

# MEDICAL MALPRACTICE REFORM

## **STATUS**

The House majority has pledged to consider and pass measures that taken together constitute an alternative approach to health care reform.

House Judiciary Committee Chairman Lamar Smith (R-TX) and Representatives Phil Gingrey, M.D. (R-GA), and David Scott (D-GA) have introduced H.R. 5, the Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2011.

The House Judiciary Committee has held a hearing on the topic.

## **LEGISLATION**

Back in 2003, the House considered a bill, also entitled the “Help Efficient, Accessible, Low-Cost, Timely Healthcare (HEALTH) Act.” H.R. 5 is an updated version of that bill. The provisions are as follows:

### *Non Economic Damages*

In any health care lawsuit, the amount of noneconomic damages, if available, may be no more than \$250,000, regardless of the number of parties against whom the action is brought or the number of separate claims or actions brought with respect to the same injury. For purposes of applying the limitation, future noneconomic damages shall not be discounted to present value.

### *Punitive Damages*

The amount of punitive damages, if awarded, in a health care lawsuit may be as much as \$250,000 or as much as two times the amount of economic damages awarded, whichever is greater.

Punitive damages may, if otherwise permitted by applicable State or Federal law, be awarded against any person in a health care lawsuit only if it is proven by clear and convincing evidence that such person acted with malicious intent to injure the claimant, or that such person deliberately failed to avoid unnecessary injury that such person knew the claimant was substantially certain to suffer.

In determining the amount of punitive damages, if awarded, in a health care lawsuit, the trier of fact shall consider only the following:

- (A) the severity of the harm caused by the conduct of such party;
- (B) the duration of the conduct or any concealment of it by such party;
- (C) the profitability of the conduct to such party;
- (D) the number of products sold or medical procedures rendered for compensation, as the case may be, by such party, of the kind causing the harm complained of by the claimant;

- (E) any criminal penalties imposed on such party, as a result of the conduct complained of by the claimant; and
- (F) the amount of any civil fines assessed against such party as a result of the conduct complained of by the claimant.

#### *Several Liability Only*

In any health care lawsuit, each party shall be liable for that party's several share of any damages only and not for the share of any other person. Each party shall be liable only for the amount of damages allocated to such party in direct proportion to such party's percentage of responsibility.

#### *Contingency Fees*

In no event shall the total of all contingent fees for representing all claimants in a health care lawsuit exceed the following limits: (1) Forty percent of the first \$50,000 recovered by the claimant(s); (2) Thirty-three and one-third percent of the next \$50,000 recovered by the claimant(s); (3) Twenty-five percent of the next \$500,000 recovered by the claimant(s); and (4) Fifteen percent of any amount by which the recovery by the claimant(s) is in excess of \$600,000.

#### *Collateral Source*

In any health care lawsuit involving injury or wrongful death, any party may introduce evidence of collateral source benefits. If a party elects to introduce such evidence, any opposing party may introduce evidence of any amount paid or contributed or reasonably likely to be paid or contributed in the future by or on behalf of the opposing party to secure the right to such collateral source benefits. No provider of collateral source benefits shall recover any amount against the claimant or receive any lien or credit against the claimant's recovery or be equitably or legally subrogated to the right of the claimant in a health care lawsuit involving injury or wrongful death.

#### *Periodic Payments*

In any health care lawsuit, if an award of future damages, without reduction to present value, equaling or exceeding \$50,000 is made against a party with sufficient insurance or other assets to fund a periodic payment of such a judgment, the court shall, at the request of any party, enter a judgment ordering that the future damages be paid by periodic payments.

#### *Statute of Limitations*

The time for the commencement of a health care lawsuit shall be 3 years after the date of manifestation of injury or 1 year after the claimant discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first. In no event shall the time for commencement of a health care lawsuit exceed 3 years after the date of manifestation of injury unless tolled for any of the following (1) upon proof of fraud; (2) intentional concealment; or (3) the presence of a foreign body, which has no therapeutic or diagnostic purpose or effect, in the person of the injured person.

## ANALYSIS

The Congressional Research Service (CRS) has published several reports over the years on medical malpractice reform. Their reports provide a convenient “pro and con” for each concept. The most recent report was published in 2006. (footnotes omitted)

### *NON ECONOMIC DAMAGES*

Economic damages refer to monetary losses that result from an injury, such as medical expenses, lost wages, and rehabilitation costs. Noneconomic damages consist primarily of damages for pain and suffering. Determining the amount of noneconomic damages is traditionally subject to broad discretion on the part of juries, which must equate two variables — money and suffering — that are essentially incommensurable. Judges, however, have the authority to reduce damage awards that they find excessive.

**Pro:** Advocates of caps on damages for pain and suffering argue that a lack of caps guarantees inconsistency and unpredictability in the tort system, and forces insurers to counter this uncertainty by charging higher premiums. Disagreement over the amount of pain and suffering damages is a major obstacle to out-of-court settlement, thus increasing litigation and coercing insurers to overpay on settlements of smaller claims. Further complicating the problem is a tendency of juries to inflate pain and suffering awards to cover some or all of the plaintiff’s attorney’s fees.

**Con:** Caps on noneconomic damages punish the worst afflicted, because the more pain and suffering that a plaintiff has endured, the more a cap deprives him of damages to which he would otherwise have been entitled. The \$250,000 cap in the bills that the House passed in the 108th Congress would have imposed was adopted by California in 1975. Twenty years later, in 1995, the median award for pain and suffering in malpractice cases reportedly was \$300,000, and inflation has also taken a toll. Jury awards for noneconomic damages are not totally arbitrary, as they are often based on multiples of the award for economic damages.

### *CAPS ON PUNITIVE DAMAGES*

In 1851, the Supreme Court wrote: “It is a well-established principle of the common law, that in actions . . . for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers.”

When may punitive damages be awarded? A law treatise states: “Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or “malice,” or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called willful or wanton. There is general agreement that, because it lacks this element, mere negligence is not enough, even though it is so extreme as to be characterized as “gross,” a

term of ill-defined content, which occasionally, in a few jurisdictions, has been stretched to include the element of conscious indifference to consequences, and so to justify punitive damages.”

Among the restrictions that have been proposed with regard to punitive damages, besides that they be capped, are (1) that the circumstances in which they may be awarded be narrowed, (2) that plaintiffs be required to prove by “clear and convincing” evidence that they are entitled to them (instead of having to prove it by a mere “preponderance of the evidence.”), (3) that liability for punitive damages be determined in a separate proceeding from liability for compensatory damages, and (4) that punitive damages be paid in part to the government or to a fund that serves a public purpose instead of to the plaintiff.

**Pro:** Critics charge that punitive damage awards in medical malpractice cases “are often unfair, arbitrary and unpredictable, and result in overkill...”

**Con:** The American Bar Foundation found that punitive damage awards are not routine. Plaintiffs often do not recover the amounts that juries award. This is because trial judges often reduce punitive damages awards that they find excessive, and a recent Supreme Court decision makes it easier for appellate courts to reduce punitive damages. Reportedly many plaintiffs settle for less than a jury’s verdict, to eliminate delays and the uncertainty of appeal.

#### *LIMITING JOINT AND SEVERAL LIABILITY*

Joint and several liability is the common-law rule that, if more than one defendant is found liable for a plaintiff’s injuries, then each defendant may be held 100 percent liable. With joint and several liability, the plaintiff may not recover more than once, but he may recover all his damages from fewer than all liable defendants, with any defendant who pays more than its share of the damages entitled to seek contribution from other liable defendants.

Some states have eliminated joint and several liability, making each defendant liable only for its share of responsibility for the plaintiff’s injury. Other states have adopted compromise positions, eliminating joint and several liability only for noneconomic damages (presumably with the view that it is more important for the plaintiff to recover all his economic damages than all his noneconomic damages), or eliminating joint and several liability only for defendants responsible for less than a specified percentage (e.g., 50 percent) of the plaintiff’s harm (presumably with the view that it is especially unfair for such defendants to be held liable for up to 100 percent of the damages).

**Pro:** Advocates of abolishing or limiting joint and several liability argue that joint and several liability in the absence of concerted action has led to the inclusion of many “deep pocket” defendants who are included primarily because of the joint and several liability, and otherwise are only remotely involved in the situation.

**Con:** Advocates of joint and several liability cite the reason that the common law adopted it: it is preferable for a wrongdoer to pay more than its share of the damages than for an injured plaintiff to recover less than the full compensation to which he is entitled.

## *ABOLISHING THE COLLATERAL SOURCE RULE*

The collateral source rule is the common-law rule that allows an injured party to recover damages from the defendant even if he is also entitled to receive them from a third party (a “collateral source”), such as a health insurance company, an employer, or the government. To abolish the collateral source rule would be to allow or require courts to reduce damages by amounts a plaintiff receives or is entitled to receive from collateral sources. Often a collateral source, such as a health insurer or the government, has a right of subrogation against the tortfeasor (the person responsible for the injury). This means that the collateral source takes over the injured party’s right to sue the tortfeasor, for up to the amount the collateral source owes or has paid the injured party. Though the collateral source rule may enable the plaintiff to recover from both his insurer and the defendant, the plaintiff, if there is subrogation, must reimburse his insurer the amount it paid him. If the collateral source rule were eliminated, then the defendant would not have to pay the portion of damages covered by a collateral source, and the collateral source would apparently not be able through subrogation to recover the amount it paid the plaintiff. In the medical malpractice context, therefore, eliminating the collateral source rule would benefit liability insurers at the expense of health insurers.

Some jurisdictions, however, have abolished the collateral source rule only in cases in which there is no right of subrogation. In such jurisdictions, where there is no right of subrogation, the collateral source would be unaffected by elimination of the collateral source rule (i.e., the health insurer would still not recover its money), and the defendant would benefit by not having to pay the plaintiff. Some proposals to abolish the collateral source rule have taken into account that the plaintiff may have paid insurance premiums for his collateral source benefit.

Such proposals, instead of allowing a damage award to be reduced by the full amount of a collateral source benefit, allow it to be reduced by the full amount of a collateral source benefit minus the amount the plaintiff paid to secure that benefit.

Some proposals would allow the defendant to introduce evidence of collateral source payments, but do not specify whether the jury must reduce economic damages awards by the amount of such payments. Eliminating the collateral source rule could also indirectly reduce noneconomic damages awards, because juries often set such awards as a multiple of economic damages. If the collateral source rule were abolished, then could the plaintiff disclose to the jury only his out-of-pocket expenses, or could he disclose his total economic damages before collateral source payments are deducted? If the former, then the plaintiff might receive a lesser award of noneconomic damages.

**Pro:** Advocates of abolishing the collateral source rule object to the fact that it allows for double recovery.

**Con:** Advocates of the collateral source rule cite the reason that the common law adopted it: it is preferable for the victim than for the wrongdoer to profit from the victim’s prudence (as in buying health insurance) or good fortune (in having some other collateral source available).

## *LIMITING LAWYERS' CONTINGENT FEES*

A contingent fee is one in which a lawyer, instead of charging an hourly fee for his services, agrees, in exchange for representing a plaintiff in a tort suit, to accept a percentage of the recovery if the plaintiff wins or settles, but to receive nothing if the plaintiff loses. Payment is thus contingent upon there being a recovery. Plaintiffs agree to this arrangement in order to afford representation without having to pay anything out-of-pocket, and lawyers agree to it because the percentage they receive — usually from 33 to 40 percent — generally amounts to more than an hourly fee would.

Twenty-five states reportedly regulate contingent fees in medical malpractice cases in one or more of the following ways: “(1) establishment of a sliding scale for the attorney fees; (2) establishment of a maximum percentage of the award that may be paid for attorney fees; and (3) provision for court review of the reasonableness of the attorney fees.” Legislation to limit contingency fees might consider specifying whether plaintiffs’ attorneys would be allowed to add certain other fees and costs.

**Pro:** Advocates of limiting contingent fees argue that such fees cause juries to inflate verdicts, result in windfalls for lawyers, and prompt lawyers to file frivolous suits in the hope of settling. They also argue that, where there is no dispute as to liability, but only as to damages, there is no contingency and therefore no justification for contingent fees.

**Con:** Opponents of limiting contingent fees argue that such fees enable injured persons, faced with medical bills and lost wages, to finance lawsuits that they otherwise could not afford — especially if their injury has disabled them from working. They argue that lawyers are unlikely to file frivolous lawsuits if they stand to recover nothing if they lose, and that studies have shown that contingent fees do not encourage frivolous lawsuits.

## *CREATING A FEDERAL STATUTE OF LIMITATIONS*

The statute of limitations — the period within which a lawsuit must be filed — for medical malpractice suits under state law is typically two or three years, starting on the date of injury. Sometimes, however, the symptoms of an injury do not appear immediately, or even for years after, malpractice occurs. Many states therefore have adopted a “discovery” rule, under which the statute of limitations starts to run only when the plaintiff discovers, or in the exercise of reasonable diligence, should have discovered, his injury — or, sometimes, his injury and its cause. Plaintiffs would favor allowing a statute of limitations to run only upon discovery of an injury and its cause because it may take additional time after symptoms become manifest to discover that an injury was caused by medical malpractice.

## *PERIODIC PAYMENT OF DAMAGES*

Traditionally, damages are paid in a lump sum, even if they are for future medical care or future lost wages. The trend in recent years has been to structure payment plans. There are many forms of periodic payment statutes.

**Pro:** Lawyers are doing it, states permit it and it can have economic benefits for the plaintiff and might increase the prospects for full compensation.

**Con:** If periodic payments will in fact benefit plaintiffs, then they will agree to them, as they sometimes do, without legislation. Some plaintiffs, however, may prefer to invest their awards themselves and not risk the insolvency of the defendant or the company from which the defendant purchases an annuity.

### **SAVINGS ESTIMATE**

During the health care reform debate, the Congressional Budget Office (CBO) estimated that implementation of a package of medical malpractice reforms would reduce total national premiums for medical liability insurance by about 10 percent.

CBO estimated that the direct costs that providers would incur in 2009 for medical malpractice liability—which consist of malpractice insurance premiums together with settlements, awards, and administrative costs not covered by insurance—would total approximately \$35 billion, or about 2 percent of total health care expenditures. Therefore lowering premiums for medical liability insurance by 10 percent would reduce total national health care expenditures by about 0.2 percent.

CBO also assessed the impact of tort reform to include not only direct savings from lower premiums for medical liability insurance but also indirect savings from reduced utilization of health care services.

CBO estimated a package of reforms would reduce total national health care spending by about 0.5 percent (about \$11 billion in 2009). That figure is the sum of the direct reduction in spending of 0.2 percent from lower medical liability premiums and an additional indirect reduction of 0.3 percent from slightly less utilization of health care services.

In the case of the federal budget, enactment of such a package of proposals would reduce mandatory spending for Medicare, Medicaid, the Children's Health Insurance Program, and the Federal Employees Health Benefits program by roughly \$41 billion over the next 10 years.

### **STATES**

Many states have already enacted at least some of the proposed reforms. For example, about one-third of the states have implemented caps on noneconomic damages, and about two-thirds have reformed their rules regarding joint-and-several liability.

### **PATIENT PROTECTION AND AFFORDABLE CARE ACT**

Last year's reform law provided for demonstration grants for states for the development, implementation, and evaluation of alternatives to current tort litigation for resolving disputes over injuries allegedly caused by health care providers or health care organizations.

## **OUTLOOK**

Unlike some of the other alternative health care reform proposals, medical malpractice reform can be “layered” on top of any system so it would not be disruptive. The fact States are heavily involved is a double-edged sword. While some Democratic policy makers are likely to be more receptive because of their state’s activity, there will be policy makers who argue why should the Federal government get involved since the states are active.

The trial lawyers are always a formidable opponent having thwarted tort reforms of all kinds for three decades.