

Department of Legislative Services
Maryland General Assembly
2006 Session

FISCAL AND POLICY NOTE

Senate Bill 229
Judicial Proceedings

(The President, *et al.*) (By Request – Administration)

Maryland Medical Injury Compensation Reform Act

This Administration bill makes various changes in provisions governing claims for medical injuries.

The bill takes effect June 1, 2006.

Fiscal Summary

State Effect: The bill's tort reform provisions would not materially affect governmental operations or finances. The task force could be staffed with the existing resources of the Department of Health and Mental Hygiene (DHMH) and the Maryland Insurance Administration (MIA).

Local Effect: None.

Small Business Effect: A small business impact statement was not provided by the Administration in time for inclusion in this fiscal note. A revised fiscal note will be issued when the Administration's assessment becomes available.

Analysis

Bill Summary and Current Law:

Definition of Health Care Provider

The Bill: The bill includes a physician assistant as one of the licensed health care professionals for whom the State's provisions governing health care malpractice claims apply.

Current Law: These provisions apply to a hospital, a related institution, a medical day care center, a hospice program, an assisted living program, a freestanding ambulatory care facility, a physician, an osteopath, an optometrist, a chiropractor, a registered or licensed practical nurse, a dentist, a podiatrist, a psychologist, a licensed certified social worker-clinical, and a physical therapist.

Certificates of Merit and Qualifications for Medical Experts

The Bill: A person claiming damages due to a medical injury must file a certificate of qualified expert for each defendant. A health care provider who attests in a certificate of qualified expert or testifies about the merits of a claim or defense as an expert witness may not devote more than 20% of the expert's professional activities to activities unrelated to the care or treatment of patients and that lead or could lead to testimony in personal injury claims.

Current Law: A person claiming damages due to a medical injury must file a certificate of qualified expert. Failure to file results in dismissal of the case, without prejudice. A health care provider who attests in a certificate of qualified expert or testifies about the merits of a claim or defense as an expert witness may not devote more than 20% of the expert's professional activities to activities that directly involve testimony in personal injury claims.

For actions filed on or after January 1, 2005, a health care provider who attests in a certificate of a qualified expert or testifies concerning a defendant's compliance with or departure from standards of care must: (1) have clinical experience, provided consultation relating to clinical practice, or taught medicine in the defendant's specialty or a related field or in the field of health care in which the defendant provided care or treatment, within five years of the alleged act or omission; and (2) be board certified in the same specialty if the defendant is board certified in a specialty, unless the defendant was providing care or treatment to the plaintiff unrelated to the area in which the defendant is board certified or the health care provider taught medicine in the same or similar field.

Collateral Source

The Bill: For causes of action arising on or after June 1, 2006, a defendant may introduce evidence that the claimant or plaintiff has been or will be paid, reimbursed, or indemnified by a government or through a governmental program, by insurance, or under contract for all or part of the damages assessed. If the defendant introduces such evidence, the claimant or plaintiff may introduce evidence of: (1) the cost to obtain the payment, reimbursement, or indemnity; or (2) that a person or governmental entity has a subrogation right, and the amount of the subrogated interest.

In an arbitration proceeding, the panel must consider the evidence and, if satisfied that it is supported by the evidence, reduce or modify the award. In a trial, the trier of fact must consider the evidence when deciding damages. If evidence is introduced, either party may move that the verdict be modified. The court must hold a hearing on a motion and, if satisfied that modification is supported by the evidence, modify the award. A defendant may not introduce evidence concerning any future expenses, costs, and losses unless specified criteria are satisfied. Unless expressly provided under the bill or federal law, a person may not recover from the claimant or plaintiff or assert a claim of subrogation against a defendant for any sum included in the modification.

Current Law: Generally, evidence that a claimant has received or will receive uncompensated care or services or that a plaintiff has been or will be paid, reimbursed, or indemnified by another source is not admissible. If the court finds that the damages are excessive, the court may then grant a new trial on damages or, if the plaintiff agrees, grant a remittitur.

Expert Witness Testimony on Damages

The Bill: For a claim or cause of action filed on or after June 1, 2006, on a motion of a party, the court must appoint a neutral expert witness to testify on the issue of a plaintiff's economic damages. The costs of a neutral expert witness must be paid by the moving party, unless otherwise agreed. The provision does not limit the authority of a court concerning a court's witness.

Current Law: A court may on its own motion, or the motion of a party, employ a neutral expert witness to testify on the issue of a plaintiff's future medical expenses and future loss of earnings. Unless otherwise agreed by the parties, the costs are divided by the parties.

Limits on Noneconomic Damages

The Bill: For a medical malpractice award or verdict for a cause of action arising on or after June 1, 2006, noneconomic damages are limited to \$500,000. This limitation applies in the aggregate to all claims for personal injury and wrongful death arising from the same medical injury regardless of the number of claims, plaintiffs, or defendants. If both a personal injury action and a wrongful death action with more than one claimant are filed, the damages would be apportioned among the two actions and the claimants if the jury awards an amount that exceeds the limit.

Current Law: For a medical malpractice award or verdict for a cause of action arising on or after January 1, 2005, noneconomic damages are limited to \$650,000. This limit is frozen for four years, through calendar 2008, and then increases by \$15,000 annually. Generally, this aggregate amount applies to all claims for personal injury and wrongful death arising from the same medical injury, regardless of the number of claims,

claimants, plaintiffs, beneficiaries, or defendants. However, if there is a wrongful death action in which there is more than one claimant or beneficiary, whether or not there is a personal injury action arising from the same injury, the total amount of noneconomic damages that may be awarded is 125% of the established limit, regardless of the number of claims, claimants, plaintiffs, beneficiaries, or defendants (\$812,500 for four years). If there is more than one claimant or beneficiary, noneconomic damages would be apportioned among them if the jury awards an amount that exceeds the limit.

Past Medical Expenses

The Bill: For a medical malpractice award or verdict for a cause of action arising on or after June 1, 2006, an award for past medical expenses must exclude any amount not actually paid by or on behalf of the claimant or plaintiff or any amount actually owed by the claimant or plaintiff to a health care provider.

Current Law: Past medical expenses are limited to the total amount paid plus the total amount incurred but not paid, if the plaintiff or another person on the plaintiff's behalf is obligated to pay.

Determination of Future Medical Expenses

The Bill: For medical malpractice claims arising after June 1, 2006, a verdict or award for future medical expenses must be based solely on Medicare reimbursement rates in effect on the date of the verdict for the locality in which the care is to be provided. A verdict or award for future medical expenses for hospital services must be based solely on rates approved by the Health Services Cost Review Commission, if the federal Medicare waiver is still in effect. A verdict or award for future medical expenses for nursing facility services must be based solely on the statewide average payment rate for the Medicaid program in effect on the date of the verdict or award. A verdict or award for future medical expenses for which there is no specified rate must be based on actual cost on the date of the verdict or award. All verdicts and awards for future medical expenses are adjusted for inflation based on the consumer price index published by the Bureau of Labor Statistics. The adjustment must be based on the average rate of inflation for the previous five years.

Current Law: Generally, economic damages include loss of earnings and medical expenses. These damages may be reduced by an arbitration panel, on application of a party. The application may include a request that damages be reduced to the extent that the claimant has been or will be paid, reimbursed, or indemnified for some or all of the damages assessed. If a defendant objects to the damages amounts as excessive after a trial, the court must hold a hearing.

Jury Size

The Bill: A civil jury must consist of at least six jurors.

Current Law: A civil jury must consist of six jurors.

Qualification for Expert Testimony Generally

The Bill: In a civil action, if a court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness determined by the court to be qualified as an expert by knowledge, skill, experience, training, or education may testify concerning the evidence or fact in issue in the form of an opinion or otherwise only if: (1) the testimony is based on sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has applied the principles and methods reliably to the facts of the case. If a court considers it necessary or on motion by a party, the court may hear evidence regarding these criteria. If the court does so, the court must hear the evidence out of the jury's presence.

Current Law: Under the Maryland Rules, expert testimony may be admitted in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making its determination, the court must determine: (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education; (2) the appropriateness of the expert testimony on the particular subject; and (3) whether a sufficient factual basis exists to support the expert testimony.

Expression of Regret or Apology

The Bill: For the purpose of any civil action or arbitration proceeding against a health care provider, an expression of regret or apology made by or on behalf of a healthcare provider to a victim of alleged health care malpractice, any member of the victim's family, or any individual who claims damages by or through that victim is inadmissible as an admission of liability or as evidence of an admission against interest. This is so regardless of whether the statement was made in writing, orally, or by conduct.

Current Law: In a proceeding brought under the provisions governing a health care malpractice action or a civil action against a health care provider, an apology or an expression of regret made by or on behalf of a health care provider is inadmissible as evidence of an admission of liability or as evidence of an admission against interest. An admission of liability or fault that is part of or in addition to an apology or expression of regret is admissible as evidence of an admission of liability or as evidence of an admission against interest.

Interest on a Judgment

The Bill: Generally, the legal rate of interest on a judgment is the rate of the weekly average one-year constant maturity treasury yield, as published by the Federal Reserve Board of Governors, for the calendar week preceding the date of the judgment.

Current Law: Generally, the legal rate of interest on a judgment is 10% on the amount of the judgment.

Task Force

The Bill: The bill establishes a task force staffed jointly by DHMH and MIA. The task force may study any aspect of the health care, insurance, or civil justice systems relating to health care malpractice liability, including specified issues. The task force is required to report its findings and recommendations to the Governor and the General Assembly on or before December 15, 2007.

Current Law: Chapter 5 of the 2004 Special Session established a task force to study and make recommendations regarding the feasibility and desirability of adopting a medical malpractice insurance market model identical or similar to the excess coverage fund in Kansas. The task force has not yet met, but was required to report its findings by October 1, 2005.

Additional Information

Prior Introductions: SB 221 and HB 301 of 2005, as well as SB 1 and HB 1 of the 2004 Special Session, included several of the provisions that are in this bill. SB 221 received an unfavorable report from the Judicial Proceedings Committee. HB 301 received an unfavorable report from the Judiciary Committee. SB 1 received an unfavorable report from the Senate Rules Committee. HB 1 received an unfavorable report from the House Rules and Executive Nominations Committee.

Cross File: HB 306 (The Speaker, *et al.*) (By Request – Administration) – Judiciary.

Information Source(s): Judiciary (Administrative Office of the Courts), Maryland Health Claims Alternative Dispute Resolution Office, Maryland Insurance Administration, Office of the Attorney General, Department of Legislative Services

Fiscal Note History: First Reader - February 28, 2006
ncs/jr

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