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Health Law Alert

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# Florida Enacts Damage Caps for Medical Malpractice

Last week the Florida Legislature finally approved legislation creating damage caps in medical malpractice cases, after several prior efforts had failed to achieve much-needed tort reform in that State. Governor Jeb Bush promptly signed the legislation into law.

The new legislation imposes caps on the amount that may be awarded for "non-economic" damages (such as "pain and suffering") in cases involving personal injury or death arising from medical malpractice. Non-economic damages are one of the largest and most unpredictable components of jury awards in medical malpractice cases. The amount of the cap varies depending on the type of claim and the status of the defendant. Under the statute, a defendant is classified as either a "practitioner" or a "nonpractitioner." A "practitioner" is defined as a person licensed as a physician, dentist, optometrist, midwife, or physical therapist, or certified as an advanced registered nurse practitioner. A "practitioner" also includes any business entity that is vicariously liable for the acts and omissions of such persons, e.g., a hospital that employs a physician who committed medical malpractice. Any other person or entity providing health care services is a "nonpractitioner." For example, nurses and nurse assistants, and the entities that employ them, such as nursing homes and assisted living facilities, would be nonpractitioners. The status of the defendant is important because the damage caps for practitioners are lower than the caps for nonpractitioners.

For medical malpractice claims against practitioners, the base cap for non-economic damages is $500,000 per claimant, regardless of the number of practitioner defendants, and no practitioner shall be liable for more than $500,000, regardless of the number of claimants. However, in cases where the malpractice resulted in death or a permanent vegetative state, the total amount that may be recovered from all practitioner defendants, regardless of the number of claimants, is capped at $1 million. In cases involving a "catastrophic injury" (specified forms of permanent impairment), the injured party may recover non-economic damages up to $1 million. The aforementioned caps are subject to an aggregate limit of $1 million recovered by all claimants against all practitioner defendants. In cases involving emergency services by a practitioner, the cap on non-economic damages is $150,000 per claimant, subject to an aggregate limit of $300,000 for all claimants.

For medical malpractice claims against nonpractitioners, the base cap for non-economic damages is $750,000 per claimant. If the malpractice resulted in death or a permanent vegetative state, the cap is $1.5 million from all nonpractitioner defendants. In cases involving a catastrophic injury, the injured party may recover non-economic damages up to $1.5 million. The aforementioned caps are subject to an aggregate limit of $1.5 million recovered by all claimants against all nonpractitioner defendants. In cases involving emergency services by a nonpractitioner, the cap on non-economic damages is $750,000 per claimant, subject to an aggregate limit of $1.5 million for all claimants.

Because there are separate damage caps for practitioners and nonpractitioners, the legislation creates an incentive for plaintiffs to sue both practitioners and nonpractitioners so as to maximize the amount of the allowable recovery.

Aside from the new damage caps, the Florida legislation contains other, less publicized provisions that should benefit health care providers. For example, the bill specifies minimum standards for expert witnesses who can support a medical malpractice claim, and attorneys must certify that the experts they use in medical malpractice cases have not been found guilty of fraud or perjury. Furthermore, parties to a medical malpractice case must participate in a mediation procedure, unless the parties agree to binding arbitration. For HMOs and similar entities, the legislation provides that such an entity cannot be held liable for the malpractice of its independent contractors, unless the entity expressly directed or actually controlled the conduct that led to the injury.

The legislation could not come too soon for health care providers operating in Florida. Florida has long been recognized as the center stage for the medical malpractice crisis in this country. A sharp increase in the number of medical malpractice claims filed in Florida has led to extraordinary liability costs for providers, higher insurance premiums, and an ensuing exodus of providers and insurers from the State. In a study of how the malpractice crisis is affecting the long term care industry, published earlier this year by Aon Risk Consultants,[1] it was reported that liability costs grew dramatically, from $3,110 per bed in 1995 to $11,810 per bed in 2002. The number of claims rose from 15 per 1,000 beds in 1995 to 37 per 1,000 beds in 2002. And the amount of the average claim has more than doubled since 1995, to $319,000 in 2002. Indeed, CMS has recognized the adverse impact in Florida created by uncontrolled liability costs for providers, noting the "recent exits of the largest [nursing home] chains from states with high liability costs such as Florida."[2]

It remains to be seen whether plaintiffs' lawyers or other interests will file a legal challenge to the new legislation. In other states that have adopted tort reform, litigation has been filed challenging the constitutionality of damage caps and other limits on medical malpractice claims. In most cases, such challenges have failed. Upholding the Florida law will be critical to achieving meaningful tort reform in Florida.

The Florida legislation contains many other provisions that are not discussed in this Alert. Health care providers should consult with legal counsel regarding the impact of the legislation on their particular operations.

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[1] "Long Term Care General Liability and Professional Liability aCtuarial Analysis" (Aon Risk Consultants, Inc., Mar. 3, 2003).

[2] "Health Care Industry Market Update" (Centers for Medicare and Medicaid Services, Office of Research, Development & Information, May 20, 2003).