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September 2002

Legal Update for Long Term Care and Assisted Living Providers

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Some Congressional Momentum, But Federal Medical Tort Reform Unlikely

by David J. Leiter

On July 25, 2002, President Bush called for national malpractice legislation that would place a cap on non-economic damages awarded in malpractice lawsuits, put a three-year limit on filing claims, and allow punitive damages only in cases with clear proof of malicious intent. Although Presidential and Congressional support for tort reform is growing, large scale reform legislation is unlikely to be passed this year. In fact, the prospects for any major malpractice measure becoming law are extremely dim for the foreseeable future.

There is no doubt that the health care system is faced with extremely high and increasing medical liability costs, which are contributing to a growing public health crisis. Most recently, the University of Nevada Medical Center closed its trauma center in Las Vegas for 10 days after its surgeons quit because they could no longer afford malpractice insurance. Concerned about the rising costs of heath care, in a speech to High Point University in Greenville, N.C., on July 25, President Bush declared the medical liability system "broken and riddled with bad, bad law."

Anticipating the President's speech, the Department of Health and Human Services (HHS) released a report on July 24—*Confronting the New Health Care Crisis: Improving Health Care Quality and Lowering Costs By Fixing Our Medical Liability System*—citing that insurance premiums in states with caps of $250,000 or $350,000 on non-economic damages have risen by 12 to 15 percent in recent years, while premiums in states without such caps have increased by as much as 44 percent. HHS cites that the cost of malpractice coverage and the indirect cost of "defensive medicine" increase the amount the government pays through federal programs by an estimated $28.6 billion to $47.5 billion per year. If reasonable limits are placed on non-economic damages, the Bush administration argues that the amount of federal money spent would be reduced by an estimated $25.3 to $44.3 billion per year.

Citing statistics from the HHS report, President Bush called for reforms to achieve a "fair, predictable, and timely medical liability process." He expressed support for legislation that limits non-economic damages to $250,000; limits punitive damages to two times the economic damages, or $250,000; and limits the time that a case can be filed to no more than three years following the date of the injury or one year after the claimant discovers or should have discovered the injury. The administration also supports legislation that would provide the payment of a judgment over time rather than in one lump sum; require that a jury be informed if a plaintiff has another source of payment for the injury; and include a provision that would make defendants liable only in proportion to their fault, "not on the basis of how deep their pockets are."

In what can only be viewed as an effort to create a political issue for the coming November elections, President Bush concluded his speech with a call to Congress to pass reform legislation by the end of the Congressional session this fall. The administration supports H.R. 4600, the Help Efficient, Accessible, Low Cost, Timely Health (HEALTH) Care Act of 2002, introduced by Rep. James C. Greenwood (R-Pa.), with 104 co-sponsors. Referred to the House Energy and Commerce Subcommittee on Health, H.R. 4600 is modeled after provisions in California law,

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the Medical Reform Act of 1975 (MICRA), which is held by many health care professionals as the model law for the country. The HHS report said that the enactment of H.R. 4600 "with improvements to ensure that its meaningful standards will apply nationally, would be a significant step" to a fair and predictable liability system. A companion bill, S. 2793, was introduced in the Senate by Senator John Ensign (R-Nev.) on July 25, but it has no cosponsors.

While the momentum for tort reform is certainly rising, large scale reforms, such as those proposed by Bush and introduced in H.R. 4600, are unlikely to be approved in this session of Congress, or even future Sessions. Prior to the August recess, the Senate voted to inable Senator Mitch McConnell's (R-Ky.) controversial amendment to the Medicare drug benefit legislation. The amendment, which was defeated by a vote of 57 to 42, would limit punitive damages to twice the amount of compensatory damages, require that 50 percent of punitive damage awards go to state activities, and restrict attorneys' fees. Although Senator McConnell is expected to reintroduce a similar amendment this fall, widespread opposition from most Senate Democrats and some Republicans will likely prevent the passage of such reforms.

Perhaps even more significant is the recent collapse of the Patient's Bill of Rights. For the past year, Senators John Edwards (D-N.C.), Edward Kennedy (D-Mass.), John McCain (R-Ariz.), authors of the Senate version of the bill, have engaged in negotiations with the White House over their differences. On August 1, 2002, the Senators announced that the negotiations were hopelessly deadlocked because the two sides could not bridge differences over the rights that patients should be given to sue their health maintenance organizations (HMOs). It is argued by those who oppose major change that national malpractice reform will protect insurance companies, HMOs, and drug companies rather than help patients who suffer grievous harm. In a speech to the Senate Floor on July 26, Senate Health, Education, Labor, and Pensions Chairman Kennedy, argued that medical malpractice legislation will "discriminate against women, children, minorities and low-income workers" and "only serve to hurt those patients who have suffered the most severe, life-altering injuries and who have proven their cases in court."

A similar political dynamic is holding up medical errors legislation. In May of 2001 Senators Kennedy and Frist (R-Tenn.) along with Health and Human Services Secretary Tommy Thompson met with Pittsburgh healthcare officials to discuss legislation to help eliminate the estimated 44,000-98,000 deaths that stem from medical errors in U.S. hospitals each year. Kennedy, Frist, and Thompson were all confident that the bipartisan legislation developing a national database to which healthcare professionals could report medical errors would be introduced within the year. While the Kennedy-Frist-Jeffords (I-Vt.) drafted bill — the Patient Safety and Quality Improvement Act — was expected to be introduced last September, disagreement over the legal options for injured patients has handicapped the measure. After failing to reach an agreement with Kennedy, on June 6, 2002, Senators Frist, Jeffords, Breaux (D-La.) and Gregg (R-N.H.) unveiled the "Patient Safety and Quality Improvement Act," which significantly protects voluntarily disclosed medical errors from legal repercussions. Kennedy's concerns illustrate the ongoing disagreement within Congress over how to find the appropriate balance between encouraging medical error reporting and maintaining legal remedies for injured patients. Lawmakers' inability to find the balance has stymied passage of similar legislation for the past three years.

Over the years there have been successful efforts to reform class action suits and product liability, but those measures have been limited in scope. Successful legislation includes the Y2K Act (1999), the National Vaccine Injury Compensation Act (1998), Private Securities Litigation Reform Act (1995), and the General Aviation Revitalization Act (1994), while legislation limiting asbestos liability and capping the tobacco industry's liability have failed after countless attempts in both the House and the Senate.

Liability reform will continue to spark contentious policy debate in Congress and the White House, especially as Senator Edwards, former trial lawyer, continues to test the 2004 presidential waters. The *Washington Post* recently reported that the Bush team believes that Edwards' association with trial lawyers will prove to be the real liability. The legislative playing field for tort reform, therefore, whether it be medical malpractice or product liability, does not lend itself to anything more than riffle shots. Only very focused and modest measures stand any chance of becoming law, and even very narrow efforts will be difficult to enact at the Federal level unless there is a major shift in the make-up of the Senate. Given the grim forecast for even small scale Federal reforms, tort reform will have to occur at the State level.

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