RECENT COURT DECISIONS

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COURT UPHOLDS MEDICAID THIRD-PARTY LIABILITY ACT, BUT STRIKES KEY PROVISIONS

Agency for Health Care Administration v. Associated Industries of Florida, Inc., 21 Fla. L. Weekly S276 (Fla. June 27, 1996)

The Florida legislature in 1994 amended Florida law to substantially broaden the state's ability to seek reimbursement for health care expenditures made on behalf of Floridians and caused by the allegedly tortious conduct of others. Although Florida's governor issued an executive order directing executive branch officials to use the Act only to pursue the recovery of Medicaid expenditures from the tobacco industry, the law does not prevent the use of the Act against other industries. Currently, nine additional states—Connecticut, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Texas, Washington, and West Virginia—are engaged in litigation seeking reimbursement from the tobacco industry.

The court emphasized that its ruling was limited only to the Act's facial constitutionality and that the Act might be unconstitutional as applied in specific cases.

The court also stated in the majority opinion that the Agency for Health Care Administration was not created in violation of the state constitution. Associated Industries had argued that creation of the agency exceeded the constitutional limitation of 25 executive branch departments. The court disagreed, stating that AHCA was created as a valid agency within an existing department.

In evaluating the Medicaid Third-Party Liability Act, the court concluded that the legislature could create a new, independent cause of action to which traditional affirmative defenses do not apply.

However, the court struck a part of the Act that would allow the state to proceed without identifying each individual recipient of Medicaid payments. Noting that the statute creates a conclusive presumption that every Medicaid payment is proper and required by the defendant's product, the court stated that such a process would be unfair and would violate due process.

The court also found that the portion of the Act that abolishes the statute of repose defense is unconstitutional. The court noted that, once a cause of action is barred, a property right to be free from a claim has accrued, and the legislature has no authority to resurrect claims.

Additionally, the court ruled that the provision in the Act for combining the theories of market share liability and joint and several liability must be stricken, even though either theory may be used separately. The cornerstone of the market share theory of liability is that, if a defendant can establish its actual market share, it will not be liable under any circumstances for more than that percentage of the plaintiff's total injuries, the court stated. Under the theory of joint and several liability, a defendant can be responsible for all of a plaintiff's injuries, even if the defendant is only one percent at fault.

"We find that the theories of market share liability and joint and several liability are fundamentally incompatible," the court reasoned.

The court also found that the Act's provisions authorizing the state to prove its case through the use of statistical analysis do not expand existing court interpretations concerning the admissibility of statistical evidence. "We interpret this provision to operate within the constraints of our rules of procedure and rules of evidence," the court reasoned. "The state retains the burden of proving its case within the bounds of these rules."

Finally, the court ruled that a cause of action under the Act accrues when the state makes a Medicaid payment to a recipient, not when an allegedly dangerous product is sold or consumed. The Act's provisions apply only to causes of action that accrued after July 1, 1994, the Act's effective date.

HURRICANE CATASTROPHE FUND UPHELD BY SUPREME COURT

American Bankers Ins. Co. v. Chiles, 21 Fla. L. Weekly S267 (Fla. June 27, 1996)

The Florida Supreme Court held the Hurricane Catastrophe Fund does not violate article III, section 19(f)(1) of the Florida Constitution.

The constitutional provision states that a trust fund may be created only through a bill that has no other purpose and that is adopted by a three-fifths vote of the legislature. Insurers argued that creation of the CAT Fund violated the constitutional provision's single-subject requirement.

A number of insurance companies filed a multi-count complaint in circuit court attacking the CAT Fund on various grounds. Counts other than the single-subject challenge have been stayed.

The supreme court generally adopted the reasoning of the majority opinion in the First District Court of Appeal, which relied heavily on section 215.3207, Florida Statutes, which implements article III, section 19(f). The First District Court stated that "the legislature reasonably interpreted the constitutional provision to mean that items related to the purpose, administration, and funding should be included within a bill creating a trust fund." *Service Insurance Co. v. Chiles,* 660

So. 2d 734, 739 (Fla. 1st DCA 1995). The district court went on to say that all of the challenged provisions of chapter 93-409 directly related to the purpose, funding, administration, and regulation of the CAT Fund.

The supreme court also found it significant that section 215.3207 was amended by the legislature in 1993, just a few months after article III, section 19(f) was approved by voters in 1992.

"Such a contemporaneous construction of the constitution by the legislature is presumed to be correct," the court wrote. "As set forth in section 215.3207, the legislature interpreted article III, section 19(f)(1) to mean that items relating to the purpose, administration, and funding should be included within a bill creating a trust fund."

The court adopted the district court's reasoning concerning the specific challenged provisions of the CAT Fund.

The supreme court did not reach the question of whether section 215.555(10) is constitutional. That statute provides that any violation of the CAT Fund statute also constitutes a violation of the Insurance Code.

UNINSURED/UNDERINSURED MOTORISTS CLAIMS ACCRUE WHEN INSURER BREACHES CONTRACT, NOT WHEN THE ACCIDENT OCCURED

Vega v. Farmers Insurance Company, Case No. CC93C-12442, CAA84679 (SCS)42362, Opinion rendered June 13, 1996

Plaintiff insureds were injured by the actions of an underinsured driver and sought a declaratory judgment that they were entitled to benefits. In response, the insurer raised as a defense the running of the statute of limitations. The carrier argued that the statute did not begin to run until Farmers denied the plaintiffs' claim. The supreme court affirmed.

The issue in this case may also arise in suits for no-fault benefits. The questions is: does the statute of limitations begin to run when the accident occurs or when the carrier refuses to pay? Although there is a split of authority, the better reasoned result would be that the statute of limitations begins to run from the date of the breach, since the action is one in contract rather than tort. In Florida, the district courts of appeal have split on the issue. One district has held that in a PIP action, the statute of limitations begins to run from the date of the accident. Another district court of appeal has held that the accident is really based in contract and thus the cause of action does not accrue until the carrier breaches the contract. The Florida Supreme Court will have to resolve the conflict between the district courts of appeal.

In this case, the Oregon Supreme Court upheld the Appellate Court and found that the statute of limitations does not begin to run until the insurer denies the claim. The Oregon Supreme Court also found that the insured does not have to exhaust the limits of a tortfeasor's insurance policy where they are entitled to underinsured motorist coverage.

EXCULPATORY CLAUSE NOT ENFORCEABLE DUE TO LACK OF SPECIFICITY

Alack v. Vic Tanny International of Missouri, Inc., Supreme Court of Missouri, Case No. 78423

Charles Alack had entered into a contract with Vic Tanny International, a health club. While using a rowing machine, a handle disengaged and Alack was struck in the mouth and jaw. Alack alleged that he has seen a dentist over 20 times and has undergone two surgeries and was scheduled for another. He also indicated that his temporomandibular jaw remained displaced and that he had $17,000 in medical expenses. Alack sued for damages.

Vic Tanny raised as a defense an exculpatory clause, which was part of the 17-paragraph "Retail Installment Clause" that Alack had signed. A provision in the retail installment contract provided that Vic Tanny was released from "any and all claims" against it. Vic Tanny argued that the exculpatory clause entitled it to a verdict in its favor because it barred claims for negligence. The trial judge submitted the case to the jury with an instruction that Vic Tanny could prevail if the plaintiff in signing the membership agreement had to release Vic Tanny from the type of claim involved in the case.

The jury found for the plaintiff and awarded $17,000. Vic Tanny appealed.

The court reviewed various state laws involving situations where one party releases another party from liability for future negligence. However, the court noted, "Most states have enforced exculpatory clauses when they include specific references to the negligence or fault of the drafter." The supreme court found that the exculpatory clause in this case was ambiguous. A fatal flaw in the exculpatory clause was that it did not use the words "negligence" or "fault" or equivalent language. Thus, the waiver was not clear and unmistakable and thus is not valid.

The dissent noted that some jurisdictions have disallowed exculpatory clauses altogether and cited cases from Wisconsin, North Dakota, Connecticut, Louisiana, and Montana. However, the dissent found that the release was not ambiguous, but rather was not conspicuous, and, if the release is not conspicuous, then it should not generally be allowed. However, in this particular case, the plaintiff testified that he had read the entire document and had come to a conclusion that it meant something other than what it said. Thus, the dissent indicated that the exculpatory clause should be enforced since it was not ambiguous and the fact that it was not conspicuous was not pertinent in this case since the plaintiff could read the clause and was aware of it.

Thus, a prudent course to follow in the use of exculpatory clauses would be to ensure that they are conspicuous and unambiguous. Use of a specific term such as "negligence" is highly desirable. Parties should be made aware that they are releasing the other party from liability for future injuries that result from the negligence or fault of the other party.