PUBLICATION

The Effects of Tennessee Tort Reform on Health Care Providers

June 23, 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 will not affect pending lawsuits or causes of action that have not yet accrued by that date.

The focus of this alert is on health care providers, although most of 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. In conjunction with equally far-reaching legislation extending the confidentiality and privileged nature of so- called "peer review" activities on the part of hospitals and physician groups, the legislation will significantly impact potential claims against health care providers in Tennessee.

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 following provisions of the Act will be of great interest to health care providers:

- Venue: Claims against providers may be brought: (1) in the county where the defendant "resides" or primarily transacts business, or (2) where a substantial part of the events giving rise to the action took place.
- Health Care Provider: This is defined broadly, to include not only facilities and licensed practitioners such as physicians, nurses and therapists, but also medical students, residents, technicians, physician assistants and the catch-all "…employee of a health care provider involved in the provision of health care services…."
- Health Care Services: This includes "…staffing, custodial or basic care, positioning, hydration and similar patient services."
- Health Care Liability Action: The Act makes it clear that any kind of claim alleging negligence on the part of a health care provider involved in the provision of health care services is considered a health care liability action, meaning that 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 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. One potential problem area for facilities maintaining voluminous records with many provider entries will be an exception to the caps for claims where the defendant is found to have intentionally concealed, altered or destroyed records with the purpose of avoiding or evading liability. See below for more information on the implications of this for health care providers.
- Past and Future Injuries: Damages in personal injury actions must be broken out into separate categories for past and future injuries, with detailed requirements of evidence reflecting the amount of economic losses anticipated per year.
- Collateral Source Rule: This often provides a windfall to plaintiffs by allowing evidence of the actual amount of the bills, regardless of whether they were discounted and written off after payment by insurance. The Act's new statute arguably weakens the collateral source rule in general negligence cases through a provision that limits economic damages to actual damages, but it does not add significant protections to defendants in medical negligence cases.
- Punitive Damages Cap:
  - Punitive damages for all cases will be capped at an amount not to exceed the greater of 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, tracking the type of intentional conduct applicable to the compensatory damages caps discussed above. Entitlement to punitive damages must be proven by clear and convincing evidence, through a bifurcated proceeding (which simply restates current law).
  - One new twist on punitive damages involves the culpability of a principal for punitive damages alleged against an agent. The liability of the hospital 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 legislation reduces the maximum appeal bond required of a defendant from $75,000,000 to $25,000,000, or 125 percent of the amount of judgment, whichever is lower (unless there are unusual circumstances).

New Peer Review Statute: In addition to the Act, the Tennessee Legislature also passed a bill repealing the existing state statute on peer review, which was very poorly written. The new statute is broad and clearly protects both non-physician and physician peer review activities. It will potentially protect most of the internal quality control measures undertaken at health care facilities from disclosure in litigation.

This new legislation will reduce the impetus toward hospitals and other health care facilities contracting with Patient Safety Organizations (PSO), which enjoy broad federal law protection, because the state statute will now exceed the protections offered under federal law. However, due to the access to a broad array of comparative data associated with participation in a PSO and federal regulatory authorities' increasing focus on collaborative quality control measures, serious consideration of contracting with a reputable PSO is still warranted. The new Tennessee statute on peer review will be the subject of a future Baker Donelson alert in this series.

Finally, the legislature passed a bill essentially overruling recent case law from the Tennessee Supreme Court making it more difficult for defendants to obtain summary judgments dismissing claims before they reach a jury trial, instead adopting the more aggressive federal court standards for these motions. That statute is also likely to be subjected to a constitutional challenge on separation of powers issues, and will be addressed in a future Baker Donelson alert in this series.

Conclusion

The existence of caps on most claims involving noneconomic damages should reduce the number of health care provider claims in Tennessee even more than they have already been reduced by the 2008 and 2009 legislation enactments providing for 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.

However, our view is that the reduction will not be as dramatic as we have seen in the past two years. At this point, the major value of the legislation will come from the reduced exposure, and, hopefully, reduced claims reserves necessitated by these lawsuits.

The recent expansion of liability claims against health care facilities under ordinary negligence theories should be stopped in its tracks. Plaintiffs (which often means plaintiffs' attorneys) will have to bear the expense of engaging standard-of-care expert witnesses in almost all medical negligence cases.

Any plaintiff's attorney evaluating a medical negligence claim will be compelled to engage economists and vocational experts to quantify future damages. In some cases plaintiffs' attorneys don't go to that expense now. On the other hand, because economic damages are not capped, we can expect more focus on the part of plaintiffs' attorneys on life care plans and economic projections. This part of the legislation appears to be a wash from the standpoint of health care providers.

Every piece of significant legislation has unintended consequences. There are two such consequences that concern us on behalf of health care providers and facilities:

1. The first issue involves the exception to caps applicable to the intentional concealment, alteration or falsification of records. If a fact issue is raised on this subject the jury is asked to resolve the issue

through a special verdict finding. We can count on plaintiffs' attorneys to attempt to exploit this loophole by focusing even more intently on records production, and in particular, modification or failure to produce records. Plaintiffs' attorneys will argue that failure to produce such entries is equivalent to intentional concealment. Also, in cases where entries in records are considered suspicious because they occur hours after an event – a common event in a busy hospital or long term care facility – plaintiffs' attorneys will probably start claiming that these are altered or falsified record entries.

It will be important for providers to ensure that they have good systems in place for implementing and updating so-called litigation holds where appropriate. The adequacy of a litigation hold system, properly documented, can provide persuasive evidence of a good faith attempt to capture and preserve potentially relevant evidence. This could be critical when defending a claim of intentional concealment of records.

2. The second area of concern is whether we will see an uptick in cases filed before October 1, 2011. The legislation is applicable only to causes of action that accrue on or after that date, which sounds straightforward. But when a cause of action actually accrues is sometimes a hotly contested issue. Some plaintiffs' attorneys may jump the gun and issue pre-suit notices simply to avoid the caps. While a short-term uptick will likely occur, it will probably not be as significant as the increase we saw before the 2008 tort reform measures establishing the pre-suit notice requirements.

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.

This is the first in a series of alerts regarding the implications for health care providers due to recent changes in Tennessee legislation. For questions about the Tennessee Civil Justice Act of 2011, please contact your Baker Donelson attorney.