

DECLARATORY RULING OF
THE
ALABAMA STATE BOARD OF MEDICAL EXAMINERS

The Alabama State Board of Medical Examiners (the "Board") has received a request that the Board issue a Declaratory Ruling pursuant to Ala. Code § 41-22-11 (2013) and Rule 540-X-1-.10 of the Alabama Administrative Code. The question to be addressed is whether, in a malpractice lawsuit, a payment made pursuant to a high/low agreement entered into with a plaintiff prior to a judicial determination of the case by a judge or jury must be reported to the Board pursuant to Ala. Code § 34-24-56, although there was a dismissal of the plaintiff's claim or a determination of no liability by the judge or jury.

Facts Presented

During the course of a medical malpractice lawsuit, but before a judicial determination of the claim (generally, but not necessarily, during the actual trial), the plaintiff and defendant physician enter into a high/low agreement in which the plaintiff will be paid an agreed upon "low" figure even if the verdict or decision is ultimately made in favor of the defendant doctor, or plaintiff will be paid a "high" amount if a plaintiff's verdict is returned even though it exceeds the agreed-upon high amount. The judge or jury subsequently renders a decision or dismissal in favor of the physician. Payment is made by the doctor to the plaintiff for the "low" amount as previously agreed upon.

The Question

Based upon the facts presented herein and pursuant to Ala. Code § 34-24-56, is a physician who is licensed to practice medicine in Alabama required to report to the Board a payment made pursuant to a high/low agreement entered into with a plaintiff when the judge or jury has rendered a decision or dismissal in favor of the physician?

Answer

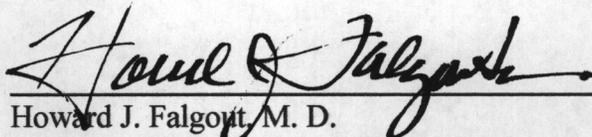
Under the facts stated above, a licensee is not required under Ala. Code § 34-24-56 to report a payment made pursuant to a high/low agreement if there was a dismissal or determination of no liability by the judge or jury.

Discussion

Section 34-24-56(a) of the *Code of Alabama* states, in pertinent part, that a report is required to be made to the Board when any final judgment is rendered against such physician or when there is a settlement of a malpractice claim. A high/low agreement payment made after a judicial determination is a payment made pursuant to an independent contract between the plaintiff and the defendant's insurer and is not being made for the benefit of the physician in settlement of a medical malpractice claim. Section 34-24-56(a) does not require a physician to report a verdict or decision in favor of the physician defendant. Consequently, in the fact situation presented herein in which the fact finder renders a judicial determination assigning no liability to the defendant physician, the high/low agreement payment is not reported to the Board.

This ruling is based upon the precise facts presented and upon the statutes and rules currently in existence. Should any relevant statutes or rules be amended or repealed, this ruling may no longer be valid.

ENTERED this 29th day of June, 2016.


Howard J. Falgout, M. D.
Chairman, Alabama Board of Medical Examiners

**DECLARATORY RULING OF
THE
MEDICAL LICENSURE COMMISSION OF ALABAMA**

The Medical Licensure Commission has received a Request for a Declaratory Ruling pursuant to Code of Alabama 1975, §41-22-11 and Medical Licensure Commission Administrative Code §545-X-1-.09. Such request is in proper form and is made on behalf of persons substantially affected by a rule of the Medical Licensure Commission.

Facts Presented

In a medical malpractice lawsuit, prior to a judicial determination of the claim (generally, but not necessarily, during the actual trial), the plaintiff and defendant physician enter into a "high-low" agreement in which the plaintiff will be paid an agreed upon "low" figure even if the verdict or decision is ultimately made in favor of the defendant doctor, or plaintiff will be paid a "high" amount if a plaintiff's verdict is returned, even though it exceeds the agreed-upon amount. The judge or jury subsequently renders a decision or dismissal in favor of the physician. Payment is made by the doctor to the plaintiff for the "low" amount as previously agreed upon.

The Question

Under the above facts, may a physician, who is licensed to practice medicine in Alabama, properly answer "no" to question 5 on the annual licensure renewal form? Such question is "5. Have you had a judgment rendered against you, or action settled relating to the performance of your professional services within the past year?"

Answer

Under the precise facts stated above a licensee may answer "no" to question 5 on the annual licensure renewal form.

Discussion

The position taken on this question by the National Practitioner Data Bank is instructive. The NPDB is the federal agency which requires reporting to it by certain professionals, including physicians, of adverse actions against them. In its published instructions, the NPDB states:

“ A high-low agreement is a contractual agreement between a plaintiff and a defendant’s insurer that defines the parameters of a payment the plaintiff may receive after a trial or arbitration proceeding. The benefit to insurers is to limit the amount they may be required to pay if the plaintiff wins the case. The benefit to plaintiffs is a guaranteed payment even if they lose the case or win only a small award. The defendant’s insurer agrees to pay the “low end” amount to the plaintiff if the verdict or decision is for the defendant. The defendant’s insurer is obligated to pay no more than the “high end” amount to the plaintiff if the verdict or decision is for the plaintiff.

A payment made at the low end of a high-low agreement *must* be reported to the NPDB *unless* the fact-finder (such as a judge, jury, or arbitrator) rules in favor of the defendant and assigns no liability to the defendant practitioner. If the fact-finder rules in favor of the defendant and assigns no liability to the defendant practitioner, the payment is not being made for the benefit of the practitioner in settlement of a medical malpractice claim. Rather, it is being made pursuant to an independent contract between the defendant’s insurer and the plaintiff.

When a defendant practitioner has been found liable by a fact-finder, any payment made for the practitioner’s benefit must be reported, regardless of the existence of a high-low agreement. If a high-low agreement is in place, and the plaintiff and defendant settle the case prior to trial, the existence of the high-low agreement does not alter the requirement to report the settlement payment to the NPDB.”

Although the above discussion refers to agreements made by the physician’s insurer and the plaintiff, there does not appear to be any logical reason why the rationale should not be

applied to agreements made by physicians, independent of an agreement by an insurer.

The Medical Licensure Commission believes that the position of the NPDB is correct and is directly applicable to the question. The operative question is whether there was a judicial determination of no liability. This is to be distinguished from the settlement of a case prior to a judicial finding, which must be reported to the NPDB and must be reported to the Medical Licensure Commission on the renewal form.

This ruling is based upon the precise facts presented and upon the statutes and rules currently in existence. Should any relevant statutes or rules be amended or repealed, this ruling may no longer be valid.

ENTERED THIS THE 5th DAY OF May, 2016.

James E. West, MD
JAMES E. WEST, M.D., CHAIRMAN
MEDICAL LICENSURE COMMISSION OF ALABAMA