

Health Law Bulletin

June 30, 2005

ILLINOIS LEGISLATURE PASSES MEDICAL MALPRACTICE REFORM PACKAGE

After years of debate surrounding damage caps in medical malpractice cases, on May 31, 2005, the Illinois General Assembly passed a major medical malpractice reform bill supported by the Illinois State Medical Society and the Illinois Hospital Association. The bill was proposed as a solution to the steady migration of physicians in high-risk specialties out of Illinois in recent years. The American Medical Association had cited Illinois as one of the twenty-one “states in crisis” based on skyrocketing medical malpractice insurance premiums. The bill includes judicial reforms for malpractice cases (such as the cap on non-economic damages), new powers for the Illinois Medical Disciplinary Board (the “Board”) and new mandates for the Illinois Department of Financial and Professional Regulation (the “Department”) to regulate the rates of and strengthen the oversight of medical liability insurers in general. 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 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.
- Implements a “Sorry Works!” pilot program in which two Illinois hospitals will promptly acknowledge and apologize for mistakes and offer fair settlements. Participating hospitals will report their total costs for malpractice verdicts, settlements and defense litigation to a committee responsible for comparing costs of participating hospitals with costs for cases handled by traditional means. If a participating hospital’s costs exceed the costs that would have traditionally been incurred, the state will reimburse the hospital up to \$2,000,000 per year.

√ 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 at and completion of continuing education courses for the three 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 to eleven 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.

- Adds violation of state or federal laws regarding legend drugs or ephedra as grounds for discipline.
- Increases the statute of limitations from five to ten 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 are 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 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 one percent of a company's insureds within a specialty or 25 insureds, or if an insurer increases its rates by greater than six percent 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 rates.
- Encourages insurers to offer plans containing 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.

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 in the courts and appealed to the Illinois Supreme Court, which has previously struck down damage caps as unconstitutional. The bill's provisions are not severable, so if the cap on non-economic damages is ruled unconstitutional, the entire bill will become invalid.

If the bill is upheld by Illinois' Supreme Court, providers are expecting the malpractice premium rate regulation and the non-economic damage caps to stabilize 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. A ruling that the damage caps are constitutional should also encourage new insurers to enter the Illinois market, and increased competition between insurers should lead to an eventual decrease in malpractice premiums.

The new expert witness standards are viewed as a "strong preventative measure against the filing of non-meritorious suits." The requirement that physicians who sign affidavits attesting to the merit 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.

The reform bill will apply only to injuries that occur after the governor signs the bill into law. Despite lobbying efforts, the bill does not protect a defending physician's personal assets from judicial recovery. Some aspects of the cap on non-economic damages will require further interpretation by the courts, such as whether the \$1,000,000 cap on non-economic damages for defending hospitals includes physicians employed by a defending hospital, or whether a plaintiff could recover \$1,000,000 from a hospital and another \$500,000 from a defending physician.

Should you have any questions regarding this bulletin or other health law issues, please call Richard H. Sanders, Esq. (312/609-7644), Amy L. Young, Esq. (312/609-7822) or any other Vedder Price attorney with whom you regularly work.

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