Polsinelli Shughart PC

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"...generally speaking, the plaintiffs allege that a legislative limitation on their right to be awarded an amount of non-economic damages, as determined by a jury, is a violation of the rights afforded to them under the Kansas Constitution.."

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Polsinelli Shughart Acquires Hendren Andrae Law Firm

Polsinelli Shughart will acquire Jefferson City-based law firm Hendren Andrae LLC, beginning April I. Three shareholders, two senior partners and two associates from Hendren Andrae will join our firm to practice insurance business and regulatory law, governmental relations and business litigation. The acquisition includes the addition of Richard Brownlee III, Michael Dallmeyer and Keith Wenzel.

"This acquisition fortifies our capabilities for our insurance clients with respect to insurance legislative, regulatory and litigation matters," said Polsinelli Shughart Insurance Business and Regulatory Law Chair Steve Imber. "Hendren Andrae is a very well-known firm in Missouri and will be able to assist our clients on a variety of matters. Having Richard, Michael and Keith on our team will provide great value and service for our insurance clients."

The acquisition of Hendren Andrae complements the firm's nationally recognized Insurance Business and Regulatory Law practice. As a result of the merger, Polsinelli Shughart's Insurance Group will have 14 lawyers, including five former state insurance department attorneys, including two who served as general counsel, a director of insurance and five attorneys who were former in-house counsel to insurance organizations.

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Recent Challenges to Tort Reform Laws: Why Insurers Should Take Heed

By Lauren E. Tucker McCubbin

Lauren E. Tucker McCubbin

Recently, Missouri and Kansas were the targets of a concerted effort to undo legislation enacted to limit certain types of damages available to plaintiffs in civil lawsuits. In both states, the challenged laws are part of legislation commonly referred to as "tort reform," and place caps on the amount of non-economic, or "pain and suffering" damages available in certain types of lawsuits.

Opponents have raised constitutional challenges in both states to caps on non-economic damages. Similar challenges have been brought in numerous states across the country, with varied success. The Kansas Court of Appeals recently held that the Kansas caps are constitutional, but there is some concern that the Kansas and Missouri caps may not be upheld in cases currently pending before the Supreme Courts in the two states. Polsinelli Shughart PC had the privilege of submitting briefs on behalf of amicus curiae in all three pending cases.

Tort Reform at a Glance

In Kansas, the statutes involved are K.S.A. §§ 60-I9a02 and 60-1903, which place a $250,000 cap on

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NAIC Corner *By August N. Rechtien*

White House Proposal for Health Reform

NAIC President Jane Cline recently commented on a provision in President Obama's health care reform plan that would grant the Secretary of Health and Human Services certain authority over health care premium increases. According to Ms. Cline, the NAIC has been working closely with the congressional drafters and the Administration to preserve the role of state regulators. Based on Ms. Cline's understanding, the final language of the plan will establish federal support for state regulators who currently do not have full rate review authority under their state law. The federal support is designed to ensure that proposed rate increases are actually justified and receive proper review.

Ms. Cline commented that the NAIC supports the federal-state partnership and that state insurance regulators are generally pleased that President Obama's proposal emphasizes state-based reforms. Additionally, the NAIC believes the proposed plan offers important benefits in terms of the market reforms aimed at helping individuals purchase insurance where pre-existing conditions are present. On the other hand, Ms. Cline voiced concern over potential negative side-effects, such as higher rates for consumers.

The NAIC has voiced great opposition to any bill that permits insurance carriers to sell products in a state utilizing the regulatory regime of a different state. Ms. Cline advised that such a proposal would eliminate important consumer protections and likely increase premiums for those who need insurance the most. Additionally, Ms. Cline noted that such a bill would negatively impact the insurance market and expose consumers to increased fraud.

Insurance Regulators Work to Protect Consumers from Fraud

Gus Rechtien

The NAIC sent four members to serve as panelists at the recent National Summit on Health Care Fraud sponsored by the U.S. Department of Health and Human Services and the U.S. Department of Justice. The main objective of the Summit was to address various means of fighting fraud in Medicare, Medicaid and private insurance.

Based on discussions at the Summit, it is clear that bills for services that have not been performed and the creation of false patient health histories occur often enough to warrant potential regulatory changes. Accordingly, the NAIC panelists promoted the positions that providers who engage in fraud and abuse should be decertified and that insurers must adopt anti-fraud plans. It was noted that the NAIC is in the process of drafting specific guidelines for anti-fraud plans that can be utilized by companies as well as regulators.

In addition to decertification and anti-fraud plans, one regulator advocated for increased fines, jail time and other measures for instances of fraud in health care. Another regulator proposed that state insurance departments should coordinate with law enforcement to investigate and prosecute allegations of insurance fraud.

For additional information about these issues, please contact August Rechtien at (816) 360-4366 or arechtien@polsinelli.com. ◆

SPOTLIGHT: Missouri and Kansas

Missouri Activity

Bulletin 10-01 clarifies that Missouri's anti-rebate laws prohibit producers and insurers from offering, without additional charge, health club memberships, exercise equipment personal trainers, and other wellness services and counseling that are not provided for in the insurance contract. Bulletin 10-02 reminds property and casualty insurers and producers that the distribution of certificates of insurance that have been modified without the insurer's permission violates the prohibition on misrepresenting the benefits, advantages, conditions, or terms of any policy under the Missouri Unfair Trade Practices Act.

Bulletin 10-03 withdraws the modified premium tax form for insurers posted in February by the Missouri Department of Insurance, Financial Institutions, and Professional Regulation and reinstates the traditional premium tax form from prior years. The treatment of certain tax credits in the modified form was inconsistent with the treatment tax credits receive in other states. The Bulletin indicates that there is no need for companies to revise any filings made using the modified form because the Department will make the necessary adjustments to effectuate the filing as if the traditional form had been filed.

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Polsinelli Shughart Acquires Hendren Andrae Law Firm

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Hendren Andrae was founded in 1946 when John Hendren and Henry Andrae returned to Jefferson City, vowing to start a law firm, following their services in the armed forces during World War II. Today, Hendren Andrae is highly regarded for its work representing clients before the Missouri General Assembly and state government agencies, and in state and federal courts. Shareholders Richard Brownlee III and Michael Dallmeyer bring more than 60 years of combined experience to our firm.

"We're very pleased to be joining a premier law firm like Polsinelli Shughart with a national insurance regulatory platform," said Brownlee. "Our clients will greatly benefit from Polsinelli Shughart's insurance regulatory attorneys who have nationwide experience. In turn, we will be able to provide additional support and experience to Polsinelli Shughart's insurance clients at the Missouri State Capital."

Brownlee served as corporate and legislative counsel for State Farm Insurance Companies for nearly 30 years. In addition, he has provided corporate legal services to the insurance industry in matters dealing with market conduct exams, reorganizations and acquisition, complaint matters and agency issues. Dallmeyer practices insurance litigation, insurance regulatory and insurance receivership law. He is very active in his industry and in the Missouri Bar, serving as former vice chair of the Insurance Law Committee, and served as Missouri Counsel for the American Insurance Association and Reinsurance Association of America. Wenzel served as director of the Missouri Department of Insurance from 1999-2001. He currently practices administrative, corporate and insurance regulatory law.

"Our goal at Polsinelli Shughart is to strive to provide excellent legal services for our clients," said Imber. "We're confident we're doing that and this team of new attorneys reinforces our strengths and goals for clients. The experience these lawyers bring will be a great asset to our clients." ◆

Operational Review and Audit Requirements for Insurers Utilizing Third Party Administrators

By Steve L. Imber and Jennifer L. Osborn

Over the past few months, several states have addressed the requirement for insurers to conduct audits or operational reviews of third party administrators (TPAs) that administer their business. Specifically, the Iowa, North Carolina and Texas insurance departments have imposed or revised various operational review or auditing requirements on insurers utilizing TPAs. In addition, the Florida Office of Insurance Regulation (OIR) requires submission of information regarding operational reviews of TPAs.

Iowa

Iowa Regulation 191-58 was adopted October 28, 2009, and became effective December 23, 2009. The new regulation rescinded the prior Chapter 58, "Third-Party Administrators" and adopted a new chapter with the same title. Insurance companies and TPAs operating in Iowa were required to comply with the new rules beginning January 1, 2010.

Among the changes in the new Iowa law is that insurers are required to review the operations of a TPA on an annual basis instead of semi-annually, and the reviews do not have to be done on-site. Additionally, under the new law, an insurance company may comply with the review requirement by having an independent party perform the operational review, so long as the insurance company has determined that the review was reasonable for purposes of this rule. This requirement specifically extends to TPAs that are otherwise exempt from the TPA registration requirements.

North Carolina

Effective July 1, 2010, North Carolina House Bill 1183 will require insurance companies licensed in North Carolina to file a Certification of Completion with the North Carolina Insurance Commissioner indicating that the insurer has completed semi-annual audits of its contracted TPAs in the format, content, and manner as specified by the Commissioner. The law also requires non-domestic insurance companies to maintain documentation of their audits for at least five years, while domestic insurance companies will be required to maintain documentation for ten years.

Steve L. Imber

Jennifer L. Osborn

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Recent Challenges to Tort Reform Laws: Why Insurers Should Take Heed

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the non-economic damages available in personal injury and wrongful death lawsuits, respectively. The caps were enacted as part of a comprehensive legislative scheme after the Legislature determined that Kansas was suffering from a medical liability insurance crisis, which was causing doctors to either stop performing high-risk procedures or to leave the state altogether. The Legislature determined that action was necessary to protect Kansas citizens from losing access to adequate medical care. The Kansas Supreme Court has upheld the constitutionality of the predecessors to the current caps. See *Samsel v. Wheeler Transport Services, Inc.*, 246 Kan. 336, 339, 789 P.2d 541 (1990).

In Missouri, the challenge is to RSMo. § 538.210, as amended by House Bill 393, which establishes a $350,000 cap on the non-economic damages available in professional liability lawsuits against health care providers (commonly known as "medical malpractice"). As in Kansas, the challenged legislation was enacted by the General Assembly after it determined Missourians were facing a health care crisis. Previously, the law permitted the cap to be adjusted for inflation, and also permitted more than one cap to apply under certain circumstances. With House Bill 393, the statute was amended to eliminate the adjustment for inflation and limit the number of caps available in any one lawsuit. Also, as in Kansas, the Missouri Supreme Court upheld the constitutionality of the cap in its earlier form. See *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. banc 1992).

The Current Challenges

There are two cases pending in Kansas that seek to challenge the damage caps in that state. In *McGinnes v. Zayat*, the plaintiffs raise constitutional challenges to both the personal injury and wrongful death caps. In *Miller v. Johnson*, the plaintiff is only challenging the constitutionality of the personal injury caps. In both cases, generally speaking, the plaintiffs allege that a legislative limitation on their right to be awarded an amount of non-economic damages, as determined by a jury, is a violation of the rights afforded to them under the Kansas Constitution. Specifically, the plaintiffs allege the caps violate the right to a jury trial, the right to a remedy by due course of law and the doctrines of separation of powers and equal protection. The plaintiffs further dispute whether a medical professional liability insurance crisis ever existed.

The case currently pending in the Missouri Supreme Court is *Klotz v. Shapiro*. The plaintiffs in the case argue, among other things, that there was no crisis in Missouri, and that the cap as amended by House Bill 393 is unconstitutional because it violates equal protection, the prohibition against special legislation, the right to due process, the right to open courts and certain remedies, the right to trial by jury, and separation of powers.

Why Insurers Should Take Note

Damage cap supporters argue the caps are integral to keeping liability insurance costs down and keeping insurers in business. The theory is, because the caps place a quantifiable limit on what is traditionally the most unpredictable aspect of damages in a civil lawsuit, carriers can afford to price their policies lower because the risk of a substantial verdict (i.e., at or in excess of policy limits) is lower. In the medical professional liability context, where there is a lengthy tail between when a claim comes in and when it is ultimately paid, the added predictability afforded by the caps helps companies to more easily establish premium rates and claim reserves that are sufficient to pay claims when the time comes. In Kansas, the caps are not limited to claims against health care providers. Therefore, the potential impact of a successful challenge to the caps in Kansas is not limited to medical professional liability insurers and is the same for all carriers writing liability policies in the state. On either side of the state line, however, all liability carriers should be aware of the potential impact from these cases.

For additional information regarding the constitutional challenges to noneconomic damage caps in Missouri and Kansas, please contact Lauren Tucker McCubbin at (816) 360-4116 or ltucker@polsinelli.com. ◆

In Future Issues of **Insurance Business & Regulatory News**

- **Holding Company Laws: Dividend Filings**
- **Reports on 2010 Insurance-Related Legislation in Kansas and Missouri**
- **And more!**

Operational Review and Audit Requirements for Insurers Utilizing Third Party Administrators

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North Carolina House Bill 1183 also amended Section 58-56-26 (Responsibilities of the Insurer) by adding a new subsection to the law which allows the Commissioner to adopt rules necessary to implement, administer, and enforce the provisions of Section 58-56-26. The rule was recently submitted to the North Carolina Office of Administrative Hearings for formal publication in the North Carolina Register by mid-March.

Texas

As reported in our Winter 2009 Insurance newsletter, Texas implemented several new regulations governing TPAs, which became effective on June 25, 2009. The new Texas TPA regulations impose an affirmative obligation on insurers licensed in Texas to conduct operational reviews and on-site audits of any TPAs they utilize for life, health, accident, or workers' compensation business in Texas.

Under the new regulations, an insurer is required to conduct an on-site audit of each TPA at least once every two years and an operational review at least twice each fiscal year. Only one operational review is required during fiscal years when on-site audits are conducted. On-site audits must include a physical inspection of the TPA's place of business and a written assessment regarding the reliability of the information provided to the insurer for the audit. The operational review may take place on the insurer's premises, another location designated by the insurer, or by electronic means. A designated representative of the insurer may perform the operational reviews and on-site audits. All information and documentation relating to an operational review or on-site audit must be made available to the Texas Department of Insurance upon request and must remain on file with the insurer for at least five years after the date of the review or audit.

Florida

While the OIR has not enacted a new law with respect to operational reviews and audits of TPAs, for the past several years, the OIR has required TPAs operating in Florida to complete Interrogatories when submitting their TPA Annual Report to the OIR. Item #15 in the Interrogatories section of the OIR TPA Annual Statement states the following:

> *Pursuant to Section 626.8817(3), F.S., if an administrator administers benefits for more than 100 certificate holders on behalf of an insurer, the insurer shall, at least semiannually, conduct a review of the operations of the administrator. At least one such review must be an on-site audit of the operations of the administrator. Have any insurers conducted a review of administrator's operations? (If yes, attach details, including name of insurer, date reviews were conducted, and whether they were conducted on-site.)*

Attorneys at Polsinelli Shughart are available to assist both TPAs and insurers with operational reviews and on-site audits of TPAs that are required in the states listed above. For additional information about our TPA audit services or other TPA or insurer compliance services, please contact Steve Imber at (913) 234-7469 or simber@polsinelli.com, or Jennifer Osborn at (913) 234-7472 or josborn@polsinelli.com. ◆

SPOTLIGHT: Missouri and Kansas

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Kansas Activity

The Kansas Insurance Department recently proposed a new regulation, K.A.R. 40-4-43, which is intended to prohibit an insurer from refusing to pay for costs that would otherwise be covered were it not for the insured's participation in a clinical trial for cancer treatment. A public hearing will be held on April 20, 2010.

Kansas Insurance Department Bulletin 2009-I, dated December 21, 2009, provides guidance regarding compliance with, and efficient use of, the flex-rating statutes (K.S.A. 40-970 through 40-975), which became effective on July 1, 2008. Under the flex-rating statutes, personal insurance rate filings with rate increases or decreases within a certain minimum range are permitted to take effect on the date they are filed. Bulletin 2009-1 cites recurring problems that have occurred when revised rating rules, territorial boundaries, and even forms have been filed under the flex-rating statutes. ◆

Insurance Business & Regulatory News

Polsinelli Shughart PC

700 W. 47th Street, Suite 1000
Kansas City, MO 64112

(816) 753-1000

Attorneys in the Insurance Group

Steven L. Imber (Chair)
(913) 234-7459
simber@polsinelli.com

Gerald W. Brenneman
(816) 360-4221
gbrenneman@polsinelli.com

Richard S. Brownlee III
(888) 886-6529
rbrownlee@polsinelli.com

Jeanie A. Botkin
(816) 360-4110
jbotkin@polsinelli.com

Jeffery S. Bottenberg
(785) 233-1446
jbottenberg@polsinelli.com

Michael A. Dallmeyer
(888) 886-6529
mdallmeyer@polsinelli.com

Justin T. Liby
(913) 234-7427
jliby@polsinelli.com

Lauren E. Tucker McCubbin
(816) 360-4116
ltucker@polsinelli.com

Jennifer L. Osborn
(913) 234-7472
josborn@polsinelli.com

August N. Rechtien
(816) 360-4366
arechtien@polsinelli.com

William W. Sneed
(785) 233-1446
wsneed@polsinelli.com

Robert B. Sullivan
(816) 360-4151
rsullivan@polsinelli.com

Lisa A. Weixelman
(816) 360-4315
lweixelman@polsinelli.com

Keith A. Wenzel
(888) 886-6529
kwenzel@polsinelli.com

Insurance Business and Regulatory Law

With decades of experience assisting the insurance industry with corporate transactions and various compliance and regulatory issues across the country, the Insurance Business and Regulatory Group at Polsinelli Shughart PC has the experience to provide outstanding services to this industry. With five former state insurance department attorneys, including a former director of insurance, two who served as General Counsel, and five attorneys who were former in-house counsel to various insurance organizations, our attorneys understand the unique needs of our insurance clients on matters involving state insurance departments, state Attorneys General, and other state and federal regulatory agencies.

We routinely handle business and regulatory issues, such as:

- Serving as national outside counsel for various property and casualty insurers, workers' compensation insurers, life and health insurers, third-party administrators and discount medical plan organizations.
- Conducting corporate mergers and acquisitions.
- Making holding company transaction and other related regulatory filings.
- Completing complex national and multi-state regulatory and compliance research.
- Filing Uniform Certificate of Authority Applications, including Primary, Expansion and Corporate Amendment Applications.
- Conducting national and multi-state licensing and compliance projects for Third Party Administrators, Agencies, Adjusters and Discount Medical Plan Organizations.
- Assisting with Market Conduct Examinations and Financial Examinations, including a Multi-State Market Conduct Examination involving 50 states.
- Assisting with insurance company corporate governance requirements, including the recently amended Model Audit Rule, and development of appropriate committee charters, conflict of interest statements, code of conduct and ethics statements, record retention and destruction policies; whistle blower policies, and others.
- Serving as the Deputy Receiver or General Counsel to the Deputy Receiver with respect to insurance company receiverships.
- Forming captive insurers and risk retention groups and assisting with their ongoing compliance and business issues.

Clients include insurance companies, insurance brokers and agencies, third-party administrators, discount medical plan organizations and associations – virtually any individual or entity subject to regulation by state insurance departments, state Attorneys General or other state agencies. The Insurance Business and Regulatory Group has the expertise and depth to provide quality and responsive legal services to regulated entities in the insurance industry with respect to all of their business and regulatory needs. ◆