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Indiana Supreme Court Answers Issue of First Impression on Attorney Fees Under Medical Malpractice Act

This week we revisit a very notable Seventh Circuit class action decision from this past Friday that fell under my radar when writing last week's installment. However, as the title gives away, this is not that discussion. That is because this week we are doing a doubleheader–with the discussion of the Seventh Circuit's decision in *Suchanek v. Sturm Foods, Inc.* to be posted tomorrow–and also discussing a case out of the Indiana Supreme Court looking at an interesting issue of first impression under the Indiana Medical Malpractice Act: "whether Indiana's Medical Malpractice Act's cap on attorney fees from a Patient Compensation Fund award also applies to reduce the Fund's liability."

For those unfamiliar with Indiana's Medical Malpractice Act: Indiana has a cap on recovery for medical malpractice claims set at $1.25 million (though under certain circumstances the cap can be lower). Part of the malpractice structure is that the healthcare provider's liability is capped at $250,000. As a result, a litigant seeking recovery above $250k, must turn to the Indiana Patient's Compensation Fund (PCF) for further recovery. We have previously discussed the PCF process in the context of the case *Robertson v. B.O.* The primary issue in *Robertson* was whether the PCF could contest liability after the healthcare provider had admitted to liability in exchange for a settlement. Today's case–*Indiana Patient's*

Compensation Fund v. Holcomb–deals with a different issue of the medical malpractice act caused by the two-stage process.

In the first opinion authored by Justice Brent Dickson since voluntarily relinquishing his position as chief justice, the court sought to address the interplay between the cap on attorney fees chargeable to the PCF and the PCF's liability in general. The case arose from the passing of an elder woman at a nursing home under circumstances giving rise to a malpractice claim. As is often the case where liability is reasonable clear and damages are potentially well in excess of the $250k cap on healthcare providers, the nursing home settled for the $250k cap. The deceased-woman's estate then filed a petition to determine the amount of excess damages that it could receive from the PCF. The estate and the PCF agreed upon most all of the damages at issue but disagreed on the amount of attorney's fees that could be recovered. The PCF did not contest the reasonableness of the estate's claimed fees, but, instead, "argued that the 15% limit on attorney fees imposed by the [Medical Malpractice Act] should be judicially expanded to directly apply to the Fund and to limit its liability on a basis unrelated to the specific attorney fee claim." The trial court disagreed and awarded the estate its full fee. The PCF appealed.

The primary issue is the application of the Fee Cap Provision of the Medical Malpractice Act. It states:

> When a plaintiff is represented by an attorney in the prosecution of the plaintiff's claim, the plaintiff's attorney's fees from any award made from the patient's compensation fund may not exceed fifteen percent (15%) of any recovery from the fund.

The PCF argued "that, in an action to recover for the wrongful death of an adult, the Fee Cap Provision should be construed and applied such that the Fund should not be required to pay to a claimant an amount for attorney fees that exceeds the 15% Fee Cap Provision." That is, the PCF sought to use a statutory provision that limited what a plaintiff's attorney can charge his client to otherwise cap the client's recovery of attorney fees from the fund. The court, unanimously, disagreed.

Before we launch into the court's reasoning, an important note is the complexity of contingency fee structures in Indiana medical malpractice cases. The 15% cap is far below the market rate for most contingency fee matters. This is particularly true with cases that include as many procedural hurdles and extremely high litigation costs as medical malpractice cases. As a result, if the act as a whole capped all attorney fees at 15%, there would be almost no mechanism for medical

malpractice actions in Indiana. Most injured persons could not afford to pay the costs themselves, and the potential recovery for attorneys even in cases that would reach the full $1.25 million cap would not be sufficient to offset the risk taken in advancing all costs–costs that are lost if the case is not successful. However, the Medical Malpractice Act only caps attorney fees on the portion that comes from the PCF. As a result, contingency fee structures for Indiana medical malpractice cases are designed to cover a sliding scale. Often, in a case where the plaintiff can recover the full $1.25 million cap, the fee will entitle the attorney to the full initial $250k, and then cap the recovery against the funds from the PCF at 15%. Even then, under the maximum recovery scenario, the contingency fee to counsel still falls below 1/3.

Another point here is that while attorney fees may not generally be available under the Medical Malpractice Act, they were available in this case. That is because the case was brought under both the Medical Malpractice Act and the Adult Wrongful Death Statute (AWDS). We recently discussed the availability of attorney fees under the AWDS. For our purposes here, it is sufficient to note that the reason the issue of attorney fees comes up is because the estate can seek them under the AWDS. Thus, what the PCF is trying to do is take the portion of the Medical Malpractice Act applying to attorney's fees and craft it onto the AWDS for medical malpractice cases.

Returning to the court's interpretation of the Fee Cap Provision. The court did not find the question to be a close one. Mind you, the court of appeals decision was a split (2-1) panel that agreed with the PCF. The court found:

> The language of the Fee Cap Provision is clear and unambiguous. It declares that in malpractice cases "the plaintiff's attorney's fees from any award made from the patient's compensation fund may not exceed fifteen percent (15%) of any recovery from the fund." Thus attorney fees payable from the excess damages recovered from the Fund are limited . . . to 15% of the excess payment. This limitation, however, is not a matter for determination in the litigation of a plaintiff's claim against the Fund, but rather in the course of resolving the plaintiff's attorney's claim for fees from his or her client. The plain language of [the Fee Cap Provision] caps the fees the plaintiff's attorney may charge a plaintiff with respect to the plaintiff's award from the Fund (i.e., the amount over $250,000), but the Fee Cap Provision does not expressly direct or authorize any reduction in the Fund's total liability to the plaintiff.

Despite the clear language of the provision–that it applies between an attorney and his client–the PCF argued that it should be interpreted to limit the recovery above the $250k. What the PCF proposed was summarized by the court:

> The Fund's argument, as applied to the facts of this case, may be mathematically illustrated as follows:
>
> > $351,166.89 Total Damages without attorney fees
> > ($250,000.00) Amount paid by qualified provider
> > $101,166.89 Fund's excess liability absent attorney fees
>
> To project Fund's maximum liability including attorney fees capped at 15%, divide Fund's excess liability absent attorney fees by 85%:
>
> > $101,166.89 ≥ 85% x Fund's maximum liability including capped fees; so, $101,166.89 ÷ 0.85 ≥ Fund's maximum liability including capped fees
> > Fund's maximum liability including capped fees ≤ $119,019.87
>
> Fund's remaining liability to Estate = Fund's liability including capped fees less payment made $119,019.87 - $101,166.89 = **$17,852.98**

An important note: as of the day of writing this post, the Westlaw version of the decision does not accurately track the opinion's text in footnote 2. For the record, I have moved the positioning of some of the numbers as well for formatting purposes. Until that problem is corrected, heed my advice and go to the text of the decision itself on the court's website.

Instead of instituting the PCF's complicated formula that fails to track the language of the Fee Cap Provision, the court chose not "to judicially modify the statute in a manner to reduce the Fund's liability[.]" As a result, the court affirmed the $50,440 attorney's fees award to the estate.

Join us again next time for further discussion of developments in the law.

Sources

- *Suchanek v. Sturm Foods, Inc.*, --- F.3d ---, No. 13-3843, 2014 WL 4116493 (7th Cir. Aug. 22, 2014) (Wood, C.J.).

- *Indiana Patient's Comp. Fund v. Holcomb*, --- N.E.3d ---, No. 49S05-1404-CC-209, 2014 WL 4212690 (Ind. Aug. 26, 2014) (Dickson, J.).

- *Indiana Patient's Comp. Fund v. Holcomb*, 998 N.E.2d 989 (Ind. Ct. App. 2013), *trans. granted*, *opinion vacated*.

- Indiana Medical Malpractice Act – codified at Ind. Code art. 34-18.

- Indiana Adult Wrongful Death Statute – codified at Ind. Code 34-23-1-2.

- Colin E. Flora, *Major Medical Malpractice Decision: Robertson v. B.O.*, HOOSIER LITIG. BLOG (Nov. 2, 2012).

- *See also* Colin E. Flora, *Indiana Supreme Court Rules PCF Cannot Defend Against Petition to Recover Excess Damages When Healthcare Provider Admits Liability*, 37 MED. LIABILITY MONITOR 2 (Dec. 2012).

- Colin E. Flora, *Does Indiana's General Wrongful Death Statute Permit Recovery of Attorney Fees? Court Says, 'Yes'*, HOOSIER LITIG. BLOG (Aug. 15, 2014).