.681.1221