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LOUISIANA LAW DOES NOT MEET DEFICIT REDUCTION ACT REQUIREMENTS

Section 6031 of the Deficit Reduction Act of 2005 ("DRA") provides a financial incentive to states that enact laws permitting state recovery for individuals and entities that submit false or fraudulent claims to the state Medicaid program, if the state's law satisfies certain requirements outlined in the DRA. If the Office of Inspector General ("OIG") determines that a state false claims act meets the enumerated criteria under the DRA, then the state will receive a 10-percent increase in its share of Medicaid fraud recoveries from state actions brought under the state act. The OIG recently reviewed state false claims acts in 10 states to determine if the DRA requirements were satisfied. The OIG concluded that seven states' laws, including Louisiana's Medical Assistance Programs Integrity Law ("MAPIL"), do not comply with requirements outlined in section 6031.

In a letter to the Assistant Attorney General at the Louisiana Department of Justice dated December 21, 2006, the OIG stated that MAPIL does not meet the requirements of sections 6031(b)(2) and (4) of the DRA. Section 6031 (b)(2) requires a state law to contain provisions that are at least as effective as the Federal False Claims Act, 31 U.S.C. § 3730-3732, in rewarding and facilitating *qui tam* (whistleblower) actions. In their review, the OIG determined that MAPIL does not satisfy the requirements of subsection (b)(2) in two regards. First, unlike its federal counterpart, MAPIL does not contain a provision to allow the State to intervene in an action at a later date upon a showing of good cause. Second, in cases where the State does intervene, the private individual who filed the suit

(known as the relator) may only recover between 10 and 20 percent of the recovery. In Federal cases where the Federal government intervenes, the relator may recover between 15 and 25 percent. Consequently, the OIG found that the State law was not as effective as the Federal False Claims Act in rewarding *qui tam* actions.

The OIG also found that MAPIL did not satisfy the requirement of section 6031(b)(4) to contain a civil penalty equal to or greater than the civil penalty authorized under the Federal False Claims Act. While both the Federal False Claims Act and MAPIL contain a maximum penalty limit, the Federal act also contains a minimum penalty amount. Because MAPIL does not include a minimum limit, the OIG determined that the penalty authorized under the State law was not equal to or greater than that authorized by the Federal government.

Based on the OIG's comments, it is likely that Louisiana will amend MAPIL to comply with the DRA requirements. The OIG has stated that if MAPIL is amended to address the issues above, then it will reconsider the law.

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LOUISIANA SUPREME COURT VACATES THIRD CIRCUIT DECISION DECLARING MEDICAL MALPRACTICE CAP UNCONSTITUTIONAL

On February 2, 2007, the Louisiana Supreme Court vacated¹ two decisions out of the Louisiana Third Circuit (Lake Charles), *Taylor v. Clement* and *Arrington v. Galen-Med., Inc. et al.* *Taylor/Arrington* garnered much attention in September 2006 when the Third Circuit

declared Louisiana's medical malpractice cap, La. R.S. 40:1299.42(B) (a statute that has survived countless constitutional challenges since its enactment in the mid-1970s), unconstitutional. The Third Circuit reasoned that the \$500,000 cap on damages did not provide the plaintiffs with "an adequate remedy" when considering the purported diminution of the cap over time due to inflation. The adequate remedy





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challenge to the constitutionality of a statute is derived from Article I, Section 22 of the Louisiana Constitution. Under current law, the \$500,000 cap does not include future medical care costs and related expenses; it does, however, include pain and suffering, lost wages and other damages.

The Louisiana Supreme Court found that the Third Circuit's judgment was not properly before the Court on procedural grounds. The plaintiffs did not plead the "adequate remedy" challenge of La. Const. Art. I, Section 22 at the trial court; rather, it was raised for the first time at the Third Circuit. Usually, at the trial court level, a contradictory hearing occurs where all parties are afforded the opportunity to brief and argue constitutional issues. No such contradictory hearing took place at the appellate level in these cases. The Louisiana Supreme Court explained that constitutional challenges must be raised in trial courts, not appellate courts. Notably, the case was remanded (that is, sent back) to the Third Circuit to consider the remaining issues involved in the appeal.

¹ The word "vacate" in this sense means that the judgement was annulled, set aside or made legally void.

The Louisiana Supreme Court's decision preserves the constitutionality of Louisiana's medical malpractice cap for the present time. It is unclear whether the Third Circuit will address the constitutionality of the cap on remand, but the possibility still remains that the Third Circuit could declare the cap unconstitutional again on the same or other grounds. Such a decision could take up to 1 to 2 years, or more, to transpire, depending on whether the Third Circuit rules on the record before it or decides to remand the case to the trial court for further proceedings. The ruling is good news for health care providers in the short term. The ruling does not, however, provide any long term stability regarding the cap and its continued viability. Nor does the ruling lend guidance to the State Legislature, should it decide to address the state's medical malpractice cap in the future.

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COURT CONCLUDES THE LOUISIANA STATE BOARD OF NURSING IMPROPERLY RELEASED A "RULE" AFFECTING THE SCOPE OF PRACTICE OF CRNAS

The Louisiana First Circuit Court of Appeal ruled on December 28, 2006 that a CRNA may not rely on a "statement" issued by the Louisiana Board of Nursing that a CRNA may perform pain management procedures even if under the direction and supervision of a physician. A CRNA had asked the Louisiana State Board of Nursing for its opinion on whether a CRNA could perform pain management procedures. The Louisiana State Board of Nursing issued a "statement" which provided that the CRNA could perform procedures such as peripheral nerve blocks, epidural injections and injection of local anesthetics, if under the direction and supervision of the physician.

Spine Diagnostics Center of Baton Rouge, Inc. appealed a trial court ruling permitting the Louisiana State Board of Nursing to rely on its CRNA "statement" and allow CRNAs to perform interventional pain management. The Louisiana First Circuit Court of

Appeal held that the Louisiana State Board of Nursing "statement" was in fact a "rule" as defined under the Louisiana Administrative Procedure Act, and that the statement expanded the CRNA scope of practice.

The court prohibited the Louisiana State Board of Nursing from enforcing the "statement" and specifically prohibited the CRNA who asked for the opinion from performing any interventional pain management procedures. Thus, in order to expand the scope of practice of a CRNA, the Louisiana State Board of Nursing will have to comply with the rule-making requirements of the Louisiana Administrative Procedure Act.

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