

Department of Legislative Services  
Maryland General Assembly  
2004 Session

FISCAL AND POLICY NOTE

House Bill 1108

(Delegate Hammen)

Judiciary

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Medical Injury Recoveries - Attorney's Fees

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This bill specifies that an attorney may not contract for or collect a contingency fee for representing a person having a claim against a health care provider for damages due to a medical injury occurring on or after June 1, 2004, in excess of the following limits: (1) 40% of the first \$200,000 recovered; (2) 33.3% of the next \$200,000 recovered; (3) 25% of the next \$200,000 recovered; and (4) 15% of any amount recovered in excess of \$600,000. The bill expands the definition of health care provider to include an adult day care center and a hospital care program.

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Fiscal Summary

**State Effect:** None. The bill pertains exclusively to private sector activities.

**Local Effect:** None.

**Small Business Effect:** Potential meaningful. To the extent the limitations on attorney's fees reduce a small business attorney's payment for services or discourage a small business attorney from representing a plaintiff in a malpractice case, a small business attorney's income could decrease.

If the bill discourages malpractice litigation, the average amount of damage awards could decrease and potentially help stabilize the malpractice insurance market. Any rate stabilization would be beneficial to small business health care providers who must purchase liability insurance.

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## Analysis

**Bill Summary:** Costs for medical care and the attorney's office-overhead costs or charges are not deductible disbursements or costs, and are not considered part of the recovered damages. These attorney's fee limitations apply regardless of whether the amount is recovered by settlement, award, or verdict, or the person for whom the amount is recovered is a responsible adult, a minor, or a person who is mentally incompetent. A division of fees for a contingency fee between an attorney who collects the fee and a referring attorney may only be made if the attorneys are in the same firm or the division is in proportion to the services performed by each attorney. An attorney who violates these provisions is subject to disbarment, suspension, or other disciplinary actions in accordance with the Maryland Rules.

**Current Law:** A health care provider is a hospital, related institution, physician, osteopath, optometrist, chiropractor, nurse, dentist, podiatrist, psychologist, licensed certified social worker-clinical, and a physical therapist.

The Maryland Rules of Professional Conduct for attorneys require that an attorney's fee be reasonable. The factors to be considered in determining the reasonableness of a fee include: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly; (2) the likelihood that the acceptance of particular employment will preclude other employment by the lawyer; (3) customary fees charged in the locality for similar services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer performing the services; and (8) whether the fee is fixed or contingent.

A fee may be contingent on the outcome of the matter for which the service is rendered, except where prohibited by law. Contingency fee prohibitions include: (1) fees charged in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or custody of a child, or upon the amount of alimony or support or property settlement, or property award resulting from divorce; or (2) representing a defendant in a criminal matter.

**Background:** 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.

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### **Additional Information**

**Prior Introductions:** None.

**Cross File:** None.

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

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Analysis by: Susan D. John

Direct Inquiries to:  
(410) 946-5510  
(301) 970-5510