INDIANA SUPREME COURT RULES PCF CANNOT DEFEND AGAINST PETITION TO RECOVER EXCESS DAMAGES WHEN HEALTHCARE PROVIDER ADMITS LIABILITY

by Colin E. Flora

On Oct. 31, the Indiana Supreme Court unanimously ruled that the state's Patient Compensation Fund (PCF)—established to cover excess damages in medical malpractice cases—may not dispute the existence or cause of a plaintiff's injury in a case where the medical providers previously settled the claim, admitting liability. The decision, Robertson v. B.O., has led to much excitement among the plaintiff's bar.

At the heart of this case was the question: When defending against a petition to recover excess damages that arise from a medical malpractice action where the healthcare provider has admitted liability, may the Indiana Patient's Compensation Fund present evidence to dispute the existence or cause of the plaintiff's injury?

In Robertson v. B.O., the plaintiff is a child who was diagnosed with spastic diplegia—a form of cerebral palsy—at four years old. B.O.'s parents filed a claim on his behalf for medical malpractice owing to the negligence of the healthcare personnel during his delivery. The specific negligence was alleged to be "fail[ure] to adequately monitor his condition during labor and delivery and then fail[ure] to respond [to] signs of fetal distress[.]" On the eve of trial, the case was settled. In most states, the settlement would have ended the matter.

In Indiana, however, the state's Medical Malpractice Act caps how much a plaintiff may recover in a medical malpractice action at $1.25 million. The plaintiff recovers the first $250,000 from the negligent healthcare providers; the next $1 million must be sought from the Indiana PCF. When B.O. filed his petition to seek payment for the excess damages, the PCF refused, identifying expert witnesses who would testify that either the child did not have spastic diplegia or that even if he did, it was not due to the negligence of the doctors and nurses during his delivery. In response, B.O. sought a determination by the trial court judge that expert testimony could not come in after the fact. The judge agreed, issuing partial summary judgment for B.O. on that issue. The basic argument was that the issue of liability had already been established, but what remained was a determination of the amount that could be awarded from the fund for B.O.'s injuries. The PCF appealed, and the Court of Appeals reversed the lower court's ruling. B.O. then sought, and was granted, a transfer of his case to the Indiana Supreme Court.

> The Court conceded that it might seem unfair that the PCF is bound to something that was not determined at a trial. However, that unfairness is what the Indiana legislature permitted in drafting the Medical Malpractice Act.

Before the Supreme Court, there was one primary issue to be determined—whether liability had been established. In order to answer that question, the Court had to determine what "liability" meant in the context of Indiana's Medical Malpractice Act. The Act does not define the meaning of the word "liability." This was not a new challenge for the Court. It had previously looked to this issue in the case Atterholt v. Herbst, determining the Act provides that where there is no definition assigned to a term, then it shall "have the meaning consistent with the common law."

The traditional definition of negligence requires a showing of: "(1) a duty owed by the tortfeasor to the tort victim, (2) a breach of that duty and (3) an injury to the tort victim proximately caused by the breach." Once these three elements have been established, then the defendant is "liable," and the only thing that remains is to determine the damages.

Using this definition, the Court determined two relevant criteria for this case: First, "[i]t is axiomatic that, before liability can be imposed, there must be proof that the defendant's negligence proximately caused the plaintiff's harm." Likewise, in order to establish liability, a plaintiff must demonstrate an injury—without a connection between the breach of duty and the injury, causation fails.

Because these two aspects are so interwoven, the Court found that the finding of liability against the defendant healthcare providers in the settlement, necessarily, provided a determination of an existence of injury to B.O. That is to

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THE DOCTORS COMPANY ENTERS AGREEMENT TO ACQUIRE UTAH MEDICAL INSURANCE ASSOCIATION

Last month, The Doctors Company (TDC) announced it had entered a merger agreement with the Utah Medical Insurance Association (UMIA), in accordance with which the former will acquire the latter through its wholly owned subsidiary, Underwriter for the Professions Insurance Co. The acquisition will broaden the Napa, Calif.-based insurer's coverage area to Utah, Montana and Wyoming. Financial terms of the deal were not disclosed.

"We are pleased to announce this partnership between our two physician-owned companies," said Richard E. Anderson, MD, FACP, chairman and CEO of The Doctors Company. "We look forward to welcoming UMIA's 3,000 policyholders to The Doctors Company group, where they will receive aggressive claims defense, unmatched legislative and patient safety advocacy, outstanding service, and industry-leading benefits. The combined organization will provide UMIA policyholders with the financial strength of a physician-owned insurer with multiple A ratings and a commitment to relentlessly defend, protect and reward its members."

With the UMIA merger, The Doctors Company will increase its number of physician policyholders to 76,000. The transaction is expected to close before the end of the first quarter of 2013 and is subject to customary closing conditions, including the receipt of regulatory approvals and approval by a majority of UMIA's subscribers voting on the transaction.

Late last year, TDC acquired Jacksonville, Fla.-based First professionals Insurance Co. (FPIC), an 18,000-policyholder professional liability insurer, for $362 million.

CONNING: LIABILITY INSURANCE INDUSTRY SHOWS SIGNS OF DETERIORATING PERFORMANCE

The benign period for liability insurance results may have run its course. Current trends in loss frequency, tort filings and reserve releases suggest that an inflection point may have been reached, according to a new study by Conning, a global provider of asset management, risk management, capital management and industry research services for insurance companies.

"The U.S. liability insurance front has been relatively quiet in recent years," said Jerry Theodorou, analyst at Conning. "Decreasing loss frequency and an ample reserve position have supported satisfactory results even in the face of falling premium rates in the past decade's soft market. Our analysis indicates, however, that the benign period for liability insurance results may be coming to an end. If current trends continue, the tort environment is expected to worsen for the defense bar, with adverse loss frequency and severity trends likely emerging for insurers."

The Conning study, "Liability and Tort Trends: Trouble Around the Corner?" explores the complex dynamics shaping outcomes for liability insurers as well as the liability market in detail at the level of individual insurers and individual product segments to understand strategic success factors over the longterm.

IN PCF CANNOT DISPUTE LIABILITY IN SETTLEMENT

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say, by settling the claim for the spastic diplegia, the healthcare providers admitted to the existence of the spastic diplegia and that it was the result of their negligence.

The Indiana Supreme Court conceded that it might seem unfair that the PCF is bound to damages that were not determined at a trial. However, that unfairness is what the Indiana legislature permitted when drafting the Medical Malpractice Act. The Court further noted that: "In an effort to control the costs associated with medical malpractice claims, the General Assembly placed numerous constraints on plaintiffs such as a statute of limitations, the use of medical review panels, caps on recoverable damages and retention of the contributory negligence defense. Perhaps in an effort to balance this sweeping reform, the legislature chose to provide plaintiffs with the benefit of final and established liability when the healthcare provider chooses to settle. It is not our place to upset that balance."

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INDUSTRY NEWS BRIEFS

Applied Medico-Legal Solutions Risk Retention Group (AMS RRG) reported another record in the third quarter of 2012, booking nearly $12 million in premium. These latest results follow several other milestones this year: Q3 marked the company's second quarter with more than $11 million in premium; overall revenue is up 11 percent, compared to the same period in 2011; and AMS RRG wrote new business from 20 states in a variety of specialties.

Last month, General Medicine of Illinois Physicians filed a lawsuit against Mecca T. McDonald, MD. According to the complaint, McDonald was covered under the company's insurance provider, Physician Malpractice Insurance Underwriters Inc., when a wrongful death lawsuit was filed the physician. General Medicine alleges it has since paid more than $40,000 to the doctor to cover defense costs and expenses for his legal representation, with the total expected to increase as litigation is ongoing. According to the complaint, the company's insurance policy does not cover legal defense costs, and General Medicine wants the court to require McDonald to reimburse the company all money paid for his defense.

RLI Corp. has acquired Rockbridge Underwriting Agency, a managing general agency specializing in medical malpractice insurance. Rockbridge Underwriting Agency is a Houston-based managing general agency specializing in surplus lines medical malpractice insurance for individual physicians and physician groups with unique needs. Rockbridge offers coverage in all 50 states through a network of retail and wholesale brokers. RLI estimates that Rockbridge will add approximately $20 million of premium per year to its business.

Coverys recently received the 2012 Registered Professional Liability Underwriter (RPLU) Supporter Award from the Professional Liability Underwriting Society (PLUS). The RPLU Supporter Award is given annually to an organization that participates in PLUS activities and supports the RPLU program by encouraging its professional liability staff to pursue the designation.