LEGALLY SPEAKING

Status of tort reform--or lack thereof

By Terrell J. Isselhard, JD *

The Illinois State Legislature has once again failed to enact any meaningful tort reform during its latest session. As a result, all physicians in the state of Illinois continue to be vulnerable to excessive judgments far in excess of their professional liability insurance coverage.

Many worthwhile pieces of legislation have been proposed to the Illinois legislature relating to tort reform. This article briefly summarizes, and provides a brief history of one such Bill--HB 4847. The history of HB 4847 demonstrates the hard work and effort that is being expended by your representatives to attempt to pass meaningful legislation. After being unanimously passed by the Illinois House of Representatives, House Bill 4847 moved to the Senate last spring, where, after surviving six amendments, it retained much of its original language as Floor Amendment 5. On May 31, Floor Amendment 5 to Senate Bill 4847 passed through the Senate, thereby sending it back to the House for concurrence. Unfortunately, this bill was never adopted into legislation.

Overview

Amendment 5 seeks to reform medical malpractice legislation on a number of fronts, including affecting all phases through which a plaintiff's successful medical malpractice case traverses, from the filing of the claim, to the damages decision. Included within Amendment 5 are sections that act to enforce stricter standards for merit, increase plaintiff expert witness qualifications, inform juries of the tax exempt status of plaintiff's awards, and protect physicians' personal assets from being seized to satisfy judgments. The proposed amendment also covers a number of other issues, including sections that aim to reform hospital agency relationships, increase the staff of the Illinois Department of Professional Regulation, extend good faith immunity to free care providers (including retired physicians), and a "Sorry Works" pilot program, which allows a pilot hospital to offer express apologies and fair settlements to patients and families who have suffered mistakes in patient care. The amendment also gives counties permission to: create risk retention trusts to provide professional liability coverage to medical care practitioners within the county, increase state regulation over doctors and insurers, and discourage unmerited lawsuits.

Litigation reform

Upon filing a medical malpractice claim against a physician, a plaintiff must employ a consulting physician to secure an affidavit of reasonableness and merit for the action. Under the proposed amendment, the affiant would be required to have a greater level of expertise in the area of health care or medicine that is at issue in the particular action. This section of the proposed amendment is of value to physicians because it aims to end frivolous lawsuits in their infancy, before a point where physicians incur defense costs and feel the effect a pending lawsuit may have over their practice.

According to ISMIE Mutual Insurance Company, a top physician liability provider, 80% of the claims filed against its insureds result in no payment to the plaintiff. While the success rate for physicians is high, over the last five years ISMIE spent in excess of $150M defending those claims. The passage of Amendment 5 would work to effect two ends at this stage of litigation; it would both eliminate millions of dollars of excess spending and free up insurance companies, defense lawyers, and courtrooms to adjudicate cases of true merit more efficiently.

Following the filing of a proper claim, a case next advances to the discovery and trial phase. At this point, expert testimony is often the greatest determining factor in the outcome of a case. The proposed amendment seeks to even the playing field as it increases the current low standards for qualification as an expert witness in medical malpractice cases. As of today, it is not required that so-called experts even be certified in the same specialty as the defendant. Upon passage, the amendment will

require the court to apply the following standards to determine if a witness qualifies for the case at hand: (a) whether the witness is board-certified or board-eligible in the same or similar medical specialty as the defendant; (b) whether the witness has devoted a majority or substantial portion of his time or work to the practice of medicine in relation to the care and type of treatment at issue; (c) whether the witness is licensed in the same profession with the same class of license as the defendant; and (d) whether, in the case of a non-specialist, the witness can demonstrate a sufficient familiarity with the standard of care practiced in the state. Subsequently, plaintiffs' lawyers would not be able to call upon their "professional" or "usual" medical malpractice expert witnesses to offer their frank criticism and expert medical opinion in cases in which they have no expertise to testify.

Clarify tax treatment

In recent years, it has come to light that some juries in medical malpractice cases have returned damages awards of a higher value when they have mistakenly believed that the plaintiff would lose a large portion of the award to taxes. In reality, for the most part, compensatory damages are not taxed under federal or state income tax laws. Amendment 5 aims to end the confusion, as it requires that juries receive instructions in writing of the relevant tax treatment to a plaintiff's damage award.

Asset protection for physicians

The most talked about section of Amendment 5 entails the protection of physicians' personal assets. The amendment expresses that in all cases in which a plaintiff seeks damages from medical malpractice, the amount of the recovery shall be limited to an amount covered by the physician's medical malpractice insurance or liability insurance, provided the physician maintains at least a minimum of $1M in insurance coverage per occurrence and $3M in the aggregate. Corporate assets are subject to attachment for satisfaction of a judgment. In no event shall physicians be liable in an amount that would cause them to forfeit any of their personal assets.

No limitation on non-economic awards

The removal of the non-economic limitation is the greatest disappointment since it is the linchpin to true tort reform. The original bill contained a cap on non-economic awards. Unfortunately, this section was removed. The proposal for a non-economic damage cap is the issue in which partisan politics has played the largest role. This section was eliminated from the amendment in the Senate and is not up for vote in the House as part of Amendment 5. The idea of the cap is to limit non-economic damages (pain and suffering, punitive damages, etc.) at a certain dollar amount. Twenty-six states currently have established caps.

Illinois has not been successful in the enactment of such caps. Similar statutes capping non-economic awards were passed by the general assembly in both 1975 and 1995 only to be later declared unconstitutional by the Illinois Supreme Court on the basis that they were "arbitrary" and "not rationally related to legitimate government interest." So long as many Illinois lawmakers gain funding from plaintiff personal injury lawyers, it does not appear that a bill containing an economic cap will see the docket listing of the Illinois Supreme Court any time soon. This is too bad, because faced with a health-care crisis in which high patient costs are limiting the availability of care and doctors continue to emigrate from Illinois, it would be hard for the Supreme Court to characterize such a law as having "no legitimate government interest" this time around. As a result of the courts' prior decisions rendering non-economic damage caps unconstitutional, pro-cap organizations are supporting SJRCA 54, a constitutional amendment that presents the question whether there should be non-economic damage caps to the voters of Illinois.

Summary

HB 4847 has the ability to begin to ease the crisis by removing inefficiencies and reforming the way in which cases go through the courts, including enacting stricter standards at the procedural level. The protection of personal assets will be a victory for physicians, if not a welcome sigh of relief, as they no longer will have to fear losing their personal assets to exorbitant damage awards. While the latest inaction by the legislature is disappointing, medical societies and physicians must continue to contact their state representatives to remind them of the critical need for tort reform and to encourage them to support such legislation. ■

The author is an equity partner in the Chicago-based health law firm of Chuhak & Tecson, P.C. Inquiries or suggestions should be e-mailed to Mr. Isselhard at tisselhard@chuhak.com

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