

# PUBLICATION

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## Tennessee Tort Reform: The Effects on Long Term Care Providers

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**August 16, 2011**

Tennessee Governor Bill Haslam signed the Tennessee Civil Justice Act of 2011 (the Act) on June 16. The legislation is effective on October 1, 2011 and does not affect pending lawsuits or causes of action that have not yet accrued by that date.

The provisions of the legislation extend to all forms of tort claims based on negligence or alleged fraud, including product liability actions and proposed class action consumer protection claims.

As a practical matter, most, if not all, of the pre-suit notices and lawsuits filed against health care providers through calendar year 2011 will not be affected by the Act. However, by June 2012, most claims and potential claims will be covered by this legislation and by October 2012, almost all pre-suit notices and lawsuits against health care providers will be governed by the provisions of the Act.

The Act addresses a number of significant issues faced by long term care providers in liability claims and litigation.

- "Health care provider" is defined to include a broad range of health care workers, including physician assistants, nursing technicians, orderlies, certified nursing assistants and technicians.
- The definition of "Health Care Services" includes "staffing, custodial or basic care, positioning, hydration and similar patient services."
- "Health care liability action" includes any kind of claim alleging negligence on the part of a health care provider involved in the provision of health care services. Therefore, the special rules applicable to those kinds of cases (pre-suit notices, expert certification, etc.) are applicable. This is intended to address recent case law from Tennessee's appellate courts holding that certain kinds of suits involving claims of ordinary negligence, such as positioning patients and helping them out of bed, do not require expert testimony on standard of care. The language in the Act effectively overrules those cases for claims falling within the realm of the legislation.
- Compensatory Damages: The legislation divides compensatory damages into two general categories: economic ("objectively verifiable pecuniary damages") and noneconomic (claims for pain and suffering, disfigurement or disability and the loss of the pleasures of life, as well as derivative claims not involving direct physical injury, such as loss of consortium).
- Caps on Noneconomic Damages: In most cases, there will be a \$750,000 cap on noneconomic damages in personal injury lawsuits. A \$1,000,000 cap will apply to certain types of catastrophic injuries such as paraplegia or quadriplegia resulting from spinal cord injuries, amputations, injuries resulting from third degree burns to 40 percent or more of the body or face, or the wrongful death of a parent leaving surviving minor children.
- Limitations on Capped Damages:
  - A single plaintiff can't recover separate capped damages from separate defendants, regardless of what kind of tort case is alleged. If there is more than one defendant found to be at fault for damages, the defendants will bear a proportionate share of damages. For noneconomic

damages, the collective exposure in most cases will be \$750,000 to \$1,000,000 depending upon the nature of the injury.

- Each injured plaintiff can recover damages, but derivative damages, such as loss of consortium, are subject to the overall cap applicable to the directly injured party.
- The noneconomic damages cap will not be disclosed to the jury, but the verdict form must separate out this category of damages. As a practical matter, this means that the presiding judge will be able to reduce awards when necessary to reflect the maximum recovery permitted under the caps.
- Exceptions to Caps on Damages: There are a few exceptions to caps for noneconomic injuries, essentially revolving around intentional wrongdoing or where the defendant's judgment was substantially impaired by alcohol or drugs. There is also an exception for instances where the defendant is found to have *intentionally concealed, altered or destroyed records with the purpose of avoiding or evading liability*. If this issue is raised, it will be decided by the jury. We expect the plaintiffs' attorneys to attempt to exploit this exception by focusing even more intently on records production, and in particular, modification of or failure to produce records.
- Punitive Damages Cap: Punitive damages for all cases will be capped at twice the total of compensatory damages, or \$500,000, whichever is greater. As with compensatory damages, there are limited exceptions to the punitive damages cap for intentional conduct or judgment impaired by alcohol or drugs.
  - One new twist on punitive damages involves the culpability of a principal for punitive damages alleged against an agent. The liability of the facility for the acts of an agent or employee for such claims "...shall be determined separately from any alleged agent..." A principal can be found not to be responsible for punitive damages even if the agent or employee whose conduct is at issue is found liable for such damages.
  - This same language regarding the liability of a principal being determined separately from that of the agent in cases of vicarious liability is in the section of the statute governing compensatory damages. The provision does not make much sense in the compensatory damages context. Liability should be automatic if the agent acted within his or her scope of authority. A plaintiff might possibly argue that this provision opens the door to a separate cap for the principal as well as the agent (or agents). Other sections of the law are so clear on this subject, however, that such arguments should not work.
  - Appeal bond: The maximum appeal bond required of a defendant is reduced from \$75,000,000 to \$25,000,000, or 125 percent of the amount of judgment, whichever is lower (unless there are unusual circumstances).

## Conclusion

The existence of caps on most claims involving noneconomic damages should reduce the number of long term care provider claims in Tennessee even more than they have already been reduced by the 2008 legislation requiring pre-suit notices and expert certifications in medical negligence cases. Most jurisdictions in Tennessee have experienced a reduction in filed lawsuits of 30 percent to 50 percent – even more in some jurisdictions.

In order to avoid claims of intentional concealment, alteration or falsification of records, it will be critical for long term care providers to have good systems in place for the creation, maintenance and preservation of records. Additionally, it will be important for providers to have good systems in place to respond to records requests from claimants and/or opposing counsel during all phases of potential claims and litigation.

Long term care providers can expect constitutional challenges to the legislation. The primary argument will be that tort cases are being treated differently from other types of civil litigation, for arbitrary reasons. Such court challenges to the legislation will probably not be resolved for at least two years.

