

Summary of West Virginia's Medical Liability Reform Law HB 2122

House Bill 2122, a comprehensive medical liability reform law, was signed into law by Governor Bob Wise on March 11, 2003. As a key member of the West Virginia CARE Coalition, the West Virginia State Medical Association worked tirelessly toward enactment of this legislation. In addition to several key medical liability reforms, such as a cap on non-economic damages, H.B. 2122 also places a cap on total damages for care provided in a trauma center and creates a physicians mutual insurance company.

Cap on Non-Economic Damages

- **\$250,000 cap on non-economic damages per occurrence, regardless of the number of plaintiffs and number of defendants.**
- Exceptions: the cap increases to \$500,000 per occurrence, regardless of the number of plaintiffs and number of defendants for wrongful death; permanent and substantial physical deformity, loss of use of a limb or loss of a bodily organ system; or permanent physical or mental functional injury that permanently prevents the injured person from being able to independently care for himself or herself and perform life sustaining activities.
- The limits only apply to defendants who have at least \$1,000,000 per occurrence in medical liability insurance.
- The limits will be adjusted annually for inflation up to \$375,000 per occurrence or \$750,000 for injuries that fall within the exception.

Joint and Several Liability

- Abolishes joint and several liability, therefore, defendants can be held liable only for the percentage of fault attributed to the defendant by the trier of fact.
- New rule goes into effect once the patient compensation fund is established (2004).

Collateral Source Reform

- A defendant may introduce into evidence payments received by the plaintiff from collateral sources.
- The plaintiff may also present evidence of the value of payments or contributions he or she made to secure such benefits.
- The court must reduce the award plaintiff by the amount the plaintiff recovered from collateral sources offset by any payments or contributions made to secure such benefits.
- The court shall not reduce the award for the following
 - amounts paid to or on behalf of the plaintiff in which the collateral source has the right to recover from the plaintiff through subrogation, lien, or reimbursement,
 - amounts in excess of benefits actually paid or to be paid on behalf of the plaintiff by a collateral source in a category of economic loss,
 - proceeds of any individual disability or income replacement insurance paid for entirely by the plaintiff,
 - the assets of the plaintiff or the plaintiff's family, or
 - a settlement between the plaintiff and another tortfeasor

Cap on Care Provided in Trauma Center

- **\$500,000 cap on civil damages for any injury to or death of a patient as a result of health care services rendered in good faith and necessitated by an emergency condition for which the patient enters a health care facility**

designated as a trauma center. The limit also applies to health care services rendered by a licensed EMS agency or employee of a licensed EMS agency.

- Cap also applies to any act or omission of a health care provider in rendering continued care or assistance in the event that surgery is required as a result of the patient's emergency condition.
- This limit does not apply if the care is rendered in willful and wanton or reckless disregard of a risk of harm to the patient or in clear violation of established written protocols for triage and emergency health care procedures developed by the office of emergency medical services. Likewise, the limit does not apply to any act or omission in rendering care that occurs after the patient has been stabilized and is considered a non-emergency patient, or care that is unrelated to the original emergency condition.
- If the physician who provided care to the patient when the patient was presented with an emergency condition provides follow-up care to the same patient and a medical condition arises during the course of this follow-up care that is directly related to the original emergency condition, there is a rebuttable presumption that the medical condition was the result of the original emergency condition, and, therefore, the cap applies. There is also a rebuttable presumption that a medical condition that arises in the course of follow-up care provided by a health care provider in the trauma center is directly related to the original emergency condition, where the follow-up care is provided within a reasonable time after the patient's admission to the trauma center.

Expert Witness

- The court may require an expert witness to establish a defendant's failure to meet the applicable standard of care.
- The expert must have professional expertise and knowledge of the applicable standard of care to which he or she is testifying and must testify with a reasonable degree of medical probability.
- The expert must be licensed to practice medicine in any state (the physician's license must not have been suspended or revoked in any state in the past year) and must be qualified in a medical field in which the defendant has experience and/or training in diagnosing or treating injuries or conditions similar to those of the patient. If the witness also devoted, at the time of the medical injury, sixty percent of his or her professional time annually to the active clinical practice or teaching in his or her medical field or specialty, there shall be a rebuttable presumption that the witness is a qualified expert.

Certificate of Merit

- At least 30-days prior to the filing of a professional liability action, a claimant must provide notice to the defendant which shall include a statement of the theory or theories of liability and a list of all health care providers and health care facilities to whom notices are being sent, as well as a certificate of merit.
- The certificate of merit must be provided under oath by a health care provider qualified as an expert and shall state with particularity: (1) the expert's familiarity with the applicable standard of care at issue, (2) the expert's qualifications, (3) the expert's opinion as to how the applicable standard of care was breached, and (4) the expert's opinion as to how the breach of the applicable standard of care resulted in injury or death.
- A certificate of merit is not required if a claimant or the claimant's attorney believes one is not necessary because the cause of action is based on a well-established

legal theory of liability which does not require an expert's testimony to support a breach of the applicable standard of care.

Mediation

- Upon receipt of a notice of intent to file a claim, a defendant may demand pre-litigation mediation. The mediator's decision is confidential and inadmissible in court.

Physicians' Mutual Insurance Company (PMIC)

- Creates a physicians' mutual insurance company to provide medical liability insurance to physicians in West Virginia.
- The Board of Risk Insurance Management (BRIM) which was a state run fund, shall transfer to the PMIC any and all medical liability insurance obligations and risks of existing insurance covering physicians, physician corporations, and physician-operated clinics issued by the board. The BRIM shall not transfer any of its medical liability insurance obligations or risks of existing insurance covering hospitals and non-physician providers.
- Initial capitalization and surplus of the PMIC shall be funded through a loan from the tobacco settlement medical trust fund. The PMIC should receive further funding through a \$1,000 one-time assessment imposed on every physician licensed in the state. The following physicians will be exempt from the assessment: physicians who serve as full-time faculty at a medical school, physicians who are on active duty in the armed forces, physicians who receive more than 50% of their practice income from services provided in federally qualified health centers, or physicians who practice solely under a special volunteer medical license.

Patient Compensation Fund

- Creates a board to study the creation and funding of a patient injury compensation fund. The purpose of the fund shall be to reimburse claimants who have been unable to collect all or part of the economic damages awarded to them in a medical malpractice action either due to limitations on awards for trauma care and/or the elimination of joint and several liability.

Assessment on all insurers

- The Insurance Commissioner shall impose a \$2,500 assessment on all insurance carriers licensed (under this chapter – check) for the privilege of writing insurance in the state. All funds collected shall be transferred to the physicians' mutual insurance company.

Loss of Chance

- Codifies a loss of chance theory of recovery that had been previously established in case law. Under the new law, plaintiffs may recover under a loss of chance theory by proving the following:
 - (1) the health care provider's breach in the standard of care deprived the patient of a chance of recovery or increased the risk of harm to a patient;
 - (2) such failure was a *substantial factor* in bringing about the ultimate injury to the patient; and
 - (3) there is a reasonable degree of probability that following the accepted standard of care would have resulted in a greater than 25% chance that the patient would have had an improved recovery or would have survived.

- The loss of chance theory is a different cause of action than traditional negligence, which requires the plaintiff to prove that the defendant's negligence was the *proximate cause* of his or her injury.

Tax Credit

- Physicians who purchase medical liability insurance are entitled to a credit against their provider tax equal to 10% of premiums in excess of \$30,000 or 20% of premiums in excess of \$70,000.

Board of Medicine and Board of Osteopathic Medicine

- Requires the board to investigate any physician who has had three or more judgements or five or more judgements and settlements against them in a five-year period.
- The board may not consider any judgments or settlements as conclusive evidence of professional incompetence or conclusive lack of qualification to practice.