Department of Legislative Services

Maryland General Assembly
2004 Session

FISCAL AND POLICY NOTE

House Bill 1237 (Delegate Vallario, *et al.*)
Judiciary

Health Care Malpractice - Mandatory Mediation or Other Alternative Dispute Resolution Process

This bill requires that in situations where arbitration of a malpractice claim has been waived by the Health Claims Arbitration Office (HCAO), the claim is subject to mediation or another alternative dispute resolution (ADR) process before the claim may be filed in a court.

Fiscal Summary

State Effect: HCAO could handle any increase in cases with existing budgeted resources. No effect on revenues.

Local Effect: Confirming that malpractice cases have been through appropriate mediation or ADR processes before being filed in circuit court could be handled with existing local circuit court resources.

Small Business Effect: Potential meaningful. To the extent small business health care providers who have been subject to litigation in malpractice claims are able to resolve the claim in mediation or ADR, legal costs could decrease significantly.

Analysis

Bill Summary: A malpractice claim subject to mediation or ADR may not be filed with a circuit court or the U.S. District Court until the mediator or neutral provider files with the court stating the ADR process has not been effective. A neutral provider is the fact finder in an ADR proceeding.

The parties may choose a mediator or neutral provider within 30 days of filing a claim with HCAO. If the parties fail to do so, the director of HCAO must assign one to the claim within 30 days. The mediator or neutral provider must schedule a conference with the parties as soon as practicable. The parties must file a brief written outline of the strengths and weaknesses of their respective cases. Any outline or written or oral communication made in connection with a conference is confidential, does not constitute an admission, and is not discoverable.

If the parties reach a settlement, they must inform HCAO. If not, they must file written notice with HCAO that the mediation or ADR has not been effective. Within 60 days, the claimant must file a complaint and the certificate of qualified expert in the appropriate circuit court or U.S. District Court. A certificate of qualified expert attests that the departure from standards of care is the proximate cause of the alleged injury. Delay without good cause in filing the complaint is grounds for dismissal of the complaint. The defendant, including a third party defendant, must file a certificate of qualified expert with the defendant's answer.

If a party joins an additional health care provider as a defendant in an action, the party must file a certificate of qualified expert with respect to the additional health care provider.

Current Law: Unless any party involved has agreed to waive arbitration, a person having a claim against a health care provider for damage due to a medical injury must file the claim with HCAO. HCAO must appoint an arbitration panel, which determines the issue of liability. If the health care provider is liable, the panel must then consider, itemize, assess, and apportion appropriate damages against one or more of the health care providers that it has found liable.

A party may apply to the arbitration panel to modify or correct an award as to liability, damages, or costs. The award of the panel is final and binding on the parties. HCAO must file a copy of the award with the circuit court, and the court must confirm the award, after which, the award constitutes a final judgment.

If the arbitration panel finds that the conduct of any party is in bad faith or without substantial justification, the panel may require the offending party, the attorney advising the conduct, or both, to pay the adverse party the costs of the proceeding and reasonable expenses, including reasonable attorney's fees.

If a case against a health care provider is filed in a circuit court or U.S. District Court, the court may, on agreement by all parties, refer the case to HCAO for a neutral case evaluation by a neutral provider.

Background: Arbitration is a process of dispute resolution in which a neutral third party, the arbitrator, renders a decision after a hearing at which both parties have an opportunity to be heard. It is intended to avoid the formalities, delay, and expense of ordinary litigation. Generally, an arbitration award is binding on both parties, although it may be subject to review in the courts.

Mediation is an informal dispute resolution process in which a neutral third person, the mediator, helps disputing parties to reach an agreement. The mediator has no power to impose a decision on the parties.

Recently, national attention has focused on what some are calling a medical malpractice insurance crisis. There is evidence in at least some parts of the country to support the claim that medical malpractice insurance is becoming dangerously unaffordable and/or unavailable, especially for individuals practicing in certain high-risk specialties such as obstetrics, neurosurgery, and orthopedic surgery. Certain areas have seen steep premium increases, the withdrawal of major insurance companies from the medical malpractice market, insurer-instituted moratoriums on the issuance of new policies, the closure of trauma centers and hospital maternity wards, the elimination of obstetrics from OB/GYN practices, an exodus of physicians, and increases in early retirements.

In 2003, the federal General Accounting Office (GAO) published a report that studied the extent of increases in medical malpractice insurance rates, analyzed the factors contributing to these increases, and identified any market changes that might make this period of rising insurance premiums different from previous such periods. GAO found that the largest contributor to increased premium rates was insurer losses on medical malpractice claims. Other contributing factors include 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.

States have adopted a variety of tort reforms in an effort to stop the rapid increase in malpractice insurance rates. According to the GAO report, direct tort reform, such as placing caps on damage awards, have a direct impact on malpractice insurance costs, while indirect tort reforms, such as permitting annuity payments and limiting attorneys' fees, have less impact. The report also noted that indirect reforms helped lower malpractice costs when coupled with caps on damages.

Until recently, the medical malpractice insurance industry in Maryland had not experienced the steep rate increases that had occurred in other states. In June 2003, the Medical Mutual Liability Insurance Society of Maryland, the insurance provider to most of the State's private practice physicians, requested a 28% rate increase in medical malpractice insurance premiums. On August 15, 2003, the Maryland Insurance

Commissioner approved the rate increase. The new rates became effective January 1, 2004. Opponents of the rate increase argued that a 3.7% rate increase was sufficient and that Medical Mutual was seeking to set aside more money than it would likely need for malpractice claims.

In response to soaring rates, other states have been considering a variety of measures to alleviate the problems in the medical community created by the medical malpractice insurance crisis. These initiatives include tort reform measures such as caps on noneconomic and punitive damages; limits on medical care provider liability; reforms to states of limitations, collateral source rules, and good faith hearings. Other measures include changes to physician discipline statutes and increased regulation of insurers.

The U.S. Congress has considered the medical malpractice insurance crisis several times. The most recent bill would have capped noneconomic damages at $250,000, limited the availability of punitive damages, required lawsuits to be brought within three years of the date of injury or one year of discovery, and preempted state law unless it imposes greater protections for health care providers and organizations from liability, loss, or damages.

Medical Mutual Liability Insurance Society of Maryland's direct written premiums for calendar 2004 are projected to be $113.7 million to provide malpractice insurance to 6,200 physicians. Annual premiums range from about $10,000 for a general practitioner to over $100,000 for certain specialists such as obstetricians. Medical Mutual covers approximately 80% of private practice physicians. Many other physicians who are associated with or employed by hospitals or professional practice groups receive partial or full malpractice insurance subsidies from the hospitals or practice groups.

According to a *Public Citizen* report, about 3% of Maryland physicians have been responsible for 51% of malpractice payouts to patients since 1990. Conversely, 89.4% of Maryland physicians have never made a malpractice payout. Only 21% (37 of 180) of physicians who made three or more malpractice payouts since 1990 were disciplined by the State Board of Physicians.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Judiciary (Administrative Office of the Courts), Maryland Health Claims Arbitration Office, Department of Health and Mental Hygiene, Maryland Insurance Administration, Department of Legislative Services

Fiscal Note History: First Reader - March 1, 2004
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