

Legislative Update Medical Liability Reform

Note: This summary focuses on key bills related to medical liability reform introduced in state legislatures this year. In particular, bills summarized below include MICRA-style reforms such as a cap on non-economic damages, joint and several liability reform, collateral source reform, periodic payment of future damages, and limits on attorney fees. We will provide a more thorough analysis of legislation once it is enacted.

Arizona

Arizona has introduced at least two medical liability reform bills this year, S.B. 1099 would abolish punitive damages, while S.B. 1100 would tighten the statute of limitations for medical liability actions and strengthen the expert witness laws. Under S.B. 1100, an expert must have been in active practice at the time the defendant is alleged to have fallen below the standard of care, practice in the same specialty as the defendant, not have a financial interest in the outcome of the action, be objective, and agree to allow the testimony to be submitted to the certification or specialty board of the expert witness for peer review. The bill has been assigned to the Senate Rules Committee.

Arkansas

On January 30, Arkansas' House of Representatives passed H.B. 1038, a comprehensive medical liability reform bill that includes a number of much needed reforms. Arkansas has virtually no reforms in place at this time. As passed, the bill includes joint and several liability reform, venue reform, and a cap on punitive damages. The bill also includes enhanced requirements for expert witnesses and requires that a certificate of merit accompany any complaint that is filed. The bill is currently in the Senate Judiciary Committee.

Colorado

Colorado has many meaningful reforms in place, however, several recent court decisions have weakened their existing laws. In response to these decisions, H.B. 1007 was introduced to clarify the intent of specific statutory provisions. For example, H.B. 1007 clarifies that Colorado's \$250,000 cap on non-economic damages applies to physical impairment or disfigurement claims in medical malpractice actions and that the \$1,000,000 cap on all damages for a course of care for all defendants includes any claim for derivative non-economic loss or injury. The bill passed the House on January 27, 2003 and has been assigned to the Senate Health, Environment, Welfare, and Institutions Committee.

Colorado's legislature is also addressing H.B. 1121, an early offers bill that requires an offset of costs and attorneys fees if a plaintiff rejects a settlement offer that is greater than that awarded in court. The bill passed the House on February 18 and has been assigned to the Senate Judiciary Committee.

Connecticut

Over 30 pieces of medical liability reform legislation have been introduced in Connecticut's General Assembly. Of note, is H.B. 5958, which is supported by the Connecticut State Medical Society. As introduced H.B. 5958 would establish a \$250,000 cap on non-economic damages. The bill is currently before the House Joint Committee on Public Health. On the Senate side, S.B. 367 was introduced on January 21. Senate bill 367 would place a \$250,000 cap on non-economic damages, limit attorney contingency fees to 10% of the recovery, implement pre-trial screening panels, and allow the court to take the age, health and economic situation of the plaintiff into account when structuring any court-approved settlement or award.

Georgia

Senate Bill 133, a comprehensive medical liability reform bill, was introduced in Georgia's Senate on January 22. The bill is supported by the Medical Association of Georgia and would provide such reforms as a \$250,000 cap on non-economic damages, abolition of joint and several liability, mandatory offset of collateral sources of payment, venue reform, and stronger expert witness rules. S.B. 133 would also abolish non-economic damages for emergency care whether or not care was gratuitous.

Hawaii

Senate Bill 328, a broad civil justice reform bill, was introduced in Hawaii's legislature on January 17.

Idaho

House Bill 92 was introduced in the Idaho legislature on January 22. As introduced, H.B. 92 would decrease the cap on non-economic damages from \$400,000 to \$250,000 (adjusted annually), tighten the standard for punitive damages, and limit punitive damages to the greater of \$250,000 or three times compensatory damages.

Kentucky

The key bill for medical liability reform in Kentucky died on the Senate Floor on February 10, when the Senate failed to pass S.B. 1. Senate bill 1 would have been the first step in amending Kentucky's Constitution to allow the legislature to enact laws that would place caps on damages, establish an alternative dispute resolution system, and provide a uniform statute of limitations for any civil action involving alleged malpractice of a health care provider.

Maine

There are several bills related to medical liability reform before Maine's Legislature. Notably L.D. 594 would place a \$250,000 cap on non-economic damages in professional negligence cases. Maine currently has a \$400,000 cap on non-economic damages in wrongful death cases. The bill was referred to the Judiciary Committee on February 11.

Maryland

Several bills related to medical liability reform have been introduced in Maryland's General Assembly this year. House bill 832 would require periodic payment of future damages in excess of \$100,000. The bill is currently before the House Judiciary Committee. House bill 164 would create the Maryland Patient Safety Center, which would be responsible for evaluating and seeking ways to improve the quality of health care in Maryland. Finally, H.B. 83 would require every insurer providing medical liability insurance in the state to submit information to the Insurance Commissioner on such items as the claims experience of their insureds, amount of reserves, and the amount of court awarded judgements and settlements against their insureds. The Commissioner will be required to report on the availability of health care malpractice and other liability insurance to the General Assembly by September 1 of each year.

Minnesota

House bill 75 as introduced would amend Minnesota's existing joint and several liability law by abolishing joint and several liability except for the following persons: persons who are greater than 50% at fault, persons who engage in a common scheme or plan that causes the injury, persons who commit an intentional tort, or persons whose liability is based on an environmental or similar statute. H.F. 75 has been reported favorably out of House Civil Law Committee.

Mississippi

After enacting a comprehensive medical liability reform bill during a special session last fall, the Mississippi Legislature has turned its attention this year to general civil justice reforms. Nevertheless, a

few bills related to medical liability reform have been introduced. For example, S.B. 2628 the “Medical Malpractice Insurance Availability Act,” would create a Joint Underwriting Association (JUA) that would be established and administered by the Mississippi Tort Claims Board. The JUA would serve as an insurer of last resort and be funded by those health care providers who participate in the JUA. Senate bill 2628 passed the Senate on February 5 followed shortly by the House passing an amended version on February 13. On February 19 the Senate called for a conference committee to work out the differences in the Senate and House versions.

Missouri

There are at least two bills before Missouri’s Legislature this year related to medical liability reform. House bill 273 would provide for a number of reforms, such as venue reform, modification of the statute of limitations for minors, and abolition of joint and several liability. House bill 273 would also require a plaintiff to file a certificate of merit no later than 90 days after filing a petition and limit attorney contingency fees to 33% of first \$500,000 recovered, 28% of the next \$500,000 recovered, and 15% of all damages in excess of \$1,000,000. The bill would also restore a \$350,000 cap on non-economic damages and delete the clause in the current statute that requires the cap to be adjusted annually for inflation. A provision is also included that would impose a \$150,000 limit on civil damages for a cause of action arising from care provided in a hospital emergency room when the care or assistance is necessitated by a traumatic injury demanding immediate attention. The House Judiciary Committee passed a substitute bill on February 20.

As introduced, Senate bill 280 would limit punitive damages, limit non-economic damages to \$250,000, and place a \$50,000 limit on civil damages arising from any act or omission in rendering care when the care or assistance is necessitated by a traumatic injury and provided in a trauma center. Senate bill 280 would also abolish joint and several liability and prohibit attorneys from contracting for, charging, or collecting a contingent fee in excess of the following schedule: 33 1/3% of the first \$50,000, 25% of the next \$50,000, 15% of the next \$500,000, and 10% of any amount exceeding \$600,000.

Montana

To further strengthen Montana’s existing reforms, Montana’s legislature is considering S.B. 367 which would abolish joint and several liability making defendants liable only for the amount of damages proportionate to their percentage of fault. A hearing before the Senate Judiciary Committee on the bill was cancelled on February 13. Montana’s legislature is also considering legislation that would weaken some of Montana’s existing reforms. For example, H.B. 212, which passed the House on January 27 by a vote of 98-1, would eliminate the requirement that an award of punitive damages must be unanimous. This bill would codify a decision by the Montana Supreme Court in 2000 where the court held that this requirement violated Montana’s Constitution.

Nevada

Last year Nevada’s legislature took a major step by enacting a comprehensive medical liability reform bill during a special legislative session called by Governor Guinn. Unfortunately Nevada is still experiencing a medical liability crisis. This is due to the fact that the market had deteriorated so significantly prior to passage of A.B.1 last year that insurers simply cannot recover overnight. More importantly, the trial bar is likely to challenge the constitutionality of A.B. 1, therefore, insurers are unlikely to reduce premiums before the constitutionality of the new law is confirmed. In response to the current harsh climate in Nevada, A.B. 9 was prefiled in the legislature on January 27 to strengthen Nevada’s new law. As introduced, A.B. 9 would create a \$250,000 cap on non-economic damages, require the court to reduce an award by the amount of collateral sources of payment received by a plaintiff, and limit attorney’s fees. Assembly bill 9 is currently in the Judiciary Committee.

New Hampshire

New Hampshire's General Assembly is considering S.B. 119 which would overrule a New Hampshire Supreme Court decision and clarify that "loss of opportunity" does not establish a cause of action in a medical liability case. The bill is currently in the Senate Insurance Committee.

New Jersey

A number of bills aimed at reforming the current medical liability system are currently before the New Jersey Legislature. For example, A.B. 50 would require a claimant to notify a defendant at least 180 days prior to filing a complaint against the defendant, strengthen existing expert witness laws, require mediation in cases alleging medical malpractice, and create a fund from which select physicians could receive an interest free loan to help pay for part of their medical liability insurance premiums. Assembly bill 50 would also attempt to reform the insurance industry. The bill passed the Assembly on December 12, 2002 and is currently in the Senate where it has been referred to the Health, Human Services and Senior Citizens Committee.

New Jersey's legislature is also considering S.B. 2174, the New Jersey Health Care Access and Patient Protection Act, which includes a number of provisions aimed at reforming the insurance industry. As introduced, the bill would also create a fund to help physicians pay for increased medical liability premiums (funded through annual assessments on physicians, chiropractors, and attorneys). The bill also includes provisions related to expert witness qualifications, periodic payment of damages, and statute of limitations. Finally, S.B. 2174 would establish a patient safety reporting system. This bill has been referred to the Senate Health, Human Services and Senior Citizens Committee. It is not supported by the Medical Society of New Jersey.

North Dakota

North Dakota's House of Representatives defeated H.B. 1458, a professional liability reform bill that included limits on attorney fees, modified submission of collateral sources of payments into evidence, and allowed for periodic payment of future damages over \$50,000.

Oklahoma

A number of medical liability reform bills have been introduced in Oklahoma. Most importantly, S.B. 629 would establish a \$250,000 cap on non-economic damages in professional liability actions. The Senate Judiciary Committee passed the bill on February 19.

Pennsylvania

Pennsylvania's legislature will consider a number of medical liability reform bills this session. For example, S.B. 50 would provide for an amendment to Pennsylvania's Constitution to allow the General Assembly to provide statutory limits on the recovery of non-economic damages for injuries resulting in death or for injuries to person or property. This bill was referred to the Judiciary Committee on January 22. A similar bill, H.B. 140, has been introduced in the House which would amend Pennsylvania's Constitution to allow the General Assembly to enact laws limiting the amount of recovery for non-economic damages and punitive damages in a medical malpractice action. House bill 139 would establish a \$250,000 cap on non-economic damages, except in cases where the act or omission to act was not in good faith and in a manner amounting to gross negligence, or reckless, willful, or wanton conduct. Finally, H.B. 149 would provide some coverage to providers who were insured by a carrier that was declared insolvent between January 1, 2000 and January 1, 2002 by requiring the MCARE fund to make payments for claims filed against physicians who were insured by such carriers. The MCARE fund will make payments on such claims in excess of \$300,000 up to the fund limit. All of the House bills have been referred to the Judiciary Committee.

Tennessee

A number of medical liability reform bills have been introduced in Tennessee's Legislature. For example, S.B. 537 would create a \$1,000,000 cap on non-economic damages. Senate bill 605 would establish a \$250,000 cap on non-economic damages, allow for the periodic payment of future damages in excess of \$50,000 at the request of either party, allow the submission of collateral sources of payment into evidence, and amend the current law limiting attorney's fees in a medical malpractice cause of action. In addition, S.B. 537 would require the inclusion of specific language in a contract between a physician and patient that includes a binding arbitration provision. Senate bill 870 would allow for the periodic payment of future damages in excess of \$100,000 at the discretion of the court and upon the request of either party. Senate bill 883 (H.B. 1005 companion bill) would establish a \$250,000 limit on damages for pain and suffering, lost prior and future wages, punitive damages, and other non-economic losses. Senate 993 would establish a \$250,000 cap on non-economic damages, allow the introduction of collateral sources of payment into evidence, require the claimant to provide 90-day written notice to a defendant of the claimant's intent to commence an action, allow for periodic payment of future damages in excess of \$50,000 and require the inclusion of specific language in a contract that includes a binding arbitration provision. Senate bill 993 would also modify the limit on attorney's fees and the current statute of limitations for medical liability actions.

Texas

Like many other states in crisis, several bills have been introduced in Texas' Legislature related to medical liability reform. Notably, House Joint Resolution 3 calls for an amendment to the Texas Constitution to allow the legislature to enact legislation that would place limits on damages for claims alleging medical negligence. If HJR 3 passes both chambers by a 2/3 vote, the proposed constitutional amendment will be submitted to voters as a ballot initiative on November 4, 2003. Another key bill is H.B. 3, which as introduced would provide for a number of reforms such as a \$250,000 cap on non-economic damages for each claimant, a limit on all damages, including punitive damages, to \$500,000 per claimant (adjusted annually for inflation), and an alternative partial limit on civil liability in the event the previous two are held unconstitutional. House bill 3 would also allow the defendant to introduce collateral sources of payment into evidence and would allow the court to award periodic payment of future damages in excess of \$100,000. Finally, H.B. 3 would limit attorney contingency fees to 33 1/3% of the amount recovered. Again, there is an alternative provision if this limit on attorney fees is found unconstitutional. Both HJR 3 and HB 3 are pending in the Civil Practices Committee.

House bill 6 also relates to medical liability reform, but focuses on strengthening Texas' board of medical examiners. As introduced HB 6 allows for competency testing of physicians. A substitute bill was reported favorably from the Public Health Committee on February 19.

Utah

At least two bills related to medical liability reform have been introduced in Utah's Legislature. House bill 117 would allow a medical review panel's determination as to whether a claim has merit or not to be submitted into evidence if allowed under the Rules of Evidence. House bill 118 would establish a cap on non-economic damages as follows: \$250,000 for causes of action arising before July 1, 2001, \$400,000 for causes of action arising after July 1, 2001 and before July 1, 2002, \$400,000 plus an annual adjustment for inflation for causes of action arising on or after July 1, 2002, and the lesser of the adjusted \$400,000 plus inflation or an amount set by federal law for causes of action arising on or after July 1, 2003. House bill 118 would also limit attorney contingency fees. Both bills have been referred to Committee.

Virginia

At least two bills have been introduced in Virginia's House of Representatives related to medical liability reform. House bill 1906 relates to medical experts, while H.B. 2520 would limit attorney fees.

Specifically, H.B. 2520 would limit attorney fees in medical malpractice cases as follows: 33 1/3 % of the first \$150,000 awarded, 25% of the next \$150,000, 20% of the next \$500,000, 15% of the next \$150,000, and 10% of any amount over \$950,000. The plaintiff's attorney may apply to the court for compensation in excess of this fee schedule.

West Virginia

House bill 2122, a comprehensive medical liability reform bill, has moved quickly through West Virginia's Legislature. The bill has passed both the House and Senate and is currently in a conference committee. As passed in the house, H.B. 2122 would provide a number of key reforms such as a \$250,000 cap on non-economic damages that would be adjusted annually for inflation starting January 1, 2004, a modification of West Virginia's existing joint and several liability law, modification of expert witness qualifications, periodic payment of future damages in excess of \$100,000, a tax credit for certain medical liability insurance premiums, and creation of a patient injury compensation plan study board which shall propose and implement a patient compensation fund. The West Virginia State Medical Association has been actively supporting H.B. 2122.

Wyoming

Wyoming's Legislature is addressing at least two bills related to medical liability reform during this session. House Joint Resolution 2 would amend the Wyoming Constitution to allow the legislature to limit the amount of non-economic damages that may be recovered for cases involving personal injury or death. If the resolution is enacted by two-thirds vote of both houses, the proposed amendment shall be submitted to voters for ratification at the next general election. Senate bill 36 would require the court to reduce the amount of a plaintiff's award by the amount received by the plaintiff from collateral sources.