

HORIZON CLASS ACTION SETTLEMENT CHALLENGED BY STATE PHYSICIANS

As reported in the last issue of MD News, the law firm of Kern Augustine Conroy & Schoppmann, P.C., is mounting a spirited challenge to the proposed settlement of the class action law suit brought by a plaintiffs' medical malpractice law firm against Horizon. Objections have been filed by most of the State's specialty societies and two of the County Medical Societies.

The proposed settlement would provide no monetary payments to physicians, but would give the law firm that brought the suit \$6.5 million in legal fees. This same law firm, while purportedly representing the interests of New Jersey physicians in his case, has repeatedly taken positions in direct conflict to the interests of the physicians it is represents in this case, according to documents filed with the court. For example, during the course of this suit, the plaintiff's firm has repeatedly sued physicians for medical malpractice, continues to promote its successes against physicians on its website, and brought a case which, if successful, would have subjected physicians to the Consumer Fraud Act. Had it succeeded, physician liability could have been increased by millions of dollars each year.

Fortunately, Kern Augustine was able to thwart the efforts of the plaintiff's firm in the Supreme Court. In a unanimous decision, the Supreme Court rejected the plaintiff's argument. Now Kern Augustine is attempting to protect physicians from a similar injustice in this class action suit – Sutter v. Horizon.

In response to Kern Augustine's objections to the proposed settlement and demand for discovery, the plaintiffs' law firm and Horizon were compelled to reveal that all of the discovery in the case – much of it potentially damaging to Horizon, was subject to a confidentiality order, agreed to by the plaintiff's firm. As a result, none of the adverse information about Horizon, discovered during the litigation, can be shared with the physician community.

In challenging the proposed settlement, Steven Kern, Esq. questioned why the plaintiff's firm agreed to prevent its physician clients from seeing this information and asked the court to infer that the real reason for Horizon's agreement to pay \$6.5 million dollars to the plaintiffs' law firm was to keep this information secret. It also asked the court to release deposition testimony from the confidentiality order.

Kern also questioned why, in light of an initial expert report, demonstrating nearly one-half billion dollars of damages to New Jersey's physicians, the case was to be settled with physicians receiving no money.

Though the burden is upon Horizon and the plaintiff's firm to demonstrate that the settlement is fair, neither Horizon nor the plaintiff's firm called even one witness to support the settlement. Rather, they sought to rely upon an expert report which claimed that steps to be undertaken by Horizon would be worth nearly \$40,000,000 to New Jersey

physicians. However, in argument, Kern pointed out that most of the steps to be undertaken by Horizon are already required by State law, or by existing Horizon contracts. As such, Kern argued, the settlement has no value to New Jersey physicians.

In fact, some of the settlement terms are less favorable than the protections of existing law. For example, under the proposed settlement, Horizon cannot seek to recoup moneys it paid more than 18 months ago, and must give physicians 30 days notice before seeking to recoup such moneys. However, existing State law already prohibits Horizon from going back more than 18 months, and requires 45 days notice. Despite the fact that the settlement provided less than the law required, the expert valued this “relief” at \$4.13 million dollars.

The expert similarly sought to value Horizon’s promise to publish its “edits” at \$30.61 million dollars based upon purported interviews with six unnamed practice managers who allegedly told her that they would save significant administrative time if they knew the basis for Horizon’s edits. However, none of the managers were called to testify, none were identified, no information was provided as to how they were selected, and there was no indication that any of the managers were made aware of the fact that existing law already mandates that Horizon and other managed care companies must advise physicians of their edits.

Not only were the plaintiff’s firm and Horizon unwilling to present any testimony to support their claim that the settlement was fair, but both also refused to produce witnesses requested by Kern, so that they could be subject to cross-examination.

Indeed, neither plaintiffs’ lawyers nor Horizon was able to produce any evidence of the number of physicians who would purportedly benefit from the settlement. Though there are only approximately 32,000 licensed physicians in New Jersey, only about 18,000 are believed to be in active practice in the State, and only a fraction of these participate with Horizon. However, the plaintiff’s firm argued that the class included sixty thousand physicians! Since the value of any alleged prospective relief would only benefit those participating with Horizon going forward, any value attributed to the settlement would have to be determined based upon the actual numbers of physicians then participating with Horizon -- a number far, far less than the 60,000 claimed by the plaintiff’s firm.

This number is also important in determining the percentage of physicians who affirmatively opted out of the settlement. Approximately 1200 physician reportedly sent letters opting out. Depending upon the actual size of the class, this could represent as many as 10% of the class members who may arguable have benefited by the proposed settlement.

Those who did not opt out, by contrast, will automatically lose their rights to bring actions against Horizon for wrongs it may have been committed, even though they have been denied the right to see the discovery in this case, as a result of an agreement between Horizon and the plaintiff’s firm.

After hearing argument, Superior Court Judge Stephen Bernstein reserved decision until after the first of the year on whether to allow Kern to call witnesses and on whether to approve or reject the settlement until after the first of next year.