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when minutes count

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Journalists Examine Current State of Federal Medical Malpractice Reform

In an article published April 3, the ***Washington Post*** examined the status of medical malpractice legislation. The reporters (Jeffrey H. Birnbaum and John F. Harris) noted that, despite President Bush's previous campaigning for medical malpractice reform, he "rarely mentions" the issue in speeches during his second term. Following his reelection, Bush said that, to help spur the U.S. economy, he would make changes to the medical malpractice system a priority. Then, in his State of the Union address on February 2, Bush said he considered limiting medical malpractice lawsuits an important goal for his second term. The Administration's campaign included three primary ideas: capping noneconomic damages in medical malpractice cases at $250,000; restricting the scope of class-action lawsuits; and limiting lawsuits against makers and sellers of asbestos-filled products.

According to the ***Post***, however, Bush's call has proven ineffective at changing the "legislative arithmetic for the idea." Last year, the Senate voted on several variations of the proposal but never reached enough votes to approve the measures. This session, four additional Republican vote in the Senate, but as lawmakers and lobbyists close to the issue have said any bill "that fits the president's preferences" still does not have enough support. While the House is likely to pass a medical malpractice bill, Senate Democrats have vowed to block such a measure by using a filibuster. With Republicans holding 55 seats in the Senate and some of those Republicans not supporting the measure, the 60 votes needed to stop a filibuster are not there.

In commenting to the ***Post***, a White House spokesperson said that medical malpractice legislation "is one of the top priorities for the president; he campaigned vigorously on it. He is going to push very hard." Yet, Senate Majority Leader Bill Frist (R-TN), who supports the proposal, has "tacitly acknowledged" that the legislation might require changes to succeed. Frist recently said he would consider "all kinds of options" to change the original bill, including a higher limit on damages. He also urged Democrats to "come to the table." The ***Post*** indicated that the Senate has no imminent plans to act on the bill, even though a spokesperson for Frist said, "The majority leader clearly feels this is a crisis, affecting both the cost and access to health care." The spokesperson added that, in their efforts to work with Democrats to strike a compromise, "We have not found the mother lode, but we are finding some areas of common ground." Implying a less promising picture, a spokesperson for Senate Minority Leader Harry Reid (D-NV), who opposes the President's proposal, said, "I would respectfully suggest that [Republicans] don't want a deal on this issue."

Another article, this one published on April 5 in the ***Los Angeles Times***, explored the other reform proposals being considered as a result of the current stalemate. The reporters (Alonso/Zaldivar) stated, "President Bush's decision to put malpractice reform near the top of his domestic agenda" and the "fact that Congress is deadlocked over Bush's specific proposal" for a $250,000 cap on noneconomic damage awards have "opened the door for consideration" of other reform proposals. **(Cont'd page 2)**

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CBO Releases Table Outlining Cost of Changing Medicare Physician Payment Formula

According to a new table of estimates recently released by the Congressional Budget Office (CBO), current proposals to change the Medicare physician payment methodology would cost as much as $154.5 billion over 10 years. This estimate reflects the cost of replacing the sustainable growth rate (SGR) methodology with an update that accounts for increases in the cost of providing care (the Medicare Economic Index, or "MEI"). This option is similar to one supported by the Medicare Payment Advisory Commission. Freezing payment rates at CY 2005 levels would cost $48.6 billion over ten years.

A two-year extension of the physician payment provisions in the ***Medicare Modernization Act***, which sets the CY 2004 and CY 2005 updates at 1.5%, would require $20.8 billion in additional spending over five years. However, the temporary increase would not eliminate the SGR methodology, which produces negative updates to compensate for spending that exceeds annual targets. The table shows that the ten-year cost of the two-year extension would be $1.7 billion due to significant payment reductions in CYs 2011 through 2015.

Another proposal to retrospectively and prospectively remove physician-administered drugs from the SGR calculation is estimated to cost $114.2 billion over ten years.

Journalists Examine Federal Medical Malpractice Reform (Cont'd from page 1)

According to the ***Times***, a growing number of health care providers and patient advocacy groups are calling for reforms that would encourage hospitals and doctors to voluntarily disclose medical mistakes, provide appropriate compensation and apologies to those who have been harmed, and eliminate "some of the emotional pain and rancor that are part of the present system." One option would replace the present system with new courts in which judges with medical expertise would hear cases and determine awards based on uniform payment guidelines. Advocates have said this system would expedite the process, bring greater equity to malpractice payouts, and reduce anger that sometimes motivates plaintiffs in such cases. The ***Times*** noted, however, that "finding judges with the requisite medical background and setting up processes for handling cases could take several years."

As another alternative, the University of Michigan Health System (UMHS) is trying a system of arbitration in which health care providers admit errors up front, express apologies, and negotiate settlements with patients and families. Since UMHS adopted these reforms to its system in 2002, the number of malpractice cases has been reduced by more than 50%, the average time it takes to close a case has fallen from more than three years to less than one, and legal costs have been cut in half. The ***Times*** added that payouts have not declined, in part because some cases that predated the rule changes have been settled since the changes took effect.

The ***Times*** article included reactions to alternative reform proposals. JCAHO President Dennis O'Leary said, "There is so much noise around the heated debate over caps that people are not looking beyond their noses to the broader picture." He added that with Bush's cap proposal moving slowly, "there is a willingness to see how . . . other ideas might work around the country. I see a period of experimentation." Harvard University Associate Professor of Law and Public Health David Studdert said, "Caps are sort of a Band-Aid approach. They do absolutely nothing about the problem of medical errors and making health care safer." Studdert added, "There are a lot of preventable deaths, and the malpractice system ought to be contributing something to reducing medical errors."

AHRQ Launches Patient Safety Findings and Resources Web Site

On April 12, the Agency for Healthcare Research and Quality (AHRQ) announced a new Web site, Patient Safety Network, or **PSNet**, as a national "one-stop" portal of resources for improving patient safety and preventing medical errors. **PSNet** is the first comprehensive effort to help health care providers, administrators, and consumers learn about all aspects of patient safety.

The site provides a wide variety of information on patient safety resources, tools, conferences, and more. **PSNet** users can customize the site around their unique interests and needs by creating a "My PSNet" page. For instance, a pharmacist interested in how bar coding can help prevent medication errors will be able to set up the site to automatically collect the latest articles, news, and conferences on this topic. Similarly, physicians, nurses, hospital administrators, and others can customize and search the site to best meet their needs.

In addition, weekly **PSNet** updates are available to subscribers on patient safety findings, literature, tools, and conferences, as well as a carefully annotated collection of sentinel patient safety journal articles in a "Classics" section. The site was developed by the same team of researchers at the University of California, San Francisco, that developed AHRQ's popular ***WebM&M*** online patient safety journal, which will now be accessible on **PSNet**.

The States: Medical Malpractice Update

Alaska Senate Approves Cap Bill

The **Alaska** Senate on April 12 voted 12-8 to approve a bill (SB 67) that would reduce the state cap on noneconomic damages in malpractice lawsuits to $250,000 per plaintiff. The legislation now moves to the House for consideration.

AZ Limits Who Can Testify Against Doctors

On April 25, Governor Janet Napolitano (D) signed legislation – S.B.1036 – limiting those who can testify against doctors in medical malpractice claims. The bill requires that experts be either practicing or instructing in the same area of medicine as the individual being sued. **If a defendant is "board certified" in a specialty, the witnesses must also be certified by the same board.** A provision of the new law will enable health care providers to offer apologies, sympathy, commiseration, and compassion to patients without fear that the providers' statements could be used against them in a malpractice action.

Bill Moves Forward in Connecticut

The state Joint Judiciary Committee on April 15 approved a bill that would require individuals who plan to file malpractice lawsuits to first obtain an expert medical opinion in support of the complaint. The legislation also would reduce from 12% to 8% the interest rate on malpractice settlements paid over time and would take "other steps to reduce risks and costs for medical professionals." A spokesperson for Governor Jodi Rell (R) said that the governor would review the bill before she takes a position. Rell in February cited medical liability reform as one of her priorities for the current state legislative session.

FL Bills Aimed at November Referendum

Several bills under consideration in the state legislature would limit the scope and impact of amendments related to malpractice that voters approved last November. **Florida** voters passed Amendment 7, which will allow patients to examine records of medical errors committed by physicians in medical facilities, and Amendment 8, which will allow the revocation of the licenses of physicians who lose three malpractice lawsuits. The **Florida** Medical Association has raised concerns that Amendment 7 could prompt physicians not to practice in **Florida** and affect the peer-review process. In response to requests from FMA, state House members have proposed a bill that would limit which patients can examine records of medical errors under Amendment 7. In addition, members of the state House and Senate have proposed legislation to allow a Board of Medicine led by physicians to decide which malpractice lawsuits qualify as "strikes" under

Amendment 8, rather than a "blanket repeal of the medical license after a judge or jury finds the doctor guilty three times."

Maryland House Committee Approves Malpractice Bill

On March 25, the **Maryland** House Judiciary Committee voted to approve a malpractice bill. The bill would require a court to appoint a neutral expert witness to help determine economic damages in malpractice lawsuits, although the state medical board could not hold the witness accountable; and, would require the state insurance commissioner to reject requested premium rate increases from health insurers with surpluses that exceed a certain level. The bill also would require patients to file malpractice lawsuits in the same county in which the alleged malpractice occurred and would not allow plaintiffs to use physician apologies as evidence in malpractice lawsuits.

Several Bills Signed in Montana

During the last week in March, **Montana** Governor Brian Schweitzer (R) signed into law four medical malpractice bills – HB 24, HB 25, HB 26, and HB 64. The **Montana** Medical Association drafted three of the new laws and the other law was drafted by **Montana** hospitals. One measure states that physicians cannot be sued for apologizing or expressing sympathy, sorrow or condolence for the suffering or death of a patient, while another bars patients from bringing claims against doctors for medical mistakes made by someone that they were not directly supervising or working with, such as a pharmacist who dispenses the wrong medication. A third bill establishes criteria for determining who can be qualified as an expert witness to testify about standards of medical care in a malpractice lawsuit. The final bill prohibits hospitals from being sued for the actions of independent contractors, such as doctors or other health care providers, who are not employed directly by the hospital. The state legislature is still considering five other malpractice-related bills.

NH House Approves Bill Aimed at Medical Malpractice Rates

Late last month, the **New Hampshire** House of Representatives overwhelmingly sided with the trial lawyers over the medical lobby in fashioning legislation aimed at controlling the future cost of medical malpractice insurance rates. The **New Hampshire** Trial Lawyers supported a last minute compromise to HB 702 that would bring every suit to a screening judge. This judge would have subpoena power and the power to decide if the injury makes the doctor liable or if the case is merely an "unfortunate medical result" even though the judge's finding could not be admissible at trial. Under the compromise, the two parties would have to meet with a mediator in hopes of reaching an out-of-court settlement within 45 days of the screening judge's recommendation.

The **New Hampshire** Medical Society has been pushing for legislation (SB 214), similar to a law adopted in Maine, where a three-member panel's recommendation has to be introduced to the jury at a trial. The Medical Society says the mandatory screening panel helped cut malpractice insurance costs in Maine by more than 30%.

Several critics of the bill contended that using existing judges will only clog up Superior Court caseloads, and that mediation has done little to resolve malpractice disputes. The bill now goes to the **New Hampshire** Senate for consideration.

SC Governor Signs Reform Bill

Noneconomic damages in medical malpractice cases will be capped at $350,000 per claimant under S.83, a medical malpractice reform bill signed into law April 4 by **South Carolina** Gov. Mark Sanford (R). The bill also caps noneconomic damages in multi-defendant medical malpractice lawsuits at $1.05 million, and parties in medical malpractice cases are required to mediate no later than 120 days after a notice of intent to file suit is served.

S.83 **contains protections for hospital emergency room providers, who cannot be held liable for medical malpractice unless it is proven that the physician was grossly negligent**. Similarly, obstetricians who render care on an emergency basis, when there is no previous doctor/patient relationship between the obstetrician and the patient or between the patient and the physician's practice, will not be held liable unless it can be proven that the obstetrician was grossly negligent.