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IN THIS ISSUE
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FLORIDA SUPREME COURT REJECTS NONECONOMIC DAMAGE CAP IN WRONGFUL DEATH MEDICAL MALPRACTICE CASES

by Jeptha Barbour and Jill Bechtold, Esqs.

In a highly anticipated decision, the Florida Supreme Court in Estate of McCall v. United States, 2014 WL 959180 (Fla. March 13, 2014), held Florida's caps on noneconomic damages in wrongful death medical malpractice cases are unconstitutional. Healthcare leaders and attorneys have waited more than two years for the decision by Florida's highest court, causing speculation that the caps would be struck down by a narrow majority. While the 5-2 decision was issued by a larger majority than anticipated, the opinion's long-term impact remains unclear.

Medical malpractice cases in Florida are governed by Chapter 766, Florida Statutes. Section 766.118 outlines the damages available to a plaintiff, including a cap on noneconomic damages. Section 766.118(2) limits wrongful death noneconomic damages to $1 million in cases against practitioners and $1.5 million in cases against hospitals or facilities. The caps apply regardless of the number of claimants.

The noneconomic caps were added to Chapter 766 by the Florida Legislature in 2003, after the Governor's Task Force investigated the status of medical malpractice insurance in Florida and found "a medical malpractice insurance crisis of unprecedented magnitude." The Task Force concluded "actual and potential jury awards of noneconomic damages (such as pain and suffering) are a key factor (perhaps the most important factor) behind the unavailability and unaffordability of medical malpractice insurance in Florida."

Unlike most Florida medical malpractice cases, McCall began in the federal courts. The estate of Michelle McCall filed suit under the Federal Tort Claims Act for alleged negligence by a United States Air Force clinic, resulting in Ms. McCall's death. The estate was awarded $2 million in noneconomic damages, but the district court later limited the award to $1 million pursuant to §766.118(2). On appeal, the Eleventh Circuit held Florida's caps on noneconomic damages did not violate the Equal Protection Clause or Takings Clause of the U.S. Constitution, but certified the question of whether the caps violated the Florida Constitution to the Florida Supreme Court.

> The Court concluded the 'insurance industry should pass savings onto Florida physicians in the form of reduced malpractice insurance premiums,' but could not look to limit recovery for injured parties based on arbitrary factors.

The Florida Supreme Court held the caps on wrongful death noneconomic damages under 766.118 violate the Equal Protection Clause of the Florida Constitution because the aggregate structure significantly reduces awards for injured parties in multi-claimant cases without regard to the tortfeasor's actions. Citing to its prior holding in St. Mary's Hospital v. Phillipe, 769 So. 2d 961 (Fla. 2000), the court held that aggregate caps on noneconomic damages violate the equal protection of eligible claimants and are "inherently discriminatory."

In an unusual move, the court further conducted an equal protection analysis of the stated purpose behind the caps (Florida's medical malpractice crisis) to determine constitutionality. The court attacked the findings of the Governor's Task Force and Legislature, holding that the wrongful death caps in 766.118(2) do not bear a rational relationship to the stated purpose of alleviating Florida's healthcare crisis.

Under the heading "The Alleged Medical Malpractice Crisis," the court undertook a vigorous attack of the Legislature and Task Force's conclusions that increasing medical malpractice insurance premiums were causing physicians to leave the state, retire or decline high-risk practices, thereby causing a medical malpractice crisis. The court relied on its own research, arguing that contrasting

→ CONTINUED ON PAGE 4

CRICO STRATEGIES ANNUAL BENCHMARKING REPORT FINDS SKILL-BASED ERRORS BEHIND LARGE MAJORITY OF NON-SURGICAL ADVERSE OUTCOMES

Mistakes made during common medical procedures may make fewer headlines than wrong-site surgery or a brain-damaged baby, but they still impact the patients and caregivers facing the consequences.

In *CRICO Strategies 2013 Annual Benchmar-king Report: Malpractice Risks of Routine Medical Procedures*, 1,497 cases are analyzed where malpractice related to a non-surgical procedure is alleged. While a large majority (88 percent) of these cases highlight skill-based errors, the analysis explores two correlative issues: rules of practice (policy and protocol) as well as inadequate knowledge or judgment demonstrated by clinicians or administrative personnel. CRICO Strategies is a division of the Risk Management Foundation of the Harvard Medical Institutions that specializes in products and services designed to reduce medical error and malpractice exposure.

The study—mined from CRICO Strategies Comparative Benchmarking System (CBS)—highlights six primary medical procedures: scopes, injections, punctures, biopsies, insertion of tubes and imaging. While the very nature of procedure-related claims implies some technical or skill-based failure, it is critical to understand how rule- and judgment-based errors contribute to the actual point of medical injury.

These medical procedure-related cases were filed from 2007-2011 and represent more than $215 million in incurred losses. Unfortunately, for thousands of patients each year, seemingly benign screening, diagnostic or therapeutic procedures lead to a significant injury or death. And, while more than two thirds of the injuries were relatively minor or temporary, 14 percent of the procedure cases with an adverse outcome involved a patient death.

CRICO Strategies CBS database currently holds 275,000 medical malpractice cases from 500 hospitals and provides a unique insight into what goes wrong and why. Analyzing malpractice data offers healthcare providers opportunities to change specific clinical systems or clinician behaviors and reduce those dominant risks.

One of the challenges to improving procedure safety is that the problem is not isolated in the emergency department, operating room or intensive care unit. The risks are ubiquitous and decentralized, and the first step toward risk reduction is recognizing a recurring problem and understanding its breadth and depth.

"In the past, patient safety efforts have focused on inpatient areas, such as the operating room," said Tejal Gandhi, MD, president of the National Patient Safety Foundation. "Now, however, medical procedures are frequently performed in settings outside of the hospital, with an increased number of adverse events being identified. We need to translate the lessons learned in hospital safety to these other settings of care to ensure that procedures are performed as safely as possible."

The next hurdle is finding clinical leadership to champion the remediation of such a diffuse problem.

"Moving the needle on patient safety improvement is hard work," said Mark E. Reynolds, CRICO president. "In order to get healthcare leaders' attention, to convince clinicians to carve time out of an already overburdened schedule, to motivate insurance providers to fund solutions, you have to show up with credible evidence that you are tackling the right problems. Our CBS database and the surrounding expertise enable CRICO and CRICO Strategies members to be proactive and effective in addressing patient safety over the long term across an entire organization."

FLORIDA SUPREME COURT REJECTS PART OF NONECONOMIC DAMAGE CAP

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data and reports showed sufficient availability of statewide healthcare. The court contended that even if there was a legitimate crisis, the caps did not alleviate it. It found no correlation between the caps and reduced insurance rates, pointing to studies showing insurance premiums rose less for high-risk medical practices in states without caps than those with caps.

Finally, regardless of any past crisis, the court determined there was no current crisis justifying the caps. The court argued that within the past several years, there have been sufficient numbers of available doctors in Florida, fewer malpractice claims filed and less noneconomic damages paid by malpractice insurance companies. In all, the court concluded the "insurance industry should pass savings onto Florida physicians in the form of reduced malpractice insurance premiums," but could not look to limit recovery for injured parties based on arbitrary factors.

In defense of its reasoning, and to counter accusations of "judicial activism," the court noted it was not bound to accept the Legislature and Task Force's findings without inquiry, but instead was authorized under the rational basis test to review the purpose of a statute being challenged for constitutionality.

Right now it appears McCall is limited only to wrongful death cases. The court expressly noted "[t]he present case is exclusively related to wrongful death, and our analysis is limited accordingly." The court also specifically narrowed the original certified question from whether all noneconomic caps under 766.118 were constitutional to whether the wrongful death noneconomic caps under section 766.118 were constitutional.

The future impact of McCall is less certain. Speculation continues that the plurality might accept a revised cap if an aggregate structure is eliminated; however, the court's opposition to intended purpose calls into question whether any cap system could pass constitutional muster. Opponents of caps will argue the majority's reasoning in McCall will extend to all remaining personal injury caps under section 766.118 if challenged since they share the same aggregate structure and purpose. Conversely, it's possible the court's acknowledgment that "the legal analysis for personal injury damages and wrongful death damages are not the same" and its further discussion of the difference in origin between common law personal injury claims versus statutorily-created wrongful death actions was intended to help set the stage for preserving personal injury caps. The answer could come soon: the first case challenging the remaining medical malpractice caps is set for oral argument before the Florida Supreme Court on June 4, 2014.

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