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DECISIONS

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Special points of interest:

- Florida Cap on non-economic damages in all medical malpractice cases lifted.
- Congress takes steps to protect doctors in Medicare "Doc Fix" Bill.
- Pennsylvania joins other states in refusing to enforce consent to settle provisions.
- New York Legislature considers expansion of New York Medical Indemnity Fund to all patients with neurological injuries.

FLORIDA APPEALS COURT STRIKES DOWN DAMAGES CAP IN MEDICAL MALPRACTICE CASES

In 2014, the Florida Supreme Court in *McCall v. United States,* 134 So. 3d 894 (Fla. 2014) held that the legislative caps imposed on non-economic damages in wrongful death cases, imposed by section 766.118 of the Florida Statutes, violated the Equal Protection Clause of the Florida Constitution. In a decision issued on July 1, 2015, the Fourth District Court of Appeal in *North Broward Hospital District v. Susan Kalitan,* 2015 WL 3973075 (Fla. 4th DCA July 1, 2015) extended the ruling from the *McCall* case and concluded that the non-economic damages caps in medical malpractice cases involving non-death personal injury cases likewise violated the Equal Protection Clause of the Florida Constitution. In *North Broward*, the plaintiff filed a medical negligence action after an undetected esophageal perforation occurred during intubation. At trial, the jury found in the plaintiff's favor and awarded a verdict of $4.7 million. Of this, $4 million was awarded for past and future pain and suffering. Following post-trial motions, the plaintiff's damages were reduced pursuant to the damages cap. In the first appellate case to address the impact of the damages cap post-*McCall*, the Court followed the *McCall* holding and declared the cap unconstitutional because it violated the equal protection clause of the Florida Constitution. Because the Court declared the statute unconstitutional, the Florida Supreme Court has mandatory jurisdiction. The decision in *North Broward*, which is binding on all Florida trial courts because no other appellate court has addressed the issue, will likely be appealed.

Florida's Cap on Medical Malpractice Damages Ruled Unconstitutional

CONGRESS OFFERS DOCTORS MORE PROTECTION THROUGH PASSAGE OF MEDICARE "DOC FIX" BILL

A little-noticed provision contained in the "Medicare Access and CHIP Reauthorization Act of 2015" enacted into law on April 16, 2015, provides doctors new protections against medical malpractice lawsuits. The provision, which amends Section 106 of the Social Security Act, stipulates that the quality-of-care standards used in federal health programs "shall not be construed to establish the standard of care or duty of care owed by a health care provider to a patient in any medical malpractice or medical product liability action or case." Doctors and their insurers requested the provision due to concern that the proliferation of quality metrics posed unintended legal risks by allowing lawyers to use such data to show that providers were negligent.

"An insured may accept a settlement over the insurer's refusal where the settlement is fair, reasonable, and non-collusive."

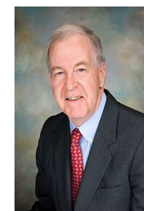
Pennsylvania Supreme Court Adopts Standard Allowing Insureds To Settle Without Insurer Consent

On July 21, 2015, the Pennsylvania Supreme Court issued its much-anticipated decision in *Babcock & Wilcox Co. v. American Nuclear Insurers,* 2015 WL 4430352 (Pa. July 21, 2015) and resolved an issue of first impression: Can the insured enter into a reasonable settlement without the insurer's consent and still preserve coverage for the settlement amount when the insurer is providing a defense under a reservation of rights? In a 3-2 split decision, the Pennsylvania Supreme Court adopted the "fair and reasonable" standard advanced by the Arizona Supreme Court in *USAA v. Morris*, 154 Ariz. 113 (1987). In *Morris*, the court reasoned that a reasonable settlement standard was appropriate because the insurer breached its duties under the policy by offering a defense under a reservation of rights. According to *Morris*, in light of that breach, the insured was excused from its duty to cooperate and did not need its insurer's consent to accept a reasonable settlement. The Pennsylvania Supreme Court emphasized that where the insurer has reserved its right to disclaim coverage for a settlement or judgment, the insured is no longer duty bound to refuse to enter into a fair, reasonable and non-collusive settlement simply because the insurer refused to give its permission to do so. According to the Court, "[I]f an insurer breaches its duty to settle while defending subject to a reservation of rights and the insured accepts a reasonable settlement offer, the insured need only demonstrate that the insurer breached its duty by failing to consent to a settlement that is fair, reasonable, and non-collusive …" Whether a settlement is fair and reasonable "necessarily entails consideration of the terms of the settlement, the strength of the insured's defense against the asserted claims, and whether there is any evidence of fraud or collusion on the part of the insured." The court's ruling in *Babcock & Wilcox* reversed a Superior Court decision that found an insured could only settle a claim being defended under a reservation of rights by the

insurer if the insured could demonstrate the insurance company was acting in bad faith. Writing on dissent, Justice Eakins (joined by Chief Justice Saylor) opined that the insurer's conduct in reserving its rights, in the absence of bad faith, was not a repudiation of the insurance contract allowing the insured to settle without the insurer's permission. The principle rationale for the dissent was based upon the fact that the parties have bargained to give the insurer control over settlement when it is defending a claim. Insurers defending cases in Pennsylvania should take this controversial decision into account when evaluating settlement demands.

New York Legislature Considering Expansion of Medical Indemnity Fund

New York continues to have the highest medical malpractice costs of any state in the country. Recognizing this, the New York Legislature created the New York State Medical Indemnity Fund in 2011. The New York Medical Indemnity Fund provides a funding source for future health care costs associated with birth-related neurological injuries. Enrollees of the Fund are plaintiffs in medical malpractice actions who have received either court-approved settlements or judgments deeming the plaintiffs' neurological impairments to be birth-related. In June, 2015, the New York Senate introduced a bill seeking to expand the Indemnity Fund to all plaintiffs with neurological injuries, regardless of age and regardless of whether caused at birth. The Indemnity Fund has been effective in curbing birth-injury case value. The bill was introduced by Senator Kemp Hannon (R— 6th District) and has been referred to the Rules Com-



New York State Senator
Kemp Hannon - Bill Sponsor

HAWAII SUPREME COURT HOLDS THAT EXCESS INSURER CAN BRING SUBROGATIOION ACTION AGAINST PRIMARY INSURER

On June 29, 2015, the Hawaii Supreme Court, in response to a question certified to it by the United States District Court for the District of Hawaii, ruled that an excess liability insurer can bring a cause of action, under the doctrine of equitable subrogation, against a primary liability insurer that in bad faith refused to settle a claim within the limits of the primary liability policy when the primary insurer has paid its policy limits toward settlement. In *St. Paul Fire & Marine Ins. Co. v. Liberty Mut. Ins. Co.*, 2015 WL 3946005 (Haw. June 29, 2015), the excess insurer settled a judgment in excess of the primary limits and then sought reimbursement from the primary carrier for the full settlement. The excess insurer claimed that the primary insurer, in bad faith, rejected multiple pretrial settlement offers within the primary insurer's $1 million limit, causing the necessity of a trial in which a $4.1 million judgment was entered against the insured. The Hawaii Supreme Court held that the excess insurer had standing under an equitable subrogation theory to pursue a claim for the primary insurer's unreasonable refusal to settle the claim. The Court held that its ruling would prevent the primary insurer from "gambling" with the excess insurer's money while encouraging settlement.

"Subrogation promotes the duty of insurers 'to accept reasonable settlements' … and enables an excess insurer to hold a primary insurer to its duty to pursue reasonable settlements and not to gamble with litigation"

INSURER'S DEFENSE IN BAD FAITH CLAIM PUTS OTHERWISE PROTECTED COMMUNICATIONS "AT ISSUE"

A South Carolina federal district court, applying South Carolina law, ruled that an insurer affirmatively waived both the attorney-client and work product protections from disclosure because it raised a defense that its denial of coverage was reasonable. In *East Bridge Lofts Prop. Owners Assoc., Inc. v. Crum & Forster Spec. Ins. Co.,* No. 2:14-cv-2567 (D.S.C. Jun. 3, 2015), an insured sued its insurer for bad faith after it denied coverage in a case that resulted in a $55 million jury verdict. During discovery in the coverage action, the insured issued a subpoena to the insurer's coverage counsel seeking its file pertaining to the underlying action. The insurer moved to quash. The Court denied the motion and held that when the insurer asserted that it acted reasonably and in good faith, the insurer waived the attorney-client privileged by putting "at issue the evidence it had before it at the time it denied the claim, including communications with counsel relevant to its state of mind." The court also found that the work product doctrine did not apply because there was no other means for the insured to discover the relevant facts prior to the insurer denying the claim.

MISSOURI LEGISLATURE REINSTATES DAMAGES CAP

Three years after the Missouri Supreme Court overturned certain caps on medical malpractice cases, a measure to reinstate limits on lawsuit awards for pain and suffering in medical malpractice cases was enacted into law on May 7, 2015. The measure caps most noneconomic awards — which do not include lost wages, medical costs or other measurable economic damages — at $400,000. In catastrophic cases, including paralysis, loss of vision or brain injury, the cap is $700,000. The bill also raises an existing $350,000 cap on noneconomic damages in wrongful death cases to $700,000. The caps would rise by 1.7 percent each year under the measure. With no cap on economic damages, a patient can still sue for projected lost wages, which can stretch into the millions of dollars when figured across an entire lifetime.

Missouri Legislature reinstates caps on non-economic damages in medical malpractice cases.

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Notable Verdicts

Providence County, RI—May 12, 2015. A Superior Court jury awarded $25.6 million in damages, including $15 million for pain and suffering and $5.6 million for medical expenses, to a man who suffered permanent brain damage after hospital failed to properly diagnose swelling on his brain.

Genesee County, MI - July, 2015. Jury awarded $12.9 million verdict in favor of mother whose infant daughter suffered brachial plexus injury during childbirth when physicians failed to deliver child via C-section.

Luzerne County, PA—June, 2015. A family has been awarded a $6.25 million medical malpractice jury verdict in connection with the 2009 death of their two-year-old daughter following a stomach ailment. In the wrongful death suit, the jury awarded the deceased child's family $3.7 million in wrongful death damages, $2.5 million for future loss of earnings and lost earning capacity and $50,000 for mental and physical pain and suffering.

New Haven, CT—July 2, 2015. A Superior Court jury awards 58-year old man **$4.2 million** for loss of use of his left shoulder after surgical procedure he claimed was the result of a doctor's misdiagnosis. Claimant argued a simple test would have shown he had a bacterial infection, not swollen lymph node.

Habersham County, GA—July, 2015. A jury returned a verdict for $10.9 million to a woman who suffered a lacerated artery during gallbladder surgery. Despite losing a massive amount of blood, she was not given a transfusion prior to her transfer to another facility. The plaintiff was left permanently impaired and disabled as a result of her

Mississippi Supreme Court Refuses To Order Arbitration In Nursing Home Case

In a decision issued on August 13, 2015, the Supreme Court of Mississippi issued a decision in *Hattiesburg Health & Rehab Center, LLC v. Brown*, 2015 WL 4855774 (Miss. Aug. 13, 2015) upholding a trial court's denial of a motion to stay the case and compel arbitration in a wrongful death case filed by the wife of a former resident of defendant's facility. Prior to the decedent's stay at the facility, the wife signed a nursing home admission agreement as "authorized agent" of her husband. The agreement contained an arbitration provision. Her husband died shortly after he was discharged from the facility and the wife alleged that he died as a result of the lack of proper case and supervision while a patient at the facility. The facility moved to stay the case and compel arbitration. The trial court denied the request. On appeal, the court held that the resident was not a third-party beneficiary for purposes of enforcing the arbitration provision. The court further held that the wife was not the resident's healthcare surrogate for purposes of invoking the health care surrogate statute, and binding the resident to arbitration provision. In addition, the court held that the resident was not estopped from denying the terms of the arbitration provision contained in the admission agreement on the basis he received services from the nursing home, and thus, benefited from the terms of the agreement. The Court noted that the nursing home conceded that the resident met the definition of lacking capacity under the healthcare surrogate statute and the evidence showed he did not knowingly seek/obtain any benefits from the facility.

Arbitration Agreements Face Tough Scrutiny in Mississippi