

Department of Legislative Services
Maryland General Assembly
2013 Session

FISCAL AND POLICY NOTE

Senate Bill 836
Rules

(Senator Gladden)

Health Care Malpractice - Awards and Judgments - Periodic Payments

This bill (1) requires periodic payments of certain damages in excess of a specified amount for health care malpractice causes of action and (2) establishes procedures and requirements relating to periodic payments and annuities for funding periodic payments. The bill must be construed to apply only prospectively and may not be applied or interpreted to have any effect on, or application to, any cause of action arising before the bill's October 1, 2013 effective date.

Fiscal Summary

State Effect: The change is procedural in nature and does not directly affect governmental finances.

Local Effect: None.

Small Business Effect: Minimal.

Analysis

Bill Summary: The bill applies if an award or verdict in a health care malpractice claim includes noneconomic damages and future economic damages that total more than \$1.5 million. In a survival action or wrongful death action, however, the bill does not apply to noneconomic damages and applies only to future economic damages if they exceed \$1.5 million. Furthermore, the bill does not affect any limitation on noneconomic damages under any other provision of law.

In an award or judgment, an arbitration or court must (1) order that portion of the total of the noneconomic damages and future damages exceeding \$1.0 million be paid

periodically to the claimant or plaintiff in the form of one or more annuities and (2) enter the cost of each annuity as the amount of the portion of the award or judgment.

A defendant (or the defendant's insurer) may purchase one or more annuities producing periodic payments for noneconomic damages, future medical expenses, and future loss of earnings, as specified by the bill. An annuity purchased under the bill must have a guaranteed term equal to the number of years necessary to fund the applicable damages to which the annuity applies. The term of an annuity to fund noneconomic damages, future medical expenses, and future loss of earnings must be calculated as specified by the bill.

If an arbitration panel awards to a claimant – or if a trier of fact awards to a plaintiff – any noneconomic damages or future economic damages, the arbitration panel or trier of fact must specify in the award the claimant or plaintiff's remaining years in life expectancy, duration of future working life, commencement date of future working life, duration of future medical expenses, and duration of loss of future earnings.

The bill does not obligate an insurer to purchase an annuity beyond the extent to the coverage the insurer is obligated to provide under an insurance policy issued to the defendant.

The defendant (or the defendant's insurer) must purchase an annuity from an insurer that has a specified rating from at least two specified rating organizations. The arbitration panel or court is required to approve an annuity purchased by the defendant or the defendant's insurer if the annuity meets specified requirements and will at all times be fully secured by assets, as specified by the bill. The approved purchase of an annuity by the defendant (or the defendant's insurer) must be deemed to have fully satisfied the portion of the award or verdict for the noneconomic damages and future economic damages that exceed \$1.0 million.

An award or verdict under the bill is not subject to the provisions of § 11-109(c) of the Courts and Judicial Proceedings Article.

Current Law: Section 11-109(c) of the Courts and Judicial Proceedings Article specifies that a court or arbitration panel may order that all or part of the future economic damages portion of an award for future economic damages (*i.e.*, loss of earnings and medical expenses) be paid in the form of annuities (or other appropriate financial instruments) or that it be paid in periodic or other payments consistent with the plaintiff's needs, funded in full by the defendant (or the defendant's insurer), and equal, when paid, to the amount of the future economic damages award. That section also specifies that, in the event that the court or arbitration panel orders that the award for future economic damages be paid in a form other than a lump sum, the court or panel must order that the defendant (or the defendant's insurer) provide adequate security for the payment of all

future economic damages. It is further specified that the court or panel may appoint a conservator for the plaintiff – upon such terms as the court or arbitration panel may impose – who must have the full and final authority to resolve any dispute between the plaintiff and the defendant (or the defendant’s insurer) regarding the need or cost of expenses for the plaintiff’s medical, surgical, custodial, or other care or treatment.

Background: In health care malpractice actions, noneconomic damages include payment for pain, suffering, physical impairment, disfigurement, loss of consortium, or other nonpecuniary injury. Economic damages, in contrast, include payment for loss of earnings and medical expenses and are not limited to a maximum amount. Studies by the U.S. Government Accountability Office indicated that sharp increases in medical malpractice insurance rates in the early 2000s were due, in part, to insurer losses on medical malpractice claims. Other contributing factors included decreased investment income, artificially low premium rates adopted while insurers competed for market share during boom years, and higher overall costs due largely to increased reinsurance rates for medical malpractice insurers.

In 2004 and 2005, the General Assembly adopted legislation in response to increasing concern that medical malpractice insurance had become unaffordable for individuals practicing in certain high-risk specialties such as emergency surgery, obstetrics, neurosurgery, and orthopedic surgery. One provision of the legislation placed a four-year moratorium on the annual increase of \$15,000 in the cap on noneconomic damages for medical malpractice awards. Another provision decreased the percentage limitation in wrongful death cases from 150% to 125% and broadened the scope of the limitation.

Several recent court cases have sought to overturn State limits on noneconomic damages. In *Green v. N.B.S., Inc.*, the Court of Appeals of Maryland held that the statutory cap on noneconomic damages applies to personal injury claims authorized by the Consumer Protection Act. (See 409 Md. 528 (2009).) In a reported opinion on January 12, 2010, the Court upheld the statutory cap in *Lockshin v. Semsker*. In *Lockshin*, the Court held that the statutory cap on noneconomic damages applies to all health care medical malpractice claims, including those for which arbitration has been waived. (See Court of Appeals of Maryland, No. 78, September Term, 2009.) In *Freed v. D.R.D. Pool Service, Inc.*, the Court held the statutory cap on noneconomic damages to be constitutional. (See Court of Appeals of Maryland, No. 104, Sept. Term, 2009.)

Additional Information

Prior Introductions: HB 1166 of 2010, a similar bill, received an unfavorable report from the House Judiciary Committee.

Cross File: HB 1114 (Delegate Mitchell, *et al.*) - Judiciary.

Information Source(s): U.S. Government Accountability Office, Health Care Alternative Dispute Resolution Office, Judiciary (Administrative Office of the Courts), Department of Health and Mental Hygiene, Department of Legislative Services

Fiscal Note History: First Reader - March 4, 2013
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