

Trade & Professional Association Bulletin

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ILLINOIS CAPS NON-ECONOMIC DAMAGES IN MEDICAL MALPRACTICE CASES

Medical societies and their members, confronted by significantly higher malpractice premiums, have been involved in legislative efforts at both the local and national levels to place caps on non-economic damages in medical malpractice cases. Societies have also sought to address false, deceptive and misleading expert testimony by their members. On May 31, 2005, Illinois' General Assembly passed a major medical malpractice reform bill addressing each of these issues that was supported by the Illinois State Medical Society and the Illinois Hospital Association. The bill was proposed as a solution to keep physicians in high-risk specialties in Illinois, a state the American Medical Association cites as one of its twenty-one (21) "states in crisis" based on sky rocketing medical malpractice insurance premiums. The bill includes judicial reforms (such as non-economic damages caps) for malpractice cases, fortifies standards for expert witnesses, strengthens the power of Illinois' Medical Disciplinary Board (the "Board") and mandates rate regulation and oversight of medical liability insurers by Illinois' Department of Financial and Professional Regulation (the "Department"). Illinois' Speaker of the House and the President of the Senate have until July 31 to certify the bill and send it to Illinois' governor to sign, which he has promised publicly to do. The most significant reforms are as follows:

Judicial Reforms

√ **Medical Malpractice Reform**

- Limits non-economic damages awarded against individual physicians to \$500,000.
- Limits non-economic damages awarded against hospitals to \$1,000,000.
- Allows damages for a plaintiff's future medical expenses and life care to be paid by purchase of an annuity by the defendant (at the election of the plaintiff, the defendant or the court).
- Encourages open communication by health care providers by requiring that all apologies, expressions of grief or explanations surrounding an inadequate or unanticipated medical outcome provided within seventy-two (72) hours of when the provider knew or should have known of the outcome are inadmissible as evidence both in court and before the Board.
- Provides immunity to retired physicians who provide services free of charge.

√ **Expert Witness Standards**

- Requires expert witnesses to be board certified or board eligible in the same medical specialty as the defendant and to have significant experience with the relevant standard of care, methods, procedures and treatments.
- Requires expert witnesses to be active in practice, teaching or university-based research. Retired expert witnesses must provide evidence of attendance and completion of continuing education courses for the three (3) previous years.
- Requires professionals who provide an affidavit for a plaintiff stating that there is a reasonable and meritorious cause for the filing of an action (the “written report”) to meet the expert witness standards (listed above) and to disclose their name, address, license number and state of licensure.
- Prohibits medical liability insurers and professional organizations from discriminating against professionals based upon a professional’s preparation of a written report.

Medical Discipline

- Increases the Board from nine (9) to eleven (11) members, four of whom shall be members of the public, with physician representation from the fields of neurosurgery, obstetrics and gynecology, cardiology, osteopathy and chiropractics.
- Doubles the number of investigators employed by the Board.
- Increases the statute of limitations from five (5) to ten (10) years for disciplinary actions

based upon a pattern of practice demonstrating incapacity or incompetence.

- Increases the maximum fine in disciplinary cases from \$5,000 to \$10,000.
- Abolishes the requirement that entities and organizations that are obligated to report provider misconduct to the Board obtain patient consent before providing medical records to the Board.
- Provides immunity for individuals and entities that volunteer information to a peer review committee regarding alleged errors or negligence by a physician (only individuals who volunteered information to the Board were provided immunity under the earlier medical practice act).
- Requires the Department to compile and publish on the Internet a profile of each licensed physician that includes information from the past five (5) years regarding criminal convictions, Board disciplinary actions in any state, revocation or restriction of hospital privileges, medical malpractice court judgments, arbitration awards and settlement information, education, specialty board certification, number of years in practice and practice locations, hospitals where privileges are held, appointments to medical faculties, information regarding publications in peer-reviewed medical literature, professional or community service, languages spoken or available translating services and Medicaid participation status.

Insurance Regulation

- Requires medical liability insurers to file their rates and rating schedules with the Department initially and each time an insurer changes its rates.

- Requires insurers to certify to the Department that their rates are based on sound actuarial experience, and authorizes the Department to obtain statistical and financial data from insurers to verify the reasonableness of their rates.
- Requires the Department to publish on the Internet the name, contact information and base rates of each medical liability insurer in Illinois.
- Authorizes the Department to hold public hearings to determine whether a rate is inadequate or excessive at the Department's discretion, at the request of the greater of 1% of a company's insureds within a specialty or twenty-five (25) insureds, or if an insurer increases its rates by greater than 6% at any time. At the conclusion of any public hearing, the Department may adjust an insurer's rates by order if the insurer cannot justify its rates or proposed increases.
- Encourages insurers to offer plans offering deductibles to insureds and premium discounts for participation in risk management activities by insureds.
- Imposes substantial disclosure and reporting requirements on insurers regarding medically related injury claims, verdicts, settlements and financial information, with such information to be made available to the public.

Of particular significance to medical societies are the bill's new expert witness standards. Illinois' Board, unlike some states' Boards, does not have the statutory authority to initiate disciplinary actions based upon a physician's expert testimony. Nevertheless, the Illinois State Medical Society backs the new expert witness standards as a "strong preventive measure against the filing of non-meritorious suits." The requirement that

physicians who sign affidavits attesting to the merits of an action be board certified or board eligible in the same specialty as the defendant, coupled with the requirement that the attesting physician disclose his or her name, address, license number and state of licensure, are expected to result in fewer malpractice claims being filed in the Illinois courts.

Medical societies that examine false, deceptive and misleading testimony by their members should not be concerned about the bill's prohibition on discrimination against physicians based upon a physician's preparation of an affidavit of merit. The provision is primarily directed at insurance companies and seeks to guarantee that insurers will not raise rates of physicians based solely on their conduct as an expert witness. Further, the prohibition on discrimination applies only to the affidavit of merit, not all expert testimony, and it does not protect testimony that is false, deceptive or misleading.

It is difficult to predict the effect this reform bill will have on practice conditions in Illinois, in part because the constitutionality of its non-economic damage caps will be challenged up to the Illinois Supreme Court, which has previously struck down similar damage caps as unconstitutional. The bill's provisions are inseverable, so if the cap on non-economic damages is ruled unconstitutional, the entire bill will become invalid.

If the bill is signed into law and upheld by Illinois' Supreme Court, providers are expecting the malpractice premium rate regulation and the non-economic damage caps to result in lower malpractice premiums for Illinois practitioners, in part because insurers will be able to purchase less high-end reinsurance limits and in part because settlement demands will be negotiated more promptly. We will keep readers advised of important developments arising from this reform bill, including the Illinois Supreme Court's inevitable decision as to its constitutionality.

Should you have any questions regarding this bulletin, please call Michael E. Reed, Esq. (312/609-7640), Amy L. Young, Esq. (312/609-7822) or any other Vedder Price attorney with whom you regularly work.

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About Vedder Price

Vedder, Price, Kaufman & Kammholz, P.C. is a national, full-service law firm with more than 210 attorneys in Chicago, New York and Roseland, New Jersey.

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- Membership issues.

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