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Affordable Care Act to open new litigation landscape for plaintiffs' lawyers

By Alexandra Schwappach

By requiring insurance companies to cover all applicants within new minimum standards and offer the same rates regardless of pre-existing conditions, the Affordable Care Act puts an end to a list of legal battles that ravaged the health care sector for years. But attorneys anticipate a bank of fresh litigation as the new health care law's individual mandate kicks in beginning in January - everything from bad faith disputes to allegations against employers - and it's in this new realm that plaintiffs' lawyers could find their next big thing.

William M. Shernoff of Shernoff Bidart Echeverria Bentley LLP is one of many plaintiffs' lawyers looking to mine bad faith disputes amid a changing health care litigation landscape.

"My sense is [plaintiffs' attorneys] are going to do just fine with a variety of Affordable Care Act-generated opportunities," said Harry Nelson, co-founder and managing partner of Fenton Nelson LLP, who counsels health care providers on business issues and challenges.

Nelson said he's been seeing many signs that plaintiffs' lawyers are gearing up for health care-related disputes. Bad faith insurance practitioners will start going after insurers over policy cancellations, but also for changes to their health care options, he said.

"There are also likely to be challenges to denials of access as the health insurers shift to a model of narrow networks," Nelson said. "This is going to lead to fights over whether insurers are unfairly limiting access."

William M. Shernoff, founder of Claremont-based Shernoff Bidart Echeverria Bentley LLP, also expects new legal prospects on the bad faith front in light of the health care law.

"With millions more people having access to health care - including some who have never had it before - it seems logical that there's going to be more disputes and lawsuits over coverage," he said.

In the pre-ACA health care sector, plaintiffs' attorneys had their hands full with claims from policyholders alleging their insurance companies dropped their health coverage just as they became sick. Many of the claims resulted in big payouts - in 2008 Shernoff received $9 million in punitive damages on behalf of a hairdresser client who had her health policy rescinded. A similar case in 2010 resulted in a $2 million settlement.

Attorneys anticipate that bad faith insurance claims in light of the ACA will replace rescission cases that were a big source of business before health care reform.

In the past, insurance cases stemming from natural disasters - earthquakes, hurricanes, tornadoes and floods - also proved to be a sizable source of business for plaintiffs' lawyers, said Brian Kabateck, founding and managing partner of Kabateck Brown Kellner LLP.

"Twelve to 18 months after the event, insurance companies leave unhappy policyholders in the wake and we bring suits," he said.

He expects the same to happen in regard to health insurers post-ACA implementation.

"Smart lawyers will watch from the sidelines and be there when the insurers start to deny claims," he said.

The health care law also expands opportunities for whistleblowers to allege fraud by making changes to the public disclosure bar in the False Claims Act, Nelson said. Before 2010, claims under the False Claims Act were dismissed if the alleged fraud had already been made public - either through legal proceedings or the media. The health reform bill amended the act to allow the government to have the final say on whether a case could be dismissed on public disclosure grounds.

This extra flexibility for whistleblowers is already impacting Nelson's practice.

"Our clients are increasingly concerned about whistleblowers," he said. "We are being asked much more frequently to evaluate whether particular problems should be self-disclosed to the government to preempt a whistleblower. The shift towards more False Claims Act defense work is an area we've flagged in our strategic plan for growth."

Kabateck said it's possible that the False Claims amendment introduced by the ACA could be an area of increased litigation, but the dust would have to settle first.

"I am cautious anytime this Congress purports to expand the rights of individuals to bring claims even if those claims are to enforce a federal law or on behalf of the government," he said.

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William T. Um, counsel at Hunton & Williams LLP who represents corporate policyholders in complex insurance coverage claims, said the increased volume of insured individuals in the wake of the statute could raise privacy issues.

"Because more private information will be expected to be shared as a result of more people being on the exchange, the ACA will only increase the likelihood of more privacy lawsuits," he said.

Since the new health law is still uncharted territory and because the life of a case can be a lengthy one, lawsuits might not crop up until after the Affordable Care Act is fully implemented, lawyers say.

"I think it's a great unknown," Kabateck said. "I believe that these kinds of new actions have a germination period. It's naturally going to take several months for this to set in before we understand where the work might be."

Smart plaintiffs' lawyers will get the lay of the land now and be ready as the law continues to advance, Kabateck said.

"A year from now the landscape is going to be completely different," he said. "We know there are going to be issues and lawyers have to be nimble in the current situation."

For now, they're left to sort through the many layers of the statute, Kabateck said. One such layer is the ACA's employer mandate, which says companies with 50 or more full-time employees - 30 or more hours a week - must provide their staff with health insurance or pay a substantial fine. Some employers have considered layoffs, a cut in hours, or a company reorganization to avoid the penalty fee.

Currently there's no sure recourse for employees to fight what they consider unlawful layoffs or a slash in hours, but Sherrie Boutwell, an attorney with Boutwell Fay LLP, said a section of the Employee Retirement Income Security Act could serve as a route to argue against those changes.

Section 510 of ERISA prevents employers from taking actions that might prohibit an employee from collecting benefits, including health benefits. It could be used to claim that it is unlawful to cut an employee's hours to keep him or her from getting employer-sponsored health insurance, Boutwell said.

Pursuing a 510 claim to fruition would require a lot of "capital and tenacity," but that isn't unheard of, Boutwell said.

"If you look at the history of the 401(k) fee litigation class actions, in the beginning the plaintiffs were losing a lot of cases on motions to dismiss," she said. "But the plaintiffs' bar has learned from those early cases and adjusted their pleadings accordingly. I expect the same will be true for ACA cases."

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