

Changes in Legal Landscape That Could Impact Medical Malpractice Risks August 2019

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In researching and reviewing recent legal developments in the medical malpractice field, Jackson & Campbell, P.C. has identified recent changes in the law and the legal landscape that could impact medical malpractice claims and the risk associated with such cases. Below highlights some of these issues.

Impact of Increase in Successful Challenges to Caps on Non-Economic Damages

- **Louisiana (October 2016):** Supreme Court of Louisiana provides pathway to circumvent cap on medical malpractice awards.
- **Florida (June 2017):** Florida Supreme Court strikes down cap on non-economic damages in medical malpractice actions ruling that the cap is unconstitutional.
- **Oklahoma (April 2019):** Oklahoma Supreme Court strikes down cap on non-economic damages in civil actions ruling that the cap is unconstitutional.
- **Kansas (June 2019):** Supreme Court of Kansas strikes down cap on non-economic damages in civil actions ruling that the cap is unconstitutional.¹

Impact of Increases to Caps for Non-Economic Damages or Overall Recovery

- **Maryland (2006):** Legislation increases the limitation on non-economic damages by \$15,000 each year beginning on January 1 of each year. No end date to increases.
- **Virginia (2011):** Legislation increases the limitation on damages by \$50,000 each year until 2031, when the cap will increase to \$3 million.
- **Indiana (March 2016):** In response to challenges to cap on medical malpractice awards, the Indiana Legislature enacted legislation to increase cap on medical malpractice awards.

¹ Notably, the Wisconsin Supreme Court (June 2018) and the Supreme Court of North Dakota (April 2019) have upheld caps on non-economical damages in medical malpractice cases.

Recently Enacted Legislation Extending or Reopening Civil SOLs for Child Sex Abuse Claims

To date in 2019, six jurisdictions have enacted legislation *extending* the civil statutes of limitations for claims involving the sexual abuse of children. They include: Alabama (May 2019), Connecticut (June 2019), Illinois (May 2019), Montana (May 2019), Rhode Island (July 2019), and Tennessee (May 2019). In addition, six jurisdictions have enacted legislation *reopening* civil statutes of limitations for claims involving the sexual abuse of children. They include:

- **Arizona (May 2019):** Extending the civil statutes of limitations to age 30 and opens a 19-month revival window against people and institutions.
- **Montana (May 2019):** Extending the civil statute of limitations against perpetrators and institutions to the earlier of age 27 or three years after discovery that injury was caused by childhood sexual abuse. The Act creates a one year revival window on May 7, 2019 against perpetrators and institutions who are alive and have been convicted of or admitted to the abuse.
- **New Jersey (May 2019):** Changes the civil statute of limitations for child sexual abuse offenses so that the child-victim may bring suit against any responsible defendant any time before reaching age 55, or seven years from the time they become aware of the injury, whichever comes later. The Act creates a reviver period in which any victim with a time-barred claim, or with a claim previously dismissed as time-barred, may file a new suit against any responsible defendant. The two year revival window will begin on December 1, 2019.
- **Vermont (May 2019):** Eliminates the civil statute of limitations and revives all expired claims against perpetrators and negligent institutions.
- **Washington, D.C. (May 2019):** Extending the civil statute of limitations for victims that were abused under the age of 35 such that victims have until they reach age 40 to bring suit with a five year discovery rule. The Act creates a two year revival window commencing on May 3, 2019.
- **New York (February 2019):** Changes the civil statute of limitations for child sexual abuse offenses so that the child-victim may bring suit against any responsible defendant any time before reaching age 55. The Act also creates a reviver period in which any victim with a time-barred claim, or with a claim previously dismissed as time-barred, may file a new suit against any responsible defendant without facing a statute of limitations or res

judicata bar. Such a suit must be filed between approximately August 14, 2019 and August 14, 2020.

In addition, legislation is pending in 39 additional jurisdictions that involve some type of reform to the statute of limitations for child sexual abuse claims.

Increased Frequency of “Failure to Obtain Informed Consent” Cause of Action

Based upon Jackson & Campbell’s review of reported and unreported medical malpractice cases, it appears that more plaintiffs’ attorneys are including a separate “failure to obtain informed consent” cause of action to claims involving medical malpractice claims. The cause of action provides plaintiffs with an additional avenue for recovery damages in situations where they may not be able to prove all of the elements of a standard medical malpractice case. These new type of informed consent allegations are also showing up in sexual misconduct cases where it is being alleged that the defendant (which is typically a chiropractor) is not obtaining informed consent to perform treatments which include touching which would more generally be considered sexual touching.

Increase in Data Breaches in Healthcare Field – Potential HIPAA Violations²

There appears to be a steady increase in data breaches and healthcare providers (and health insurers) have been the target of such breaches. The breaches could lead to violations of medical privacy laws and claims relating to same. Below are a few recent examples:

- **Dominion National:** 2.9 million patients were impacted by a nine year Dominion National hack. Officials received an internal alert about unauthorized access and launched an investigation, then later discovered an unauthorized party accessed Dominion National’s servers beginning as early as August 25, 2010, nearly nine years before the investigation concluded on April 24, 2019.
- **LabCorp** reported on June 4, 2019 that 7.7 million consumers’ data was compromised in a breach that affected a third-party vendor collections firm American Medical Collection agency (AMCA).³

² Under HIPAA, covered entities must notify patients of data breaches within 60 days of discovery. However, some states are passing legislation that truncates the reporting time. In April 2019, the Washington, D.C. legislature passed a new law – requiring a 30-day notice to victims of a data breach. North Carolina and Oregon are working on similar legislation, while Colorado and Iowa have already introduced similar bills – cutting the reporting time to 45 days.

³ The AMCA breach included a number of other smaller providers. Because AMCA has such a large number of clients in the medical industry, it is possible that patient information from other healthcare providers may also have been breached.

- **Quest Diagnostics** reported on June 3, 2019, that it was affected by the AMCA breach which compromised the data of 11.9 million Quest patients. Quest claimed that a hacker gained access to AMCA's system for nearly eight months, accessing clients' personal information such as credit card numbers, bank account details, medical data, and other personal information like Social Security numbers.
- **Premera Blue Cross**, the largest health insurer in the Pacific Northwest, agreed (on July 11, 2019) to pay \$10 million to 30 states following an investigation into a data breach that exposed confidential information of over 10 million people across the country.

Jurisdictions Adopting Heightened Standard for Expert Evidence (Favorable Change)

Notwithstanding the above, not all of the recent legal developments negatively impact medical malpractice claims or tort claims in generally. By way of example, several states have recently adopted the heightened standard for the admissibility of expert witness evidence.

- **Missouri (March 2019)**: The Missouri Legislature enacted legislation that effectively codified the Daubert standard for determining the admissibility of expert witness evidence.
- **Florida (May 2019)**: The Florida Legislature in 2013 enacted legislation to adopt the Daubert standard to determine the admissibility of expert witness evidence. In a 2017 decision, the Florida Supreme Court refused to enforce the statute. In a decision issued on May 23, 2019, the Florida Supreme Court formally adopted the Daubert standard.

This concepts index is not intended to contain legal advice or to be an exhaustive review. If you have any questions about insurance coverage key concepts and terms, please contact [Christopher P. Ferragamo](mailto:Christopher.P.Ferragamo@jacksncamp.com) at Jackson & Campbell, P.C.