

LIABILITY REFORM IN 2005:

How individual states are addressing the issues

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The first six months of 2005 defied predictions on passage of state medical liability reforms, with six states passing significant reforms, including caps on noneconomic damages, and other reforms, such as alternative dispute resolution, expert witness qualifications, and “I’m sorry” provisions. Inaction by Congress on a federal solution to the problem helped spur on state legislatures to rise to the challenge, with advocates for reform seeing years of hard work pay off.

By January 2005, 22 states had instituted caps on noneconomic damages, with seven of these laws containing annual inflation adjustments. Georgia, Missouri, and South Carolina each passed reforms that included \$350,000 caps on noneconomic damages, and a last-minute compromise between Illinois legislative leaders and Gov. Rod Blagojevich (D) allowed passage of S.B. 475, which caps noneconomic damages at \$500,000 for physicians and \$1 million for hospitals. Alaska reduced the cap from \$400,000 (which was enacted in 1997) to \$250,000, although the new legislation included a provision that a person who is at least 70 percent disabled may be entitled to \$400,000.

Specific state highlights

Georgia's reforms didn't stop at caps—restrictions on venue shopping, elimination of joint and several liability, expert witness qualifications, and an "I'm sorry" provision were included in S.B. 3, which Gov. Sonny Perdue (R) signed on February 16. Georgia was one of the first states in 2005 to pass liability reform legislation, encouraging the neighboring South Carolina to pass reforms of its own. South Carolina Gov. Mark Sanford (R) cited Georgia's bill as a reason to push for the passage of S.B. 83, and he signed the bill into law on April 4. In addition to caps on noneconomic damages, the South Carolina bill enacted expert witness qualifications and allows parties to participate in binding arbitration; furthermore, it mandates mediation for medical liability claims.

For the past three years, Missouri's legislature has passed liability reform only to see it vetoed by then-Gov. Bob Holden (D). Recently elected Gov. Matt Blunt (R) campaigned on the issue of liability reform and on March 29 signed H.B. 393 into law. The Missouri bill contains several significant reforms in addition to the \$350,000 cap: it limits venue shopping, permits joint and several liability when the defendant is more than 51 percent at fault, strengthens the affidavit of merit requirements (including expert witness qualifications), includes an "I'm sorry" provision, modifies the col-

lateral source rule, and creates civil immunity for physicians who volunteer their services at free health centers.

Probably the biggest surprise was passage of medical liability reform in Illinois. Tort reform seemed highly unlikely because of the hold the trial lawyers had on the legislature. However, the recent election of a "pro-tort reform" Illinois Supreme Court Justice and the urging of downstate legislators (on behalf of their constituents) focused the issue and gave reformers the support they needed to pass this legislation. Not only did the bill cap noneconomic damages, but it also included improvements to the affidavit of merit, stronger standards for expert witness qualifications, and an "I'm sorry" provision. However, as part of the compromise necessary to gain Democratic support for the legislation, the bill also included a public access Web site that will contain profiles of physicians' medical liability histories. Furthermore, insurance reforms will permit state insurance regulators to reject steep premium hikes from liability insurers by requiring public hearings.

Montana law had previously enacted several major liability reforms, including a \$250,000 cap on noneconomic damages that was passed in 1995, but that didn't stop Gov. Brian Schweitzer (D) from signing several bills March 24 aimed at adding more protections for Montana's medical professionals. Four separate bills—which included,

STATES THAT PASSED LIABILITY REFORM IN 2005

| State | Caps on noneconomic damages | "I'm sorry" provisions | Expert witness qualifications | Alternative dispute resolution |
|----------------|---|------------------------|-------------------------------|--------------------------------|
| Alaska | Lowered previous cap to \$250,000 | | | |
| Arizona | State constitution does not permit caps | ✓ | | |
| Georgia | \$350,000 | ✓ | ✓ | |
| Illinois | \$500,000 for a physician; \$1 million for a hospital | ✓ | ✓ | |
| Missouri | \$350,000 | ✓ | ✓ | |
| Montana | \$250,000 | ✓ | ✓ | |
| South Carolina | \$350,000 | | ✓ | ✓ |

among other reforms, an “I’m sorry” provision and expert witness qualifications—were signed.

Although Arizona’s constitution prohibits limiting damages, the legislature passed a number of medical liability reforms. In April, Gov. Janet Napolitano (D) signed S.B. 1036, which included expert witness qualifications and an “I’m sorry” provision. To resolve the constitutional issue, S.C.R. 1035, which would give the legislature the authority needed to enact caps, may be brought to the state as a ballot question in November 2006.

During its 2005 session, the Florida legislature passed two bills, S.B. 938 and S.B. 940, in order to clarify constitutional Amendments Seven and Eight, which Florida voters approved in November 2004. It let stand a third amendment, which limits attorney fees.

As passed, Amendment Seven, which allowed for “open [medical] records,” created concerns related about violations of Health Insurance Portability and Accountability Act (HIPAA) regulations. The Florida legislature addressed those concerns by passing S.B. 938, which placed restrictions on who may view the records and what information they may contain in order to comply with HIPAA and still allow for peer review. In addition, the legislature determined that the amendment does not apply to records created or incidents occurring before Amendment Seven was adopted. S.B. 940 addressed physicians’ concerns about Amendment

Eight—a “three strikes” rule for revocation of a Florida medical license after three liability judgments. The first provision of the legislation is that the amendment will not be retroactive; only incidents that occur after November 2, 2004, can be considered a strike. Furthermore, the definition of a “strike” was clarified; settlements may not be considered a strike nor can a single incident count as more than one strike. In addition, disciplinary measures that occur out of state or in another country do not count as strikes unless the burden of proof applied equals or exceeds the burden in Florida. Lastly, before a physician’s license is rescinded, the state medical board will review the three claims for their merit and determine whether the physician’s license should be revoked.

Other liability issues

Wisconsin has two major challenges to its current \$432,000 cap on noneconomic damages (which adjusts for inflation) pending in the state’s Supreme Court. The first is *Gregory G. Phelps et al. v. Physicians Insurance Co. of Wisconsin Inc. and Matthew Lindemann, MD*. On March 3, the court heard oral arguments in the Phelps case, which is an appeal of a recent appellate court ruling that first-year residents are not included under the state’s cap because the statute requires a health care practitioner to be licensed in order to be covered. As such, this system creates a disadvantage,

WASHINGTON’S I-330

- Caps noneconomic damages between \$350,000 and \$1,050,000, depending on the number of individuals and institutional defendants
- Permits periodic payment of future damages
- Implements a sliding scale for attorney contingency fees
- Permits voluntary arbitration agreements between patients and physicians
- Eliminates collateral source rule
- Abolishes joint and several liability to hold defendants liable only for their share of damages
- Implements a three-year statute of limitations on medical liability claims

WASHINGTON’S I-336

- Revokes licenses of physicians who have three jury verdicts for preventable medical injuries against them within 10 years
- Bans secret settlements in medical liability cases
- Before an insurance company could increase liability rates by more than 15 percent, a public hearing would be required and those companies would have to open their financial records to the public
- Establishes a supplemental insurance fund for clinics, hospitals, and health care providers
- Increases from four to six the number of members representing the public on the state’s Medical Quality Assurance Commission

because *only* first-year residents are not covered.

In addition, on April 26, the court heard arguments in the case of *Matthew Ferdon, et al. v. Wisconsin Patients Compensation Fund, et al.* This case challenges the constitutionality of caps on noneconomic damages in medical liability cases. The state's Supreme Court has previously upheld caps on noneconomic damages in cases of wrongful death. (*Maurin v. Hall*). (Note: Rulings in both the Maurin and Ferdon cases are expected early this summer and were unavailable at press time.)

Not all liability reform centers on capping damages, however. New Hampshire's S.B. 214 established a prescreening panel for medical liability claims. The panel would consist of a "retired judge, (or) persons with judicial experience" who would be named as the chair and then two or three additional members would be chosen by the chair from a list of candidates. At least one member would be an attorney and another a health care practitioner in the same specialty or profession as the accused. If more than one person is accused, a second health care practitioner in the same specialty as the additional defendant may be appointed. In the original language of the bill, if the judgment of the panel is unanimous and the case still goes to trial, the findings of the panel may be admissible in court. (Note: As of press time, the bill had passed both chambers and was awaiting Gov. John Lynch's (D) signature.

In Ohio, State Sen. Kevin Coughlin (R) introduced S.B. 88, a bill to create a pilot program to study the benefits of using arbitration in medical liability disputes. Unlike the bill in New Hampshire, S.B. 88 states that only evidence from the arbitration would be admissible in court (should the claim move forward) and not the final judgment. The bill is facing an uncertain future, and as of press time had not yet been heard in the Senate Insurance, Commerce and Labor Committee where it was assigned in March. Senator Coughlin has stated that he is looking for some form of alternative dispute resolution and is willing to amend his legislation to reflect another option (for example, mediation, a "tort court," and so on).

Washington State's medical liability reform initiative, I-330, was certified at the end of 2004 and was heard in the Senate's Health Care Committee in January 2005. No vote was taken, and as the legislature refused to act on the initiative by

the end of the 2005 legislative session, residents will have a chance to vote on it in November of this year. Highlights of the initiative include a cap on noneconomic damages and a limit on attorney contingency fees in medical liability lawsuits.

The Washington State Trial Lawyers Association proposed its own initiative, I-336. Opposed by physicians and other supporters of reforms similar to those in California's Medical Injury Compensation Reform Act (MICRA), I-336 would revoke licenses of physicians who have multiple jury verdicts against them and would require public hearings before insurance companies could increase liability insurance premium rates. I-336 will also be on the November ballot and because the two initiatives do not conflict, it is possible that both could pass. A coalition, Doctors, Nurses and Patients for a Healthy Washington, has been created to support I-330 and oppose I-336. This group has established a Web site for more information: <http://www.yesoni330.org/>. (More information on I-330 and I-336 is provided in the sidebars on page 11.)

The future of reform

Most state legislatures have adjourned for 2005, so further state medical liability reform is unlikely until 2006. States without caps on noneconomic damages or other MICRA reforms will probably see reform legislation introduced in 2006, and focused grassroots advocacy will be essential if reform legislation is to pass. The College's State Affairs staff is available to assist chapters in their state advocacy efforts and physicians are encouraged to contact Jon Sutton, Manager of State Affairs (jsutton@facs.org), or Mindy Baker, State Affairs Associate (mbaker@facs.org). 