

Department of Legislative Services
Maryland General Assembly
2020 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 187 (Senator West)
Judicial Proceedings

Civil Actions - Health Care Malpractice Claims (Life Care Act)

This bill, for health care malpractice claims, establishes (1) requirements related to expert witness testimony and (2) limits on plaintiff's attorney's fees in certain actions involving contingency fees. In doing so, the bill codifies Federal Rule of Evidence 702, which uses the *Daubert* standard in determining reliability for expert testimony.

Fiscal Summary

State Effect: The bill is not anticipated to materially affect State finances or operations.

Local Effect: The bill is not anticipated to affect local government finances or operations.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary:

Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise only if (1) the expert's scientific, technical, or other specialized knowledge will help the trier of fact understand the evidence or determine a fact in issue; (2) the testimony is based on sufficient facts or data; (3) the testimony is the product of reliable principles and methods; and (4) the expert has reliably applied the principles and methods to the facts of the case.

Further, if a witness is retained or specially employed to provide expert testimony on the issue of future medical services, the witness must have expertise in the specific medical services required by the plaintiff.

Contingency Fees

In any action brought under the Health Care Malpractice Claims subtitle involving a contingency fee, the bill specifies that (1) the injured plaintiff must receive a least 70% of the first \$250,000 awarded and 90% of future economic damages; (2) the plaintiff's attorney must receive payment for court costs and witness fees; and (3) the injured plaintiff may not waive contingency fee limits.

Current Law/Background:

Maryland Rule 5-702 (Rule of Evidence)

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 that 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.

Federal Rule 702 (Rule of Evidence)

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if (1) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (2) the testimony is based on sufficient facts or data; (3) the testimony is the product of reliable principles and methods; and (4) the expert has reliably applied the principles and methods to the facts of the case.

Daubert Standard

The *Daubert* standard is used by a trial judge to assess whether an expert witness's scientific testimony is based on scientifically valid reasoning that can properly be applied to the facts at issue. This standard comes from the Supreme Court case, *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993).

Under the *Daubert* standard, the factors that may be considered in determining whether the methodology is reliable under Federal Rule of Evidence 702 are (1) whether the theory or technique in question can be and has been tested; (2) whether it has been subjected to peer

review and publication; (3) its known or potential error rate; (4) the existence and maintenance of standards controlling its operation; and (5) whether it has attracted widespread acceptance within a relevant scientific community.

In the federal court system, the *Daubert* standard replaced the *Frye-Reed* standard, which is still used in some states.

Maryland Frye-Reed Standard

The *Frye-Reed* standard of general acceptance is still nominally used in Maryland. However, the Maryland Court of Appeals has described itself as “drifting” toward *Daubert*. Also, the 66-page opinion in *Sissoko v. State*, 182 A.3d 874 (Md. Ct. Spec. App. 2018) explains the evolution of *Frye-Reed* law, compares the *Frye-Reed* standard to Maryland Rule 5-702(3), and applies a type of *Daubert* analysis. Thus, Maryland is already close to using the *Daubert* standard.

Small Business Effect: Future economic damages can be fairly large depending on the type of case. With the advent of the federal Patient Protection and Affordable Care Act (ACA), certain defense attorneys are arguing that claims of future medical damages should be reduced. Thus, depending on the future of the ACA, the requirement that almost all of the future economic damages should go to the plaintiff could be meaningful to law firms.

Additional Information

Prior Introductions: SB 784 of 2019, a bill containing a similar provision, received a hearing in the Senate Judicial Proceedings Committee, but no further action was taken. Its cross file, HB 1323 of 2019, received a hearing in the House Judiciary Committee, but no further action was taken.

Designated Cross File: None.

Information Source(s): Judiciary (Administrative Office of the Courts); Maryland Health Care Alternative Dispute Resolution Office; Department of Legislative Services

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