

OVERVIEW OF THE “CARE BILL” AMENDING THE WEST VIRGINIA MEDICAL PROFESSIONAL LIABILITY ACT (MPLA)

Findings of Fact: The legislative findings of fact, contained in West Virginia Code §55-7B-1, are expanded to reflect the current crisis in the availability of insurance for physicians, other health care practitioners and facilities. The findings demonstrate the legislative intent to address an economic problem which impacts the reasonable governmental objective of availability and affordability of professional liability insurance for health care professionals and facilities so that the public has insurance protection in the event of a legitimate claim.

Exclusive Remedy/Elimination of Third Party Actions: The bill makes an action under the MPLA the exclusive remedy for a patient to recover from a physician in the new section 55-7B-2a. The bill amends 55-7B-2(d) to change the definition of medical professional liability to specifically refer to injuries or death to “patients” not “persons”, and adds a definition in new 55-7B-2(f) for “medical injury.” These changes are intended to give health care professionals and facilities protection from actions by persons injured by their patients, as allowed in *Osborne v. United States*, Slip Op. 30115 (W.Va. July 3, 2002).¹ It also addresses actions where patients sue health care providers for product liability and other theories, such as pharmaceutical litigation, where they are named as defendants in the chain of distribution. This is often done to defeat diversity jurisdiction, meaning that the case cannot be brought in federal court.

Loss of Chance: New 55-7B-3(c), the bill establishes a higher burden of proof for “loss of chance” cases, where the plaintiff argues that the negligent treatment by the health care provider reduced the chance of recovery from a preexisting condition. Examples are failure to timely treat trauma injuries or diagnose cancer. The current standard is that the negligence only has to be a substantial factor. The new statute requires clear and convincing evidence of a substantial probability, defined as a greater than fifty percent chance, the correct treatment would have changed the outcome.

Prefiling Obligations: The bill amends 55-7B-6 dealing with the prefiling procedures established in HB 601 (service of Notice of Claim and Certificate of Merit [“NC/CM”]). These are cleanup provisions to HB601 and require the plaintiff to include a list of all health care providers being served with NC/CM; allowing the provider to state in a response to the Notice that the provider has a bona fide defense and the name of counsel; and making the service of the NC/CM on the provider subject to West Virginia Rules of Civil Procedure 4.

¹ *Osborne* recognized a cause of action for a “person” injured by a “patient.” *Osborne* involved the allegation that a physician negligently over-prescribed narcotics and the patient, while intoxicated, caused a vehicular accident, injuring and killing several persons. The physician was sued for the injuries caused by the patient.
<http://www.state.wv.us/wvsca/docs/spring02/30115.htm>

Expert Qualifications: As attempted in the original MPLA, amended 55-7B-7 sets forth the minimum eligibility threshold for medical standard of care experts, requiring an active license, experience in the same or similar field as the defendant health care professional, and devotion of 3/4 time to active clinical practice or teaching at an accredited school. The original statute requiring the expert be in the same or similar specialty was struck down as unconstitutional in *Mayhorn v. Logan Medical Foundation, Inc.*, 454 S.E.2d 87 (W.Va. 1994). The court held that the determination of an expert's competency to testify is determined solely under the West Virginia Rules of Evidence which are the exclusive province of the Court.

Non-economic Loss: The bill reduces the cap on non-economical loss to \$250,000, but raises the "cap" by \$10,000 per year for each year, thereafter. Low caps are one recognized way to decrease the cost of medical professional liability cases, and several other states have lesser caps than West Virginia's present \$1,000,000. See, *Verba v. Ghaphery*, Slip Op. No. 27464, at fn. 4 (W.Va. May 9, 2001). Non-economic damages include pain and suffering, emotional distress and loss of companionship. The cap has nothing to do with actual or "special" damages such as medical bills and lost wages.

Joint and Several Liability: Amended 55-7B-9 eliminates joint and several liability in MPLA actions, and requires the jury verdict form to include the names of all the possibly negligent parties to the accident, not just those who remain after settlements. "Several" liability means each person/entity is responsible to pay from the total judgment/verdict, only his/its percentage of fault as assessed by a jury. (Joint liability means that any one defendant can be responsible for the entire judgment. Presently, there is joint liability if a defendant is 25% or more at fault.) The bill has a procedure for the identification of negligent non-parties by defendants and consideration of any payments or percentages of negligence assigned the non-parties. The vast majority of health care professionals and facilities are insured so it should be a rare event that a defendant with a large percent of fault does not have insurance. In fact, this legislation is designed to help more in the health field obtain good coverage.

Collateral Source Reform: The WVSMA bill changes the law on collateral source by adding W.Va. Code §55-7B-10, and amending §55-7B-2 to add definitions of "collateral source" and "collateral source payments." Evidence that "expenses or losses were paid or are payable, in whole or in part, by a collateral source" is admissible.² The bill provides that the court shall determine the amount paid or payable by collateral sources, and offset any premium paid by the plaintiff, and then reduce the judgment by the amounts paid or payable by collateral sources. The reduction cannot exceed the amount awarded for economic loss. There is no reduction for any payment for which a subrogation interest has been perfected. The bill requires notice to parties with a subrogation interest within ten days of any verdict, and gives the court the power to determine the amount of reimbursement to the collateral source, less a pro rata share of legal fees. The concerns this portion of the bill address are ensuring a process for the payment of collateral sources, eliminating double recovery where the plaintiff either does not have a repayment obligation or avoids it, and allowing evidence to be placed before the jury that demonstrates the plaintiff will not be responsible for "unpaid" bills. Only a very few states

² W.Va. Code §55-7B-10 ().

proceed as West Virginia does in allowing a plaintiff to have a double recovery, in that the bills are paid by another source, and the plaintiff gets the full amount of that money from a liable defendant.

Periodic Payments: New section 5-7B-11, provides for a jury to determine and distinguish an award of past damages from future damages. Future damages, that is, money which will be needed in the future for medical and other related expenses, will become due as the jury determines based on when the expenses are expected to accrue. Juries do not need to evaluate future damages that total less than \$100,000.

Trauma Care: The bill provides special protection (55-7B-12), in the nature of good samaritan laws, for health care providers who “in good faith renders care or assistance necessitated by a traumatic injury demanding immediate medical attention” by limiting liability to \$500,000 for economic and non-economic loss. The bill does not cover non-trauma related care, but creates a rebuttal presumption that any medical condition which arises during follow-up care is related to the original trauma and is subject to the same limitations.

Contingent Fee Limits: New section, 55-7B-13, the bill limits contingent fees by establishing a sliding scale of allowable fees: 40% of the first \$50,000; 33.3% of the next \$50,000; 25% of the next \$500,000; and 15% of any recover over \$600,000. Translated, a million dollar settlement at 40% means an attorney’s fee of \$400,000 under current law plus costs such as deposition transcripts, expert fees, etc. Under the statute, the fee would be \$221,650. This should be a sufficient amount for an attorney to make a profit while at the same time getting more money to injured plaintiffs.

In addition, settlement is facilitated as plaintiffs recover more dollars at a lesser figure. For example, at present it takes \$1 million dollars for a plaintiff to get \$600,000 (before costs are deducted and assuming a standard 40% contingency arrangement). With the new statute, a settlement of \$800,000 will yield the plaintiff \$608,000. The lawyer gets \$191,650.

Severability: Like HB 601, the bill contains some severability and non-severability provisions.