

Department of Legislative Services
Maryland General Assembly
2010 Session

FISCAL AND POLICY NOTE

House Bill 1166
Judiciary

(Delegate Elliott, *et al.*)

Health Care Malpractice - Awards and Judgments - Periodic Payments

This bill requires a portion of a health care malpractice award or judgment for the payment of noneconomic damages and future economic damages exceeding a specified amount to be paid in the form of one or more annuities that produce periodic payments. The bill applies to an award or verdict that includes noneconomic damages and future economic damages totaling more than \$250,000, except as otherwise specified.

The bill applies prospectively and may not be applied or interpreted to have any effect on or application to any cause of action arising before October 1, 2010.

Fiscal Summary

State Effect: The bill does not directly affect State finances or operations.

Local Effect: The bill does not directly affect local finances or operations.

Small Business Effect: Potential minimal.

Analysis

Bill Summary: If the total amount of noneconomic damages and future economic damages awarded for a health care malpractice cause of action exceeds \$250,000, an arbitration panel or a court must:

- order that the portion of the total noneconomic damages and future economic damages exceeding \$100,000 be paid periodically to the claimant or plaintiff in the form of one or more annuities; and

- enter the cost of each annuity as the amount of the portion of an award or judgment.

A defendant or the defendant's insurer may purchase an annuity that produces periodic payments for:

- the noneconomic damages awarded, divided by the remaining years in the life expectancy of the plaintiff or claimant as determined by the arbitration panel or trier of fact;
- the future medical expenses awarded, divided by the lesser of the number of years for which the plaintiff or claimant will need treatment or the remaining years in the claimant or plaintiff's life expectancy as determined by the arbitration panel or trier of fact; and
- the future loss of earnings awarded, divided by the lesser of the number of years the plaintiff or claimant will suffer future loss of earnings or the number of years in the future working life of the plaintiff or claimant as determined by the arbitration panel or trier of fact.

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

The term of periodic payments provided by an annuity must equal the number of years necessary to fund the claimant's or plaintiff's damages. The bill includes calculations for determining the annuity's term and does not require an insurer to purchase an annuity that provides payments beyond the coverage period. The defendant or the defendant's insurer must purchase the annuity from an insurer with a specified grade rating from at least two specified national rating organizations.

The arbitration panel or court must approve an annuity purchased by the defendant or the defendant's insurer if the annuity meets the requirements of the bill and, at all times, is fully secured by assets (1) held in a validly established separate account that may not be charged with liabilities; or (2) in which the claimant has a perfected security interest. The purchase of an approved annuity by a defendant or the defendant's insurer fully satisfies the award or verdict for the applicable portion of noneconomic damages and future economic damages.

Survival Action or Wrongful Death Action

In a survival action or a wrongful death action, the bill's provisions do not apply to the award of noneconomic damages and only apply to future economic damages if the future economic damages exceed \$250,000.

Current Law: An award or verdict for noneconomic damages is limited to \$650,000 for health care malpractice causes of action arising between January 1, 2005 and December 31, 2008, with annual increases of \$15,000 for each year beginning on January 1, 2009. The increased amount applies to causes of action arising between January 1 and December 31 of that year, inclusive. 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, claimants, plaintiffs, beneficiaries, or defendants. In a wrongful death action with two or more claimants or beneficiaries, whether or not there is a personal injury action arising from the same injury, the total noneconomic damage award may not exceed 125% of the statutory limitation for health care malpractice claims, regardless of the number of claims, claimants, plaintiffs, beneficiaries, or defendants.

As part of the verdict in any action for damages for personal injury or for wrongful death, the trier of fact must itemize the award to reflect the monetary amount intended for past medical expenses, future medical expenses, past loss of earnings, future loss of earnings, noneconomic damages, and other damages. The court or the health claims arbitration panel may order that all or part of the future economic damages portion of the award be paid in the form of annuities, other appropriate financial instruments, periodic payments, or other payments consistent with the plaintiff's needs. The future economic damages award must be fully funded by the defendant or the defendant's insurer.

If the court or panel orders the award for future economic damages to be paid in a form other than a lump sum payment, the defendant or the defendant's insurer must provide adequate security for the payment of all future economic damages. A conservator may be appointed by the court or panel who has the 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, on the other hand, 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.

The *2008 Report on the Availability and Affordability of Health Care Medical Professional Liability Insurance in Maryland* issued by the Maryland Insurance Administration in September 2008 stated that medical professional liability insurance remains available in Maryland and is more affordable for physicians today than it was in 2004.

Three 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 (Court) 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 March 2010, the Court will hear arguments on the constitutionality of an award limit on noneconomic damages in a general liability case in *Freed v. D.R.D. Pool Service, Inc.*

Additional Information

Prior Introductions: None.

Cross File: None.

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

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Analysis by: Jason F. Weintraub

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