Public Policy Position

Medical Malpractice Reform

ISSUE

In line with the overall tort system, the purpose of medical malpractice liability is to compensate patients who suffer an injury as a result of medical negligence. However, an effective tort system must balance appropriate compensation of victims with the need to prevent an unintended disincentive toward reasonable behavior which can have the effect of reducing the availability of quality care.

BACKGROUND

Patients are entitled to compensation from providers who fail to provide a reasonable standard of care, and as a result, cause a patient to suffer an injury. This is a basic tenant of tort law, which is a cornerstone of the American legal system. The purpose of the American legal system, however, is to appropriately compensate victims while protecting and encouraging desirable acts that produce goods and services demanded by others.

Data suggest the medical malpractice system falls short of capturing legitimate cases and delivering compensation to victims. A seminal study conducted in 1990 found that fewer than two percent of patients identified as victims of medical malpractice filed claims. Six percent of injured patients who had not been victims of negligence also filed claims. In the end, only one percent of victims of medical malpractice receive compensation.\(^1\)

Medical malpractice litigation is also expensive. Since 1950, tort cost growth has exceeded that of gross domestic product by an average of roughly two percentage points and the escalation of medical malpractice litigation costs has outpaced the increase in overall U.S. tort costs.\(^2\)

Research shows the medical malpractice system induces undesirable practice patterns that results in increased cost and reduced access to care. Liability concerns have, and will continue to have, negative impact on access to care. For example, in Florida 83 percent of radiologists do not read mammograms and the top reason (24.6 percent) for not doing so was liability. Of the respondents who provide obstetric care, only 40 percent indicated that they deliver babies. Of the same population, 13 percent plan to discontinue obstetric care in the next two years, more than 90 percent of whom are under 65. Overall, the Florida Department of Health reports that 13 percent of physicians in the state planned to retire or reduce the scope of their practice in the next five years and the primary reason given (by 27.4 percent of the respondents) was liability.\(^3\)

To protect themselves against potential liability, physicians commonly practice defensive medicine – ordering more tests and procedures than necessary to protect themselves from
Public Policy Position

Medical Malpractice Reform

litigation. A survey of over 2,400 physicians in 2009 found that 91 percent of physicians across specialty lines practice defensive medicine. These findings are consistent with those of several previous studies. Although it is clear that defensive medicine adds costs to the system, it is difficult to precisely calculate the amount. Estimates of annual additional cost due to defensive medicine range from $55.6 billion to $210 billion. The Dartmouth Atlas Project reports that differences in the malpractice environment explain 10 percent of variations in medical spending. Physician groups argue strongly for the need for medical malpractice reform, and have long advocated limits to non-economic damages. And though the monetary impacts are difficult to quantify, the evidence does seem clear that the medical malpractice environment impacts the supply of physicians and the hours worked by physicians, even more so in certain specialties.

Civil lawyers, and to a slightly lesser degree consumer groups, argue that restricting medical malpractice lawsuits or putting caps on damage awards keep victims from receiving the compensation due them in cases of negligence. They also argue that it impacts patient safety and that “defensive medicine” measures improve patient outcomes.

There have been various attempts to address the issue of medical malpractice in Florida. Florida law limits recovery of noneconomic damages and joint and several liability. Noneconomic damages are nonfinancial losses as a consequence of the injury giving rise to the cause of action (e.g. pain and suffering, physical impairment, mental anguish, etc.). These types of damages are limited to $500,000 per practitioner ($1 million overall) and $750,000 per non-practitioner ($1.5 million overall). Joint and several liability is a legal concept where each of the parties who are responsible for an injury is liable for the total amount of damages awarded in a lawsuit if the other parties responsible cannot pay. Florida law bars the application of joint and several liability in medical malpractice cases. On the other hand, Florida voters passed a constitutional amendment in 2004 that forbid licensure of any medical doctor that had three incidents of medical malpractice. These provisions likely motivate physicians to practice defensive medicine in order to decrease the probability of lawsuits and, ultimately, the revocation of their license to practice medicine.

Many states have made efforts to reform their medical liability systems, with varying degrees of success. Most recently, however, Texas has seen dramatic improvements in both cost and access to health care since implementation of sweeping reform measures in 2003, in conjunction with a voter-approved amendment that precluded constitutional challenges to monetary damage limits. In the case of Texas, medical malpractice reform measures included: 1) limits on non-economic damages of $250,000 from individuals and $250,000 from any one hospital or institution, 2) limits on punitive damages and wrongful death damages, 3) a requirement that after a claim of malpractice has been filed,
Public Policy Position

**Medical Malpractice Reform**

expert testimony must provide reports addressing the issues of liability and causation, and 4) empowering counties to set up alternative dispute resolution systems.

The effects of these measures were almost immediate. In the four years immediately after passage of the reforms malpractice insurance rates dropped an average of 21.3 percent. The number of new physicians licensed by the Texas Medical Board increased 29.6 percent compared to the previous four year period and this increase was spread across geographic areas including those that had been facing significant shortages. Analysis and studies by both the Rand Corporation and The Perryman Group have also shown that non-economic damage caps were associated with a smaller number of uninsured in both Texas and in other states.

Other options for addressing the issue of tort reform include various proposals for alternative methods for resolving issues of medical malpractice and addressing concerns about inordinately high jury awards for non-economic damages. One such idea that has generated a good deal of interest is the idea of health courts. In concept, this would be similar to special courts already being used for worker’s compensation, tax and patent disputes and other areas where the complexity of the subject matter really requires expertise to best resolve disputes. Health courts would have a presiding judge who would have a medical or health care background and who rely on a neutral set of experts to advise on such things as prevailing standards of care. The thinking is that by providing a forum to incorporate special expertise in the topic that 1) matters of medical fact can be more clearly determined, 2) damage awards are more likely to be based on consistent guidelines than in a jury trial and 3) it would also help resolve issues of court overcrowding.

**PUBLIC POLICY POSITION**

Florida Blue supports a tort liability system that provides an avenue of pursuit for legitimate liability claims while allowing for appropriate access to efficient, quality health care. As such, Florida Blue supports medical malpractice tort reform that would include such critical components as:

- Limits on non-economic damages that brings Florida in line with other states that have seen success as a result of medical malpractice tort reform efforts (e.g. Texas, which has caps on non-economic damages of $250,000/$500,000).
- Enhanced standards for expert witnesses, requiring them to be board-certified and actively practicing in the field,
Public Policy Position

Medical Malpractice Reform

- Strengthening of the rules of evidence, requiring “clear and convincing” evidence of negligence instead of “greater weight of the evidence” that is now required,\(^\text{1}\)
- Provisions that appropriately reduce the liability burden of emergency room physicians and physicians that treat Medicaid patients and provide free care where there are adequate resources to pay potential liability claims and result in increased access to care for these populations.
- Use of health courts, to be the first step in deciding issues of medical negligence. These courts would have judges with expertise in health care and would rely on objective criteria in determining standards of care, negligence and compensation.

We would also support the additional measures listed below:
- More substantial sanctions for frivolous and unfounded litigation, which are enforced,
- Repeal the ‘three strikes’ provision that forbids the licensure of medical doctors who have three or more medical malpractice incidents.

Any type of reform must be complemented by a continued focus on reducing medical errors and ensuring high levels of health care quality. Continued cooperation and participation in quality programs and initiatives in existing organizations such as the National Committee for Quality Assurance (NCQA) and other initiatives to improve health care quality, must be part of that effort. We also support the Florida Board of Medicine in its role to take steps to address negligent behavior, and to require appropriate remedial education under such conditions. And we support the ability of individuals to pursue legitimate claims through the court system, as a way both of holding the health care system accountable and compensating victims of legitimate negligence.

REFERENCES

External References

Medical Malpractice Reform

7 http://www.abanet.org/legalservices/findlegalhelp/faq_legaltrends.cfm#1 accessed December 10, 2010
8 2006 Fla. Stat. 768.81 (3)
9 Florida State Constitution, Article X, s. 26 and Fla. Stat 456.50
11 A number of states have had damage caps declared unconstitutional. Texas passed a state constitutional amendment authorizing the limitation of noneconomic damages to provide a state constitutional challenge. The Florida Constitution has no such provision; however, the statutory limits referred to in this document are effective.