

Senators Agree to Reintroduce Medical Malpractice Bill

Senators Judd Gregg (R-N.H) and John Ensign (R-NV) will partner again this year to sponsor legislation that would place a \$250,000 cap on non-economic damages awards against obstetricians and gynecologists and limit attorneys' fees. In an attempt to force Democrats to make repeated votes against malpractice limits, Senate GOP leaders last year held cloture votes on legislation to cap judgments against emergency and trauma center personnel as well as obstetricians and gynecologists. Democrats blocked those efforts, just as they had a comprehensive bill that would have capped non-economic damages on all doctors at \$250,000. Senator Gregg indicated that the Senate would split up the medical malpractice measures again this year, starting off with OB-GYNs.

Gregg, who recently chaired the Committee on Health, Education, Labor and Pensions Committee, is now Chairman of the Senate Budget Committee, but still plans to be very active in health care matters. He has indicated that he hopes to offer a "comprehensive" package on the uninsured this year, as well as find ways to make sure that the new Medicare drug bill stays within its projected cost of \$400 billion.

President Outlines Renewed Drive for Malpractice Reform

President Bush opened a new drive for caps on medical malpractice awards, contending the limits would lower health care costs. Opponents said such ceilings would merely shield doctors and others who provide poor health care. "I believe the voters made their position clear on Election Day on medical liability reform," Bush said, citing his reelection as evidence of support for a proposal that has passed the House but failed in the Senate. The President's framework for addressing the medical liability crisis includes:

- Securing the ability of injured patients to get quick, unlimited compensation for their "economic losses," including the loss of ability to provide unpaid services like care for children or parents;
- Ensuring recoveries for non-economic damages do not exceed a reasonable amount (\$250,000);
- Reserving punitive damages for egregious cases where they are justified, and limiting damages to reasonable amounts;
- Providing for payments of judgments over time rather than in a single lump sum, to ensure that appropriate payments are made when patients need them;
- Ensuring that old cases cannot be brought to court years after an event; and
- Providing that defendants pay judgments in proportion to their fault.

Advocates of changing the rules on lawsuits say they believe public opinion is cresting in their favor, as evidenced by moves in numerous state legislatures to limit malpractice damages. In recent interviews, however, several supporters acknowledged that the congressional arithmetic may not have changed as much as they had hoped after the November elections. Lisa A. Rickard, President of the U.S. Chamber Institute for Legal Reform, said: "It's more challenging at the

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President Outlines Renewed Drive for Malpractice Reform (cont'd)

federal level in particular, because you are dealing with caps on damages, and that's a tough issue in the Senate." The House has routinely passed legislation limiting lawsuits. But the problematic arithmetic of the Senate – where backers of Bush's agenda on lawsuits have often shown they can win a majority, but not the 60 votes needed to end debate and push legislation to passage – sets up an important test of a second-term influence and governing strategy.

For the next several months, the debate promises to be a high-profile battle of anecdotes, with both sides laboring to put a compelling human face on a policy clash in which the main contestants – trial lawyers on the Democratic side, and HMOs, pharmaceutical companies and other big businesses on the Republican side -- often do not have an easy claim on public sympathy.

In the case of rising malpractice insurance rates, most Democrats acknowledge there is a problem, but one that can be addressed with more limited changes. Bush's proposals, the trial lawyers and consumer groups maintain, would do little to address the problem they say is largely caused by profiteering insurance companies.

Other proposals face better prospects, but they would require compromises of the sort that Bush and the GOP last year were unwilling to make to win Democrats. In this category is a significant revision of laws for class-action lawsuits. A GOP proposal would push more of these cases out of state courts and into the federal system, which defendants typically prefer because historically it has higher thresholds for bringing suits and smaller damage awards. Even though

many Democratic senators support this concept, a bill died last year when Senate leaders were unwilling to consider amendments.

Supporters and opponents of medical malpractice reform believe individual state battles could be rendered moot with the increasing likelihood that a far-reaching federal measure will pass instead. The first steps toward that outcome began earlier this month, when President Bush called on Congress to pass a law imposing limits on medical-malpractice lawsuits to help combat skyrocketing insurance rates he said are driving physicians out of medicine. However, the jury is out about how effective existing state laws have been. For example, Texas malpractice legislation passed in 2003, and the Texas Medical Association says the law encouraged the state's largest medical-liability insurer – Texas Medical Liability Trust – to slash liability rates by 17%. But the Foundation for Taxpayer and Consumer Rights says damage awards caps have not prevented other insurers in Texas from raising malpractice rates by nearly 20%.

According to legal experts on both sides of the issue, the medical malpractice bill backed by President Bush would prevent consumers from seeking punitive damages from the makers of Vioxx and Celebrex, two popular pain medications recently linked to increased risks of heart attacks and strokes. While the President promotes the medical malpractice proposals as a prudent way to stop frivolous lawsuits against doctors, the bill's less-discussed liability protections for pharmaceutical companies such as Merck & Co., the manufacturer of Vioxx, is generating much controversy in the policy arena.

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MedPAC Recommends Increase for Physicians in 2006

In a move estimated to cost \$5 to \$10 billion over five years, the Medicare Payment Advisory Commission (MedPAC) recommended on January 12, 2005, that Congress increase physician Medicare reimbursements by 2.7% for 2006. Taking into account expected Medicare physician pay reductions forecast for 2006-2012 under the sustainable growth rate formula (SGR), Cristina Boccuti, a MedPAC staff analyst, told the commissioners that any positive update would score as a large spending increase. The 2.7% hike, which was revealed in draft form in December and will be in the commissioners' March report to lawmakers, would maintain beneficiaries' access to physicians.

Despite the recommendation, the annual physician update is controlled by the SGR, an annual target intended to control the growth in expenditures for physicians' services. Under the formula, when spending for physician services exceed the SGR, payments must be reduced to compensate for the extra spending. Unless Congress intervenes this year, physicians will receive an approximate 5% reduction in reimbursements in 2006.

In addition to physician reimbursement, the commissioners approved six other recommendations intended to encourage more appropriate use of physician services and improve the quality of care. Two of these deal with the "Stark Law" that prohibits physicians from referring Medicare/Medicaid patients for certain services to providers with which the physicians have financial relationships. However, facilities that offer nuclear medicine, including PET scans, are not included under this law.

Other recommendations focused on the rapidly growing volume of imaging services as part of a broader measurement initiative. According to MedPAC staff, studies have shown that more imaging is not associated with improved survival in patients with heart attack, colon cancer, and hip fracture.

Of particular interest to AAEM members, the commissioners recommended that Congress direct the Secretary of Health and Human Services (HHS) to use Medicare claims data to measure fee-for-service physician resource use and share the results with physicians confidentially to educate them about how they compare with aggregated peer performance. MedPAC believes that physician education through profiling will result in decreased utilization of imaging services over time.

The commissioners also recommended that Congress direct the HHS Secretary to set standards for all providers who bill Medicare for performing diagnostic imaging services. While the committee did not dictate the content of such standards, the discussion focused on equipment, credentials of non-physician staff such as technicians, image quality, supervising physicians, and patient safety.

Recommendations also addressed standards for physicians who bill Medicare for interpreting diagnostic imaging studies. These standards are likely to address physician training, education, and experience. Commissioners did express support for standard setting by specialty certification boards.

Clarification was provided by MedPAC staff on teleradiology – the practice of some facilities (specifically EDs) to transmit radiologic images on off hours to a remote site (frequently overseas) for a "wet reading." They reiterated that reimbursement from Medicare for these services was applicable only to approved Medicare providers for services that are provided within the United States.

More information on the January meeting including transcripts of the presentations is available at www.medpac.gov/public_meetings/index.cfm?meeting_id=112.

Senate Confirms Leavitt as HHS Secretary

The Senate confirmed Michael Leavitt's nomination for HHS Secretary earlier this week by voice vote. Currently the Administrator of the Environmental Protection Agency, Leavitt replaces Tommy Thompson. Despite some concerns among Democrats about his stand on Medicaid reform, his nomination process went smoothly. As a former governor of Utah, he secured the first waiver from HHS allowing a state to finance an expansion of its Medicaid roll by cutting benefits to other enrollees. As HHS Secretary, Leavitt will oversee an agency with a budget of nearly \$550 billion and 67,000 employees.

Legislation Introduced to Fund California Trauma Care

On January 13, 2005, California State Senator Richard Alarcon (D-Sun Valley) introduced legislation to raise about \$100 million annually to stem the tide of trauma center and emergency room closures. Alarcon lost his 3-year-old son in 1987, when he was injured in a traffic accident. Because there was no pediatric trauma center in the East San Fernando Valley area where the accident occurred, the boy was airlifted to Children's Hospital Los Angeles. He died a day later.

Since then, Alarcon said, the situation has worsened, with six emergency rooms closing in the last 14 months in Los Angeles County. Senator Alarcon's bill, SB 57, would increase the penalties for some criminal offenses and traffic violations by up to \$40 on a \$320 fine. Penalties would be higher for crimes that often result in injuries requiring trauma care, including domestic violence. About \$15 million of the \$100 million raised would be earmarked for pediatric trauma care centers.

The States: Medical Malpractice Update

✓ MD Assembly Overrides Governor's Veto

On the final day of a rare emergency session, the **Maryland** General Assembly overrode Governor Robert Ehrlich's (R) veto of legislation designed to curb doctors' soaring medical malpractice insurance rates. Ehrlich faulted the legislation for including a tax on HMO premiums that he is convinced would be passed along to consumers and for doing too little to curb payouts in court cases. The Democrat-backed measure provides immediate relief to **Maryland** doctors and includes long-term initiatives aimed at limiting the cost of malpractice litigation. The **Maryland** State Medical Society and the Maryland Hospital Association urged Ehrlich to let the Democrats' bill become law.

✓ NJ Bar Association Files Suit Over Fee to Offset Cost of Malpractice Premiums

The **New Jersey** State Bar Association filed suit against the state over a new fee that attorneys must pay to help offset the increased cost of malpractice insurance premiums for health care providers. The \$75 annual fee, which will continue for the next three years, was established under the **Medical Care Access and Responsibility and Patients First Act**, which became law in June. The fee – which attorneys, physicians, and certain other professionals must pay – will raise an estimated \$78.3 million over three years. The lawsuit argues that the fee violates the right of attorneys to due

process, and that the state cannot require attorneys to pay the fee because the Legislature "made no specific finding about attorneys' contributions to the purported fault in the system." Arguments in the case will begin on February 14.

✓ GA Panel Weighs Malpractice Issue

On January 24, 2005, the **Georgia** Senate Judiciary Committee heard testimony on a proposed bill – Senate Bill 3 – that would cap non-economic jury awards at \$250,000, or \$750,000 if multiple defendants in a medical malpractice suit are found liable. Senator Preston Smith (R-Rome), Chairman of the Judiciary Committee, sponsored the bill.

For the past several years, tort reform has been one of the most divisive issues among state lawmakers. Last year, the issue pitted Republicans against Democrats, led to infighting within each party, and caused the House Judiciary Committee chairman to lose his post. With Republicans controlling both houses of the Legislature, a chance exists this year of some tort-reform measures becoming law.

Several speakers warned that rising premiums for malpractice insurance are forcing medical providers to quit. Senator Seth Harp (R-Midland), expressed approval of some parts of the bill but said he didn't like a section that, with a few exceptions, would exempt hospital emergency departments and emergency physicians from non-economic damages.