



Insurance Solutions For Healthcare Providers

Vol. 21 No. 3
Third Quarter 2009
Florida Edition



Inside This Issue:

▶ The Impact of the Federal Stimulus Package on Healthcare Delivery

Information in this newsletter does not establish a standard of care, nor is it a substitute for legal advice. The information and suggestions contained here are generalized and may not apply to all practice situations. First Professionals recommends you obtain legal advice from a qualified attorney for a more specific application to your practice. This information should be used as a reference guide only.

First Professionals Insurance Company is Florida's Physicians Insurance CompanySM and the endorsed carrier for professional liability insurance by 23 county medical societies, 15 specialty societies, and two statewide associations in Florida.

NEWS & VIEWS

Recent Challenges to Caps on Non-Economic Damages

By Robert E. White, Jr., President
First Professionals Insurance Company

The Florida legislature enacted a law in September 2003 to place caps on non-economic damages in medical malpractice cases. For Florida physicians, the success of the passage of this tort reform measure has had positive benefits in the form of lower medical malpractice insurance rates and a reduction in the number and severity of claims.

Non-Economic Caps

Caps on non-economic damages in all Florida court cases involving injury or death due to medical negligence is \$500,000 - regardless of the number of defendants - in suits against healthcare practitioner defendants (physicians and surgeons) and \$750,000 per claimant in suits against non-practitioner defendants (hospitals and other non-physicians).

The court can decide to exceed these caps in certain circumstances. In cases of catastrophic injury or negligence which results in a permanent vegetative state or death, a patient may recover up to \$1 million and \$1.5 million, respectively. For any type of injury resulting from emergency care, the law caps non-economic damages at \$100,000 per claimant, (but not to exceed \$300,000 for all claimants), in suits against practitioner defendants and \$750,000 per claimant, (but not to exceed \$1.5 million for all claimants), in suits against non-practitioner defendants.

Benefits of Tort Reform to Florida Physicians and Their Patients

The award limits established by the 2003 tort reform law are advantageous to the quality of healthcare in this state, because they help control the severity of claims filed against doctors. The caps were set to help ensure accessible, quality healthcare in Florida for all patients.

Tort reform helps protect qualified doctors from exorbitant judgments that may drive them out of the state, and even out of practice. Specialists are more likely to accept complex cases when the threat of a significant verdict is minimized. Losing good doctors benefits no one.

Current Court Challenges

Caps on non-economic damages are facing opposition in the Florida court system. Recent cases, including the two mentioned below, have challenged the constitutionality of the tort reform that was enacted in 2003. Based on cases that are pending in the appellate courts, there is a strong likelihood that a decision of the appellate court (for either a plaintiff or defendant) regarding the constitutionality of non-economic damage caps will eventually be appealed to the Florida Supreme Court for their review by the loser.

In *Nadine Raphael vs. James Shecter & Emergency Physician, etc.*, the jury returned an award for the plaintiff on August 30, 2007 in the amount of \$783,119 in economic damages and \$9,500,000 in non-economic damages. The total award was



Tort reform helps protect qualified doctors from exorbitant judgments that may drive them out of the state, and even out of practice.



Continued on next page

Continued from front

\$10,283,119. The lawyer for the physician defendant petitioned the trial judge to apply the non-economic damage cap to the verdict. The plaintiff's lawyer argued to the trial judge that the cap was unconstitutional and urged the judge to not to apply the cap.

On September 14, 2007, the judge ruled that the \$150,000 non-economic damage cap governing emergency room cases was constitutional. The judge entered an order reducing the \$10,283,199 award to a total of \$845,119, which included some adjustment to the economic losses that had nothing to do with the application of the non-economic damage cap.

The plaintiff filed an appeal of the ruling regarding the cap on February 4, 2008 to the Fourth District Court of Appeal. The case was briefed by the parties and oral argument occurred on July 7, 2009. The Fourth District could rule on the constitutionality of the emergency room as early as late summer or in the fall of 2009. Regardless of what happens in the Fourth District, the losing side will appeal the ruling to the Florida Supreme Court.

A ruling from the Florida Supreme Court may take as long as 18 to 24 months after the Fourth District ruling. The end result is that it could be 2011 (or eight years after the cap was passed) before a definitive ruling on the issue.

Another case currently working its way through the Florida courts is *Daniel Weingrade, M.D., vs. Kimberly Ann Miles and Jody Haynes*. The result of this case was a \$1 million judgment against the defendant after the \$500,000 cap was applied.

On April 7, 2008 a Miami-Dade County jury returned a verdict for the plaintiff in *Miles v. Weingrad* for \$16,104 in economic loss and \$1,500,000 in non-economic loss for a total verdict of \$1,516,104. The trial judge reduced the non-economic portion of the loss from \$1,500,000 to \$500,000 making the total judgment entered against the doctor

\$516,104. This case was appealed and is in the briefing stages in the Third District Court of Appeal. It will be set for oral argument some time later this year.

Florida Medical Malpractice Trends

Florida is one of the most litigious states in the country. Knowledge of the medical malpractice industry is critical for physicians in the state. Florida was ranked 42nd in the U.S. Chamber's Institute for Legal Reforms 2008 State Liability Systems Ranking Study and 50th in Pacific Research Institute's 2008 U.S. Tort Liability Index. South Florida was ranked the #1 Judicial Hellhole by the American Tort Reform Foundation. These rankings were awarded during a nearly five-year span of relative malpractice calm which recently came to an abrupt halt in Florida. Since November of 2007, juries in four separate trials returned plaintiffs verdicts of over \$30 million each. This is the highest concentration of such large verdicts to ever occur in Florida. Unfortunately, large verdicts like these tend to attract more lawsuits.

With the increase of these substantial plaintiff awards, it is essential that the tort reform package that passed in 2003 survives the expected constitutional challenge. As the largest and longest-serving medical malpractice insurer in Florida, First Professionals Insurance Company is committed to its partnership with Florida physicians. We will continue to support physician organizations in their efforts to protect the progress made almost six years ago with the passage of caps on non-economic damages.

Summary

The award limits established by the 2003 tort reform law are advantageous to the quality of healthcare in this state, because they help control the severity of claims filed against doctors. The limits apply only to non-economic or punitive damages, not compensatory damages. It is essential that the caps on non-economic damages survive current and future constitutional challenges to provide maximum protection for both patients and physicians. ■

The Impact of the Federal Stimulus Package on Healthcare Delivery

Identity theft is a spiraling international problem. While it is often difficult to detect when the identity of a patient is stolen, measures to protect the identity and privacy of all patients continue to evolve globally. One example is the Federal Stimulus Package, which sets forth substantial changes to requirements for the protection of health information privacy and security under the Health Insurance Portability and Accountability Act of 1996 (HIPAA). Virtually every medical practice is affected by these latest revisions. Notification requirements of a privacy breach and restriction and accounting of disclosures in the face of increased enforcement measures require that physicians become acquainted with the new regulations and the necessary compliance measures.

Continued on next page



By Cliff Rapp
Vice President, Risk Management
First Professionals Insurance Company

Passage of the American Recovery and Reinvestment Act of 2009 (ARRA), often referred to as the “Federal Stimulus Bill”, resulted in myriad HIPAA revisions. These revisions were enacted in response to a number of factors; the evolution of new entities holding personal health information, an absence of privacy breach notification requirements, and a lack of control over business

associates – including inadequate enforcement. While the revisions primarily pertain to privacy measures of electronic health records, the existing preemption principles of HIPAA still apply. The Secretary of the Department of Health and Human Services (DHHS) is responsible for enacting HIPAA rules to conform to ARRA provisions. Consequently, additional HIPAA revisions should be anticipated.

The majority of HIPAA revisions apply to “covered entities” (defined as a health plan or payor, a healthcare clearing house, billing service, or any healthcare provider that transmits any healthcare information in electronic form) and their “business associates” (essentially anyone who uses or discloses a patient’s personal health information in order to perform a function necessary to help carry out a healthcare function) and serves to modify HIPAA privacy and security rules applicable to electronic health records. These revisions may be summarized as follows:

Compliance

Covered entities must initiate a written, breach notification policy and procedures plan in addition to the HIPAA compliance plan. The new provisions require that specific procedures entailing breach notification include documentation of staff training, provide an accounting of disclosures and contain a corrective plan in the event of a privacy breach.

Business Associates

Business Associates (BAs) must fully comply with HIPAA Security and Privacy rules. Penalties for noncompliance apply to BAs who must secure their own business associate agreements. Health information exchanges, such as regional

health information exchanges are considered BAs.

Breach Notification

Breach of personal health information (PHI) privacy or security is the responsibility of the covered entity. An individual must be notified if the breach is of unsecured PHI, such as unencrypted electronic records. Each individual affected by the breach must be notified in writing, within 60 days of discovery. An annual log must be maintained, and reported to DHHS. Covered entities are required to adhere to the written notification procedures contained in their HIPAA compliance plan.

Disclosures Accounting

An accounting of all PHI disclosures, including those disclosures made for payment, treatment and operations must be maintained. Furthermore, all disclosures must be limited to the minimum necessary – as defined by DHHS.

Disclosure Restrictions

Patients may restrict disclosure of PHI to their health plan, insurer or managed care organization if the PHI pertains to health information that was fully paid for by the patient.

Individual Rights

Patients have the right to obtain their electronic medical records electronically and may not be charged for more than the labor costs incurred. Patients may also take civil action against a BA, in addition to a covered entity, for security and privacy breach occurrences.

Enforcement, Penalties, and Audits

Government enforcement capabilities of HIPAA security and privacy violations have been significantly enhanced in tandem with increased governmental monetary fines and penalties. Patients may also initiate civil actions seeking monetary damages in addition to governmental penalties. State Attorneys General can sue in federal district court for such civil damages and are free to award court costs and attorney fees in addition to monetary damages. Consequently, broadened financial incentives and increased legal action may result. Criminal penalties for wrongful disclosure of PHI apply to individuals whether employees or not of a covered entity. The DHHS is required to perform periodic audits of both covered entities and their business associates.

Continued on next page

Continued from previous page

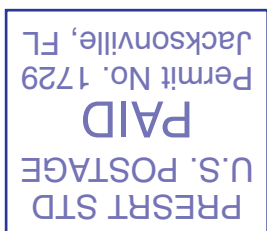
Many of the HIPAA revisions implemented as a result of the ARRA remain under governmental rulemaking review with varying phase-in dates and compliance deadlines. For these reasons, contemporaneous legal or risk management guidance should be sought.

Risk Management Guidelines

- Prospectively seek legal or risk management guidance
- Become fluent in HIPAA terminology
- Educate and train all levels of staff
- Review and revise outdated HIPAA compliance measures
- Revise patient information forms, consents and authorizations
- Ensure BA agreements are compliant
- Remain current – access professional, governmental, and legal informational websites
- Diary applicable ARRA effective dates
- Anticipate continued revisions and timeframes

References

- Health Insurance Portability and Accountability Act of 1996 (HIPAA)
- American Recovery and Reinvestment Act of 2009 (ARRA)
- 45 C.F.R. § 164.308 – Regarding administrative safeguards to protect ePHI;
- 45 C.F.R. § 164.310 – Regarding physical safeguards to limit physical access to ePHI;
- 45 C.F.R. § 164.312 – Regarding technical safeguards for electronic information systems that control access to ePHI;
- 45 C.F.R. § 164.316 – Regarding reasonable and appropriate policies, procedures and documentation requirements of the HIPAA Security Rule as it relates to ePHI.
- American Recovery and Reinvestment Act of 2009, H.R. 1, 111th Cong. § 13400(1) (2009) ■



P.O. Box 44033 Jacksonville, FL 32231-4033 • 800-741-3742 • www.firstprofessionals.com

