MALPRACTICE REFORM: A CHANGING LANDSCAPE

By Glen A. Huff and M. Todd Gerber [1]*

Most agree that reform is needed in the laws applying to the practice of medicine, but little consensus has been reached about what those reforms should be. Patients craving lowered health costs have contributed to economic pressures for the delivery of less expensive health services. Managed health care and business models now direct the course of medicine. Simultaneously, government and consumers insist on greater regulation and heightened scrutiny on matters such as granting of privileges, billing, referrals to related entities, and patient privacy. Each of these are adding to the expense and complexity of the administration of medicine.

Beleaguered physicians are justifiably crying for a halt to the rapidly rising costs of malpractice insurance. Meanwhile, the poor investment performance for medical malpractice insurance companies, coupled with increased litigation expenses and exorbitant jury verdicts, has generated an insatiable need for money to keep the carriers alive. Premiums go up or the insurance company leaves or dies. The siren call for medical malpractice reform beckons, but reform is illusive because the panacea of "reform" is splintered by divergent interests and opposing directions.

For more than a decade, Virginia has capped damage awards in medical malpractice cases. Such caps limit exposures. Professional liability premiums, computed by insurance actuaries, theoretically, therefore, reflect the overall limit placed on Virginia awards.

However, the direction of change in Virginia counters the current national movement of legal-medical reform designed to benefit medical professionals. Specifically, the long existing cap applicable to medical malpractice cases in Virginia (set at $1,000,000 for many years) has recently been amended to provide an annual upward adjustment. Va. Code Ann. § 8.01-581.15. The present cap on medical malpractice awards is $1,650,000 which will continue to increase until it reaches $2,000,000.00 in 2008.

President Bush has sounded the trumpet for national reform in medical malpractice laws. The several proposals currently pending in Congress uniformly address the component of jury awards attributable to the intangible element of pain and suffering. The President is promoting a cap of $250,000 on that element of jury verdicts in medical malpractice cases. A limit on non-economic damages would not, however, alter other components of medical malpractice jury awards such as actual and projected medical expenses or wage loss . Under the proposed legislation, the size of jury verdicts would not be subject to an absolute limit as currently applies in Virginia cases. However, in those cases in which the actual monetary damages are less than $1,400,000, the federal legislation would afford greater protections than the current law of Virginia.

Several other suggestions have been made in Congress' bills. Among the proposals for national medical malpractice reform are bills that would limit and structure contingent fees paid to

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plaintiff's attorneys and provisions that would allow the jury to hear evidence about whether the patient's medical bills were paid by insurance (such evidence is typically prohibited at trial). Strong opposition has mounted to these suggestions, and the President appears to be silent as to these reforms.

The proposed legislation also would require that plaintiff's attorneys file an affidavit certifying that the matter has been reviewed by an expert who support the plaintiff's claim of negligence. Such a requirement has the potential to significantly limit the filing of malpractice lawsuits which are without merit.

While powerful lobbying interests such as the American Trial Lawyers Association are likely to slow or stop the bills pending in Congress, some reform seems inevitable. Whether this legislation will provide greater protections than that currently afforded under Virginia's law remains to be seen and should be followed closely.

Although not perfect and notwithstanding the recent direction of legal-medical reform in Virginia, laws governing medical malpractice suits in Virginia have long been effective to block run away verdicts. However, increased publicity targeting the medical profession and an increase in the number of plaintiff's attorneys willing to file malpractice actions is cause for alarm. We must therefore, remain cognizant of the changing legal landscape and take an active role in insuring that the interests of the entire health care profession are protected.