John LOCKE FOUNDATION

SPOTLIGHT

No. 238 — September 24, 2003

A Start on Malpractice

Senate legislation contains useful ideas & bad ones

Summary: The North Carolina Senate held a special session in mid-September to pass a bill reforming the state's treatment of medical-malpractice issues. A key element of the legislation — instigating expert review of malpractices claims before trial and imposing a related "loser pays" rule to discourage frivolous lawsuits — would be a welcome improvement. But some of the bill's other provisions, including price controls and subsidized insurance, are much less attractive.

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In mid-September, the North Carolina Senate reconvened in a special session and passed legislation to reform medical malpractice laws and the way in which courts handle malpractice lawsuits.[1] During the regular session legislation was introduced by Senator Robert Pittenger[2] that would have capped awards for non-economic "pain and suffering" at $250,000. This bill was not acted on. It contains a number of provisions, some making a great deal of sense and others being misguided.

The Medical Review Committee and Loser Pays

The most encouraging aspect of the bill is the establishment of a "medical review committee"[3] to review cases and make recommendations regarding their merit, and the implementation of a "loser pays" rule. The legislation requires that a panel of three expert "referees" be chosen for each medical malpractice case. Each side in the case would choose one of the experts and a third would be chosen either jointly or by the judge. After reviewing the case the panel would either recommend to the defendant that the case be settled, if they thought it had merit, or that the plaintiff drop the case if it was deemed frivolous. If either the plaintiff or defendant proceeded to trial against the recommendation of the panel, and then lost, they would have to pay the opposing party's legal fees and court costs.

For example, if the plaintiff ignores a panel's recommendation to drop a case, sues and loses, he would be responsible for legal fees and court costs incurred by the defense. Similarly, the defense would be responsible for the plaintiff's costs if it ignored an adverse recommendation. Presumably this would be an amount over an above the amount of the settlement. Furthermore, if the case proceeded to trial the opinion of the panel could be introduced as evidence by either the plaintiff or the defendant.

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There are several benefits to this provision. First the panel's recommendations will be taken seriously by litigants on both sides. To proceed to trial against an adverse recommendation could be very costly, especially to plaintiffs with questionable cases. With contingency fees, there is no cost to losing and there is always the possibility of a defendant settling the case, even if they might be found non-negligent, simply to avoid the cost of a trial. The probability of frivolous lawsuits making it to trial or ending in a purely defensive settlement would be greatly reduced. Furthermore if either side defies the panel and takes a case to trial it would be much more difficult to sway the jury with junk science. The panel's findings would be introduced and would act as an objective check on attempts to manipulate the jury's lack of medical or scientific knowledge.

The Excess Liability Fund

While the creation of the medical review committee and the institution of "loser pays" are welcome reforms that will make the system both less costly and more fair, the other major provision of the bill will actually make the system worse. The bill establishes what it calls "the excess liability fund."[4] The purpose will be to subsidize the malpractice insurance costs of doctors, hospitals, and nursing homes over and above a basic amount that providers would be required to have. If a successful claim were made against a provider, they would be able to draw on the fund for pay-outs above the required coverage. In the first year the fund would be established at $20 million, paid for entirely by North Carolina taxpayers. Afterward the fund would be maintained at professionally determined, actuarially sound levels by a tax on all doctors, hospitals, and nursing homes. All providers may also be subject to "surcharges" if the predetermined tax is not adequate to maintain the fund.

The primary effect of this provision is to socialize the costs of malpractice insurance. The initial $20 million will be paid for with either higher taxes or reduced spending in other areas of the budget. In other words it will amount to a coerced wealth transfer from the average North Carolinian to doctors and other health professionals. The taxes and surcharges imposed to maintain the fund will unfairly penalize the most responsible providers and doctors in the least-risky specialties. Ultimately this fund will not reduce the overall cost of the system and could actually *increase* risks to patients — in that the fund will be subsidizing risky behavior on the part of some health care providers by artificially keeping their insurance premiums low.

There are other provisions of the bill that should be mentioned. The least desirable of these is the provision to impose price controls on insurance rates. The legislation states that "no insurer's rate shall be approved or remain in effect that is excessive." The law does not define excessive other than to say the "[Insurance] Commissioner shall consider whether the rate mathematically reflects the insurer's investment income."[5] The problem with this is that insurance rates should be guided by market conditions of supply, demand, and risk. If a commissioner institutes caps at rates that are below those that reflect these factors then the state will lose providers and experiencing shortages. Price controls are always bad policy.

Another provision that has merit would allow judge's to order that economic awards be paid out at specified intervals rather than in a lump sum.[6] In other words payments would be timed to reflect future economic damages, such as the cost of ongoing medical needs. The purpose is to insure that the plaintiff has the funds when they are needed and does not deplete the settlement amount before expenses are incurred. This would be done according to strict guidelines that would insure that the funds are available from the defendant at the future dates when they are needed to be paid out.

Conclusion

This legislation, which at the present time has only been considered by the NC Senate, has much to commend it, and will act as a good staring point for deliberations when lawmakers reconvene next May. The excess-liability fund and the insurance-rate controls should be eliminated, but the review board and loser-pays provisions are solid ideas that should be the cornerstone of any revisions by the NC House. The reform package offered earlier this year by Sen. Pittenger called for a $250,000 cap on non-economic pain and suffering awards. While doctors and insurers have seen this as an absolute necessity, there are other ways to address the problem. A possibility for compromise has been suggested in an article by Harvard Professors Joseph Newhouse and Paul Weiler. Instead of arbitrary caps, they suggest establishing a "scale for pain and suffering damages running from a floor to a ceiling containing standardized injury profiles and specific damage amounts that would govern the parties' and the juries' appraisal of particular claims."[7] This would make pain and suffering awards more predictable and more consistent from case to case.

— Dr. Roy Cordato, Vice President for Research

Notes

[1] "An Act to Reform the Laws Related to Medical Providers…," Senate Bill 802, The General Assembly of North Carolina, April 3, 2003.
[2] "Medical Malpractice Damages/Attorney's Fees," Senate DRS75006-LD-3A, General Assembly of NC, 2003.
[3] Note 1, p. 2.
[4] *Ibid*. p. 23.
[5] *Ibid*. p. 18.
[6] *Ibid*. p. 16.
[7] Joseph P. Newhouse and Paul C. Weiler," "Reforming Medical Malpractice and Insurance," *Regulation*, Vol. 14, No 4, 1991.