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HEALTHCARE NOTES
July 2004

THREE YEAR PRESCRIPTION PERIOD FOR MEDICAL MALPRACTICE CLAIMS DECLARED UNCONSTITUTIONAL

In *Walker v. Bossier Medical Center*, 2004 WL 1103072 (La.App. 2d Cir. 5/12/04), the Second Circuit Court of Appeal held the three (3) year prescription period for medical malpractice claims, as stated in La. R.S. 9:5628, to be an unconstitutional violation of due process as applied to a patient suffering from a disease with a latency period exceeding the statutory limitation.

Importantly, Louisiana Revised Statute 9:5628 provides that

> (A) No action for damages for injury or death against any physician, chiropractor, nurse, licensed midwife practitioner, dentist, psychologist, optometrist, hospital duly licensed under the laws of this state, or community blood center or tissue bank as defined in R.S. 40:1299.41(A), whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought unless filed within one year from the date of the alleged act, omission, or neglect, or within one year from the date of discovery of the alleged act, omission or neglect; however, even as to claims filed within one year from the date of such discovery, in all events such claims shall be filed at the latest within a period of three years from the date of the alleged act, omission, or neglect.
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> (B) The provisions of this Section shall apply to all persons whether or not to infirm or under disability of any kind and including minors and interdicts.
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> LSA-R.S. 9:5628. (Emphasis added.)

The Louisiana Supreme Court has previously upheld the constitutionality of the statute of limitations as set forth in the medical malpractice act; however, the *Walker* court recognized that the issue as applied to an action filed by a claimant with a disease whose latency period is greater than three (3) years was left unanswered by those decisions. In the immediate case, Plaintiff, Aiko Walker underwent surgery and received a blood transfusion in January of 1981 at Bossier Medical Center Health Care Foundation, but she was not diagnosed with Hepatitis C until February of 1992. The court also heard physician testimony that 99% of patients contracting Hepatitis C will not experience any symptoms for a period of approximately ten (10) years from the date of receipt of contaminated blood.

The *Walker* court based its decision on due process - freedom from the deprivation of life, liberty or property without due process of law. It stated that the right to file a damage suit in tort is a vested property right protected by the guarantees of due process, and reasoned as follows:

To find La. R.S. 9:5628 constitutional as applied to plaintiffs who suffer from diseases with latency periods which prohibit their manifestation and discovery until well after the three-year, event-oriented period provided by Section 5628 would be to prevent a small number of the least blameworthy, yet most seriously injured claimants from having their day in court. To do so would divest such plaintiffs of their fundamental right to due process through the legal system while allowing defendant health care providers to avoid accountability and litigation.

The court ultimately limited their conclusion to hold the statute unconstitutional as applied to these claimants.

A dissent in the *Walker* decision, however, vehemently criticized the reasoning of the majority on various grounds including: (1) the fact that the Louisiana Supreme Court has held that the right to recovery in tort is not a fundamental right protected by due process; (2) the fact that the Louisiana Supreme Court has determined that the legislative decision to limit medical malpractice actions to those situations where the injury occurs within three years of the act, omission, or neglect was substantially related to the state's legitimate objective to stabilize insurance rates and thereby provide healthcare for the public at a reasonable cost; and (3) the fact that the majority failed to provide any Louisiana authority to support its conclusions.

Traditionally, other appellate courts have uniformly upheld the constitutionality of La. R.S. 9:5628 when attacked as it applies to diseases with latency periods in excess of three (3) years, but it is unclear as to whether or not the jurisprudence will continue to do so or will follow the reasoning of the *Walker* decision.

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FOURTH CIRCUIT COURT OF APPEAL DISCUSSES THE EFFECT OF A SELF-INSURED PHYSICIAN'S FAILURE TO REPLENISH HIS DEPOSIT WITH THE PCF

In an opinion relative to four consolidated cases – *Evans v. Louisiana Patient's Compensation Fund* (No. 2002-CA-0538), *Talbert, et al. v. Louisiana Avenue Medical Center, Inc.* (No. 2002-CA-1486), *Scott v. Dr. David Golden, et al.* (No. 2002-CA-1809) and *Celestin, et al. v. State of Louisiana, Medical Center of New Orleans, et al.* (No. 2003-CA-0187) – the Louisiana Fourth Circuit Court of Appeal has held that the Louisiana Patient's Compensation Fund ("PCF") remains liable to plaintiffs even though a defendant physician's bond has been depleted and not been replaced. Specifically, the court concluded that:

> . . . The injured party has a claim against the [qualified health care provider] for the $100,000.00 and judicial interest. The PCF is still liable for the balance over $100,000.00 subject to the statutory maximum. The seizure of the bond is immaterial to coverage under the Act. That is, if the surcharge has been paid, as long as the self-insured's bond was in existence and posted at the time of the wrongful conduct, coverage is afforded by the Act.
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> (Emphasis added).

In other words, for the PCF to remain liable for a plaintiff's damages in the event that a physician fails to replenish an exhausted bond, the following must exist: (1) the self-insured health care provider must have a $125,000.00 deposit on file with the PCF in accordance with Louisiana Revised Statutes 40:1299.42(A)(1); and (2) the self-insured health care provider must have paid the surcharge assessed by the PCF in accordance with Louisiana Revised Statutes 40:1299.42(A)(2). According to the Fourth Circuit, these two items must be on file with the PCF at the time of the alleged wrongful conduct.

The Fourth Circuit's decision in *Evans* is in accordance with two prior decisions – *Perdue v. Sudderth*, 831 So.2d 1050, 02-357 (La. App. 5th Cir. 10/29/02), *writ denied*, 837 So.2d 628 (La. 2/21/03) and *Taylor v. Clement*, 832 So.2d 1089, 02-561 (La. App. 3rd Cir. 12/4/02), *writ denied*, 840 So.2d 571, 2003-0038 (La. 3/28/03). In *Perdue*, the court concluded that "[w]e find the failure to replenish the deposit should terminate enrollment of the provider, but only as to claims filed after the date of disqualification. The PCF should be responsible for those claims which were filed while the provider was qualified and covered by the Act." (Emphasis added).

One issue which is raised by the *Evans*, *Perdue* and *Taylor* decisions is the time when coverage attaches in the event of an exhausted bond. In *Evans*, the Fourth Circuit Court of Appeal focused on the time of the wrongful conduct. However, in *Perdue*, the Fifth Circuit Court of Appeal looked to the date on which claims were filed. In *Taylor*, the court noted that the defendant physician was qualified on the date of the occurrence of the medical malpractice, on the date that the plaintiffs filed their claim against the defendant physician and on the date that the judgment against the defendant physician was signed. Without further guidance from the Louisiana Supreme Court or Louisiana legislature, it would appear that, as long as the bond was posted and surcharges paid on either the date of the alleged malpractice, the date a claim was filed with the PCF or the date judgment was rendered by a court against a qualified health care provider, the PCF will remain liable up to the statutory cap even if a physician allows his bond to lapse.

Neither the First Circuit Court of Appeal or the Second Circuit Court of Appeal nor the Louisiana Supreme Court have addressed this issue. The fact that the Louisiana Supreme Court denied writs in both *Perdue* and *Taylor* indicates that the decisions cited herein will likely be maintained as the general rule. However, in *Evans*, the court advised the PCF that its complaints regarding the asserted shortcoming of the Act relative to protection of the PCF were best directed to the legislature. Therefore, we can expect to see legislation presented in future legislative sessions to specifically address the issues raised in these decisions.

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DID YOU KNOW?

- That the OIG issued two reports in April, 2004, regarding possible fraud, waste and abuse in reimbursement for power wheelchairs. One of the significant findings was that the certificates of medical necessity and/or delivery documentation were "missing, incomplete or dated after the date of service." Physicians who prescribe or order power wheelchairs should take heed and ensure that they are properly and timely completing certificates of medical necessity. For more information regarding the ten-point Plan recommended by OIG to curb power wheelchair fraud, waste and abuse, please visit the OIG website.

- That the HHS Departmental Appeals Board ("DAB") has recently upheld the imposition by CMS of civil monetary penalties against skilled nursing facilities for (1) a deficiency that did not result in patient harm but that had the potential for resulting in patient harm [failure to follow a lift procedure] and (2) having a policy that did not assess the risks of a foreseeable accident [risk assessment did not include assessment of use of air mattress in conjunction with quarter bed rails; patient died when caught between air mattress and rail].

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