



Medical Liability Reform

Potential Cost Savings

As outlined by the Congressional Budget Office, medical liability reform would reduce total health care spending by about 0.5 percent (about \$11 billion in 2009) and help achieve health system savings of up to \$54 billion over the next decade by reducing the incentives for defensive medicine while also protecting physicians from unaffordable liability premiums. In addition to this savings, these reforms will also improve patient access to specialty care, particularly in rural and underserved areas. Unfortunately, the Patient Protection and Affordable Care Act (PPACA) did not address this issue in a meaningful manner.

Obama FY12 Budget

President Obama's FY12 Budget Request provided \$250 million (\$100 in 2012; and \$50 each subsequent year through 2016) to provide incentives through the Department of Justice for State medical malpractice reform. "The President encourages Republicans to work constructively with him on medical malpractice as part of an overall effort to restrain health costs." In addition, the budget would deny the deduction for punitive damages, with an overall savings projection of \$312 M over 10 years.

Key Legislation

HEALTH Act (HR 5, S 218)

On January 24, 2011, Rep. Phil Gingrey, MD (R-GA) introduced H.R. 5, the "Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2011," which currently has 86 cosponsors. On January 27, 2011, Sen. Ensign (R-NV) and Sen. Blunt (R-MO) introduced companion legislation, S. 218. This legislation sets conditions for lawsuits arising from health care liability claims regarding health care goods or services or any medical product affecting interstate commerce, including:

- setting a statute of limitations of three years after the date of manifestation of injury or one year after the claimant discovers the injury, with certain exceptions,
- limiting noneconomic damages to \$250,000 and making each party liable only for the amount of damages directly proportional to such party's percentage of responsibility,
- allowing the court to restrict the payment of attorney contingency fees, including limiting the fees to a decreasing percentage based on the increasing value of the amount awarded.
- allowing the introduction of collateral source benefits and the amount paid to secure such benefits as evidence and prohibiting a provider of such benefits from recovering any amount from an award in a health care lawsuit involving injury or wrongful death,
- authorizing the award of punitive damages only where: (1) it is proven by clear and convincing evidence that a person acted with malicious intent to injure the claimant or deliberately failed to avoid unnecessary injury the claimant was substantially certain to suffer; and (2) compensatory damages are awarded. Limits punitive damages to the greater of two times the amount of economic damages or \$250,000,
- denying punitive damages in the case of products approved, cleared, or licensed by the Food and Drug Administration (FDA), or otherwise considered in compliance with FDA standards, and
- providing for periodic payments of future damages.

Job Creation Act of 2011 (S 12)

On January 25, 2011, Sen. Portman introduced S. 12, the “Job Creation Act of 2011.” With respect to medical liability reform, this legislation sets conditions for lawsuits arising from health care liability claims regarding health care goods or services or any medical product affecting interstate commerce, including:

- revising the statute of limitations,
- allowing a court to restrict the payment of attorney contingency fees in health care lawsuits and limiting such fees to a decreasing percentage based on the increasing value of the amount awarded,
- authorizing the award of punitive damages in health care lawsuits only where: (1) it is proven by clear and convincing evidence that a person acted with malicious intent to injure the claimant or deliberately failed to avoid unnecessary injury the claimant was substantially certain to suffer, and (2) compensatory damages are awarded,
- limiting punitive damages to the greater of two times the amount of economic damages or \$250,000, and
- providing for periodic payments of future damages exceeding \$50,000.

Medical Care Access Protection Act of 2011 or MCAP Act (S 197)

On January 26, 2011, Sen. Ensign (R-NV) introduced S. 197, the “Medical Care Access Protection Act of 2011” or the “MCAP Act.” Currently, this legislation has 8 cosponsors. This legislation sets forth provisions regulating lawsuits for health care liability claims related to the provision of health care services, including

- setting a statute of limitations of three years after the date of manifestation of injury or one year after the claimant discovers the injury, with certain exceptions,
- requiring a court to impose sanctions for the filing of frivolous lawsuits,
- limiting noneconomic damages to \$250,000 from the provider or health care institution, but no more than \$500,000 from multiple health care institutions and making each party liable only for the amount of damages directly proportional to such party’s percentage of responsibility.
- allowing the court to restrict the payment of attorney contingency fees and limiting the fees to a decreasing percentage based on the increasing value of the amount awarded,
- prescribing qualifications for expert witnesses,
- requiring the court to reduce damages received by the amount of collateral source benefits to which a claimant is entitled, unless the payor of such benefits has the right to reimbursement or subrogation under federal or state law,
- authorizing the award of punitive damages only where: (1) it is proven by clear and convincing evidence that a person acted with malicious intent to injure the claimant or deliberately failed to avoid unnecessary injury the claimant was substantially certain to suffer, and (2) compensatory damages are awarded
- limiting punitive damages to the greater of two times the amount of economic damages or \$250,000.
- prohibiting a health care provider from being named as a party in a product liability or class action lawsuit for prescribing or dispensing a Food and Drug Administration (FDA)-approved prescription drug, biological product, or medical device for an approved indication, and
- providing for periodic payments of future damage awards.

Empowering Patients First Act (HR 105)

On February 1, 2011, Rep. Dan Burton (R-IN) introduced H.R. 105, the “Empowering Patients First Act.” With respect to medical liability reform, this legislation included the provisions of the HEALTH Act.

Medical Liability Procedure Reform Act of 2011 (HR 314)

On February 7, 2011, Rep. Thornberry (R-TX) introduced H.R. 314, the “Medical Liability Procedure Reform Act of 2011,” which currently has 3 cosponsors. This legislation would provide the Attorney General with

the authority to award grants to states to develop, implement, and evaluate health care tribunals, which are defined as a trial court or administrative tribunal: (1) the sole function of which is to adjudicate disputes over injuries allegedly caused by health care providers; (2) to which all or a portion of such disputes within a jurisdiction are assigned; and (3) the judges for which have health care expertise and render decisions about the standard of care in dispute adjudication, with reliance on independent expert witnesses commissioned by such court or tribunal.

The Attorney General would also provide technical assistance to states to: (1) develop common definition, formats, and data collection infrastructure for states to use in reporting in order to facilitate aggregation and analysis of data within and between states; and (2) provide guidance about the identification and selection of health care tribunal judges and independent expert witnesses, compensation of injured patients, and clinical resources relating to the standard of care.

The Attorney General must also contract with a research organization to evaluate and report on the effectiveness of grants awarded, to include an analysis of the effect of such grants on: (1) the number, nature, and costs of health care liability claims; (2) the liability environment; (3) health care quality; and (4) patient safety.

Reform Americans Can Afford Act (HR 397)

On February 9, 2011, Rep. Herger (R-CA) introduced H.R. 397, the “Reform Americans Can Afford Act,” which currently has 15 cosponsors. With respect to medical liability reform, this legislation would set conditions for lawsuits arising from health care liability claims regarding health care goods or services or any medical product affecting interstate commerce, including:

- establishing a statute of limitations and limits noneconomic and punitive damages, and
- declaring that nothing in this Act shall be construed to interfere with the doctor-patient relationship or the practice of medicine.

Provider Shield Act of 2011 (HR 816)

On February 18, 2011, Rep. Phil Gingrey, MD (R-GA), Rep. Henry Cuellar (D-TX), Judiciary Committee Chairman Lamar Smith (R-TX), Paul Broun, MD (R-GA), Sam Graves (R-MO), Tim Murphy (R-PA), and Dan Benishek, MD (R-MI) introduced H.R. 816, the “Provider Shield Act of 2011.” This legislation clarifies federal law so that no new federal treatment guideline or other standard of care under PPACA can be construed to establish the standard of care in a medical malpractice case. While the bill mentions specific sections from a required Government Accountability Office (GAO) report,¹ it is not limited to providing protections for those areas.

¹ Section 10201 of PPACA requires the GAO to study whether the implementation of any of the provisions below would result in the creation of a new cause of action or claim and the report must be submitted to the appropriate Congressional committees regarding the findings of this study no later than March 23, 2012. The study and report will focus on the following provisions:

- Sec. 2701 - Adult health quality measures.
- Sec. 2702 - Payment adjustments for health care acquired conditions.
- Sec. 3001 - Hospital value-based purchase program.
- Sec. 3002 - Improvements to the Physician Quality Reporting Initiatives.
- Sec. 3003 - Improvements to the Physician Feedback program.
- Sec. 3007 - Value based payment modifier under Physician Fee Schedule.
- Sec. 3008 - Payment adjustment for conditions acquired in hospitals.
- Sec. 3013 - Quality measure development.
- Sec. 3014 - Quality measurement.
- Sec. 3021 - Establishment of Center for Medicare and Medicaid Innovation.
- Sec. 3025 - Hospital readmission reduction program.
- Sec. 3501 - Health care delivery system research, quality improvement.
- Sec. 4003 - Task Force on Clinical and Preventative Services.
- Sec. 4301 - Research to optimize delivery of public health services.

Latest Congressional Actions

HEALTH Act (HR 5)

After a hearing on the topic on January 20, 2011, on February 16, 2011, the House Judiciary Committee reported out of committee H.R. 5, the HEALTH Act, by a party line vote of 18-15. The committee debate centered on the bill's cap of \$250,000 for non-economic compensatory damages, which concerns emotional pain and suffering, physical impairment and disfigurement. It would not limit economic compensatory damages — loss of past or future earnings and future medical expenses. Democrats made more than a dozen attempts to loosen the bill's limits on damages or otherwise modify the measure but were almost entirely rebuffed by the GOP majority.

The committee did adopt, by voice vote, one Democratic amendment, sponsored by Robert C. Scott of Virginia, to eliminate a provision that would allow juries to hear evidence of "collateral source benefits," such as workers' compensation payments or long-term disability insurance payments. The amendment also struck a provision that would prohibit providers of collateral source benefits from recovering any amounts paid after a court award is made to the plaintiff.

While the President would likely not support this legislation, the bill will next be considered by the Energy and Commerce Committee at some point in the near future.