

Medical Malpractice Reform: Limiting Contingent Fees

Many states, including New York and its neighbors, limit the contingent fees plaintiff attorneys can charge clients in medical malpractice cases to discourage non-meritorious cases, reduce malpractice coverage costs, and ensure more of the recovery goes to the injured plaintiff. This issue of *Health Care News In-Depth* explores the goals of contingent fee limits and the negative financial impact of increasing those limits.

Plaintiff attorney contingent fees are considered a way for individuals who might not be able to pay attorneys an hourly rate to access the courts. The fees are contingent on a settlement or award in the case and are based on a percentage of the amount actually recovered. Given the negative incentives created by such fees, some states have imposed across-the-board limits, while others have enacted sliding fee schedules under which the permissible fee percentage de-

creases as the size of the recovery increases. numbers of cases, each with a low probability of success, with the expectation that the fees earned from the successful cases will be large enough to subsidize the unsuccessful cases.¹ Limiting contingent fees might therefore remove that incentive. Similarly, a 2004 National Association of Insurance Commissioners report states that limits on contingent fees help deliver “more of the award to the person who sustained the injury and thus [are] fairer to malpractice claimants.”² In addition,

dollar values, regardless of their validity.

EXAMINING THE CASE FOR CONTINGENT FEE LIMITS

“...contingent fees—which are typically a percentage of the amount awarded—create incentives for attorneys to take on large numbers of cases, each with a low probability of success, with the expectation that the fees earned from the successful cases will be large enough to subsidize the unsuccessful cases.”

— Congressional Budget Office, *The Effects of Tort Reform: Evidence from the States* (2004)

Fee Limits: Goals & Impacts

A number of reports and articles discuss the benefits and perceived downsides of limiting contingent fees. According to the Congressional Budget Office, contingent fees “create incentives for attorneys to take on large

such limits help “weed out non-meritorious claims, as attorneys are less inclined to take a chance on a doubtful recovery if their stake in the claim might be smaller.” On the other side, both reports acknowledge the argument that contingent fee limits may deny injured individuals their day in court because attorneys might be less inclined to take cases with small

Fee Limits, Settlements

A *Duke Law Journal* article on contingent fees discusses the fact that such limitations may not only decrease the number of claims but also increase the rate of malpractice claim settlements.³ According to the article, insurance companies—and presumably providers—are “generally willing to settle meritorious claims for amounts that the plaintiffs and their attorneys find reasonable. By decreasing the amount that the plaintiff’s attorney may charge in fees, contingent fee limitation statutes consequently increase the amount of a proposed settlement a plaintiff will retain.” The article suggests that this result will lower the threshold settlement offer necessary to prompt plaintiffs to settle. The article argues that “[a]ttorneys will also have a greater incentive under sliding scale contingency fee limitations to accept a lower settlement offer.” This is because the attorney will have “less incentive to risk sure money for the opportunity of a large jury award.”

New York’s Sliding Schedule

New York State enacted its existing limitations on plaintiff attorney contingent fees in malpractice cases in 1985 as part of a comprehensive package of reforms to limit increases

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1. Congressional Budget Office, *The Effects of Tort Reform: Evidence from the States*. June 2004.

2. Nordman, Eric, Davin Cermak, Kenneth McDaniel. “Medical Malpractice Insurance Report: A Study of Market Conditions and Potential Solutions to the Recent Crisis.” National Association of Insurance Commissioners: September 12, 2004. Available at: http://www.naic.org/documents/topics_Med_Mal_Rpt_Final.pdf.

3. Dwyer, Casey L. “An Empirical Examination of the Equal Protection Challenge to Contingency Fee Restrictions in Medical Malpractice Reform Statutes.” *Duke Law Journal* 56 no. 2 (November 2006): 611–642.

Medical Malpractice Reform *continued from front page*

in the costs of malpractice coverage. The Legislature replaced the one-third across-the-board fee limit with the current schedule that breaks down a plaintiff's recovery into tiers so that attorneys may receive fees equal to:

- 30% of the first \$250,000 recovered;
- 25% of the next \$250,000;
- 20% of the next \$500,000;
- 15% of the next \$125,000; and
- 10% of those portions of recoveries above \$1,250,000.

The bill memorandum that accompanied then-Governor Mario Cuomo's proposal to move to a sliding scale stated that the limits were intended "to assure that the injured party will receive a sufficient share of the

can demonstrate that the schedule would not provide adequate compensation. In reviewing an application for a fee increase, the New York State Court of Appeals has stated that the test is whether the fee schedule "equitably compensates counsel for 'the amount of time reasonably and necessarily spent' in litigating the claim." In determining whether the statutory fee might be inadequate, the Court stated that factors that might be considered are "whether the case involves an extremely complicated procedural history or where plaintiff's counsel is required to expend an inordinate amount of time in pursuing the medical malpractice claim, thereby rendering the hourly rate of compensation exceptionally low or causing a loss of other income or some other financial detriment."⁵ According to a 2005 *Forbes* arti-

estimated that raising the fee tiers would increase hospital malpractice costs by 15%, or \$240 million, statewide. Eliminating the sliding fee schedule entirely and returning to a one-third across-the-board cap would increase hospital costs by 25%–40% or \$400 million–\$640 million statewide while drastically increasing plaintiff attorneys' fees. For example, in the case of a \$2 million recovery, the attorney's fee would increase from \$350,000 to \$666,667, a 90% increase. In the case of a \$6 million recovery, the attorney's fees would increase from \$750,000 to \$2 million, a 167% increase.

While there is debate about exactly how much premiums and other coverage costs would rise if the limits were increased, any change would unquestionably result in harm to plaintiffs and providers. An increase in attorney fees must come from either the pockets of the attorneys' clients in the form of reduced shares of their recoveries and/or out of the pockets of hospitals and physicians in the form of increased coverage costs.

Plaintiff attorneys argue they are due an increase because the fee schedule has not been adjusted recently. However, the reason for the currently unsustainably high levels of coverage costs is that the severity of recoveries has increased significantly in recent years. Plaintiff attorneys have thus received increases in fees because the underlying recoveries have increased, and they have the ability to apply for larger fees if the complexity or demands of a particular case warrant it.

PLAINTIFF ATTORNEY CONTINGENT FEES			
SETTLEMENT/ AWARD	CURRENT: SLIDING FEE SCHEDULE	PROPOSED: 1/3 OF THE SETTLEMENT/AWARD ACROSS THE BOARD	% FEE INCREASE
\$250,000	\$75,000	\$83,333	11%
\$500,000	\$137,500	\$166,667	21%
\$750,000	\$187,500	\$250,000	33%
\$1,000,000	\$237,500	\$333,333	40%
\$1,500,000	\$300,000	\$500,000	67%
\$2,000,000	\$350,000	\$666,667	90%
\$3,000,000	\$450,000	\$1,000,000	122%
\$6,000,000	\$750,000	\$2,000,000	167%

judgment and to target insurance premium dollars primarily to the plaintiff's compensation." The memorandum also stated that limiting contingent fees would diminish awards that are often significantly increased to pay for attorney's fees.⁴ Governor Cuomo's proposal was much less generous to attorneys than the one the Legislature ultimately enacted. His plan would have reduced the fee to 10% on recoveries as low as \$500,000.

Higher Fees Available

New York permits attorneys to apply for compensation beyond the fee schedule when, due to extraordinary circumstances, the attorney

ple, some plaintiff attorneys in New York State have been very successful in applying for fees beyond the statutory schedule.⁶

Impact of Modifying Fees

As limitations on contingent fees are a mechanism to reduce malpractice coverage costs, it is not surprising that proposals to increase or even eliminate New York State's current sliding fee schedule would greatly increase such costs, an outcome that would make little sense during a time when all three branches of New York State's government are looking for ways to streamline the system and reduce costs. Actuaries have

Schedule Should Remain

Rolling back the significant reform of limiting plaintiff attorney fees would likely result in both lower recoveries for plaintiffs and higher costs for providers. Such a move would be antithetical to the current policy goals of reducing the costs of malpractice coverage, streamlining the resolution of cases, and ensuring that a sufficient share of the recovery dollars goes to the injured parties. ■

For additional information on medical malpractice issues, contact Susan Waltman at GNYHA.

4. New York State Executive Department. Medical Malpractice Insurance—Comprehensive Reform. 1985 Session Laws Ch. 294: 3019.

5. *Yalango v. Popp, et al.*, 84 N.Y.2d 601 (1994)

6. Vardi, Nathan. "Moore's Law." *Forbes*, November 28, 2005.