

Medical Malpractice Reforms: What's on the Table in NYS?

In early July, the New York State Insurance Department (SID) approved a 14% increase in medical malpractice insurance premiums—the largest rate increase in a decade—effective July 1, 2007. Subsequently, SID Superintendent Eric R. Dinallo announced that Governor Eliot Spitzer had charged him with heading a task force “to confront the fundamental drivers of high medical malpractice costs.” The task force will comprise physician and hospital associations, insurers, consumers, health plans, trial lawyers, and the Legislature, as well as New York State Department of Health Commissioner Richard F. Daines, M.D. It will be charged with recommending reforms to the Governor by the end of 2007 and will likely consider a variety of proposals that State legislators and stakeholders have put forward in recent years. This issue of *Health Care News In-Depth* looks at some of those proposals.

The Schimminger-Hannon Bill: Medical Liability Reform Act

In 2007, Assemblyman Robin Schimminger and Senator Kemp Hannon sponsored a bill (A. 3139 / S. 2144) that takes a comprehensive approach to tort reform. This bill, which has been introduced in every Legislature since 2003, proposes the following reforms:

- Currently, no affidavit is required to accompany the certificate of merit from a consulting physician concluding that there is a reasonable basis for commencing a malpractice lawsuit. This bill would require the plaintiff's lawyer to obtain a signed affidavit to accompany the certificate of merit.
- The proposed bill requires that a case be dismissed for failure to file the required certificate of merit and affidavit on a timely basis.
- New York is the only state that allows the identity of expert witnesses to be kept secret in medical malpractice cases. The proposed bill would require that lawyers reveal the names of expert witnesses to be called at trial and that the opposing counsel be given the opportunity to orally depose expert witnesses who will be called.
- Currently, all defendants are liable for all economic damages regardless of their level of culpability; defendants are liable for non-economic damages only in relation to their proportion of the culpability, but only if their relative culpability is less than 50% of the total liability. The proposed bill provides for a “Fair Share Rule” under which all defen-

dants are liable for economic and non-economic damages only in proportion to their relative culpability.

- The proposed bill would cap non-economic damages, such as pain and suffering, emotional distress, and so forth, at \$250,000.

The Towns-Volker Bill: Health Courts Pilot

In 2007, Assemblyman Darryl Towns and Senator Dale Volker proposed a bill (A. 8066A / S. 4149) that would launch a pilot program to test a novel new approach to the medical malpractice tort system. The bill authorizes the Office of Court Administration to select up to five counties, each in a different judicial district of the State, to establish specialized “health courts.” The health courts would have exclusive jurisdiction over any medical, dental, or podiatric malpractice lawsuits brought within the supreme court of the county.

Judicial Training Program: Each supreme court judge who is chosen to preside over a health court would be required to complete a judicial training program on the law and science of medicine, to prepare for cases that might be brought before the judge in health court. The training curriculum, which would include classroom clinical education as well as internship experience in health care settings, would be developed by a committee with equal

representation from the Medical Society of the State of New York and the State Bar Association.

Medical Experts: The health court would maintain a list of qualified, court-appointed medical experts to advise the judge on medical issues, as needed. The experts would be required to hold an active license in the same profession as the defendant; be trained and experienced in the same discipline as the defendant and have experience in the diagnosis and treatment of the condition or injury that is the subject matter of the lawsuit; have no financial ties or conflicts of interest that would call into question the expert's independence; and have no *ex parte*

communication with either party to the lawsuit—that is, without the other party present—except as permitted by the court.

The Towns-Volker bill would also amend the Education Law to make it a violation of medical conduct to provide expert witness testimony that is false or without any medical foundation—that is, without foundation in accepted peer-reviewed, science-based medical research. Like the Schimminger-Hannon bill, the Towns-Volker bill would also require lawyers to divulge the names of expert witnesses and make them available for oral deposition by opposing counsel.

The health courts would have exclusive jurisdiction over any medical, dental, or podiatric malpractice lawsuits brought within the supreme court of the county.

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The Golden Bill: Impaired Infant Compensation Fund

Introduced in each Legislature since 2004, bill S. 157, sponsored by Senator Martin Golden, would, among other things, create an “impaired infant compensation fund” to help pay the cost of medical malpractice awards for obstetrician-gynecologists and nurse midwives. The State would create a fund to compensate plaintiffs for award amounts exceeding \$250,000, which would be administered by a board comprising nine members appointed by the Governor and State legislative leaders. At least six of the board members would be OB-GYNs who are board-certified and licensed to practice in NYS. If the board found that a case for which it is providing compensation involved a physician who, in its judgment, had acted in a particularly egregious manner, it would not agree to provide funding for future claims against that physician, and there would be no cap on that physician’s liability. Physicians participating in the fund would, in effect, have their liability capped at \$250,000 and have personal assets valued in excess of \$250,000 protected.

In addition to the impaired infant compensation fund, the Golden bill would create a medical care and assistance program for impaired infants, under which medical and custodial care expenses would be paid for the rest of an impaired infant’s life through the State Medicaid program. Juries would be instructed not to include amounts for medical expenses that will be covered by the medical assistance program in the jury award.

The Golden bill would also provide that a physician who gives expert witness testimony that fails to meet professional clinical standards acceptable to the State Office of Professional Medical Conduct may be fined not less than \$50,000 or have his or her license to practice medicine revoked.

Medical Indemnity Fund

In the late 1980s and early 1990s, the State Legislature debated a bill a number of times—which passed the State Senate but not the Assembly—that would create a State fund to pay the actual medical expenses of neurologically impaired individuals as those expenses are incurred, as opposed to including an often-inflated estimate of future medical expenses in

a medical malpractice award. The fund would be administered by the State Insurance Department. The NYS Department of Health would resolve disputes about the medical necessity of a claim against the fund. In addition, to ensure that the fund was the secondary payer, or payer of last resort, private health insurers would be prohibited from placing liens on awards and would be required to pay for any medical expenses for which they were liable. The fund would be financed through broad-based assessments, thus spreading the cost of medical expenses for impaired individuals from the relatively small universe of physicians, hospitals, and medical malpractice insurers to a much larger tax base.

Quality Improvement and Tort Reform

As a way to get beyond the usual debate in which health care providers blame trial lawyers and trial lawyers blame poor quality for all of the ills of the medical malpractice system, GNYHA has in the past proposed a possible solution: a program whereby, in exchange for engaging in a rigorous State quality improvement program and meeting certain quality improvement benchmarks, participating hospitals and physicians would benefit from tort reform. Non-participants, or participants that did not achieve quality goals, would operate under the current system. Specifically, hospitals and physicians would gain a certification from the State for meeting quality improvement goals (for example, achieving thresholds on measures promulgated by the Centers for Medicare & Medicaid Services), participating

in quality improvement activities (for example, activities under the Institute for Healthcare Improvement’s *5 Million Lives Campaign*), and conducting a program of early disclosure and compensation for so-called adverse events.

The certification would grant providers a presumption in court that they were creating a culture of safety within their institutions or physician practices and, thus, would afford them certain protections, as detailed in the sidebar below. These protections would not be available for actions brought against physicians or hospitals related to adverse events that should never occur. Such “never events” are defined as 1) surgery performed on the wrong body part, 2) surgery performed on the wrong patient, and 3) the wrong surgical procedure performed on a patient.

The Gottfried-Hannon Bill: Protection of Peer Review Activities from Disclosure

Bill S. 4642 / A. 6723, introduced in every Legislature since 2003, is sponsored by Assemblyman Richard Gottfried and Senator Kemp Hannon. The bill would encourage health care providers to participate in hospital peer review and quality improvement committees and proceedings by protecting from discovery a provider’s statements at a peer review or quality assurance meeting if he or she is party to an action or proceeding that is being reviewed at that meeting. The bill would also make it a violation of medical conduct to refuse to cooperate with and participate in quality assurance and peer review activities that are protected by State confidentiality statutes. ■

Medical Malpractice Tort Reform: A Proposal by GNYHA

GNYHA has proposed that hospitals and physicians gain State certification for meeting specific quality improvement requirements that would provide protections such as:

- a cap on non-economic damages;
- prohibition on liens placed on damage awards by providers of collateral source benefits, including private insurers and the State Medicaid program;
- an exemption from Medicaid income and asset tests of the dollar amount of the award, so that Medicaid-eligible plaintiffs may remain covered by the Medicaid program in the future for their health care needs;
- a Fair Share Rule, under which defendants are liable only for their share of economic and non-economic damages in direct proportion to their responsibility for damage done to the plaintiff;
- a requirement that expert witnesses at trial be chosen from a neutral list of experts;
- protection against disclosure in court of statements, including statements of remorse, made during pre-claim negotiations and as part of an early disclosure and offer of compensation program;
- protection for statements made by all parties participating in peer review committees and other quality improvement activities.