

Legislative Analysis



MEDICAL MALPRACTICE: NO CAP ON LOSSES IF MEDICAL RECORDS FALSIFIED OR ALTERED

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House Bill 5745 as introduced
Sponsor: Rep. Ellen Cogen Lipton
Committee: Judiciary

First Analysis (10-28-10)

BRIEF SUMMARY: The bill would remove the cap on noneconomic damages that limits the award to a plaintiff in a medical malpractice action if the defendant (or an individual for whose actions the defendant was liable) was found to have falsified the patient's medical records.

FISCAL IMPACT: The bill would have an indeterminate fiscal impact on state and local government, including the judicial branch. Most of the bill's impact will fall on private entities and private parties. The provisions of the bill would allow for no cap on non-economic damages where the defendant was found by a preponderance of the evidence to have intentionally, willfully, or recklessly placed misleading or inaccurate information in a patient's medical record or was found to have falsified or altered medical records.

THE APPARENT PROBLEM:

In the 1980s and 1990s, legislation was enacted in an effort to preserve the availability and affordability of health care in the state. Included in those efforts was legislation that placed a cap on the amount of damages that could be awarded to a plaintiff in a medical malpractice action for noneconomic loss (that is, pain and suffering).

There have been cases, however, in which a health care provider being sued for medical practice has, after being notified of a plaintiff's intention to sue, changed information in the medical record relevant to the action, even though doing so is against the law. The penal code criminalizes the intentional alteration or destruction of a patient's medical records or charts for the purpose of concealing that person's responsibility for the patient's injury, sickness, or death, as well as prohibiting the act of knowingly placing misleading or inaccurate information in a patient's file. Therefore, some believe that when medical records are deliberately altered or destroyed or incorrect information is inserted in a medical record in order to avoid liability in a medical malpractice action, that the cap on noneconomic damages should be lifted.

THE CONTENT OF THE BILL:

Generally speaking, under the bill, caps on noneconomic losses in medical malpractice cases would not apply where the defendant was found to have intentionally, willfully, or recklessly placed misleading or inaccurate information in a patient's medical record or was found to have falsified or altered medical records.

Specifically, House Bill 5745 would amend Section 1483 of the Revised Judicature Act of 1961, which limits recovery for noneconomic losses in medical malpractice cases in Michigan. "Noneconomic losses" include compensation for pain and suffering, physical impairment, and physical disfigurement, as opposed to "economic losses" such as lost earnings or hospital bills. The current limit, adjusted annually for inflation, is \$408,200, unless an exception applies, in which case the limit is \$729,000.¹ (The higher cap applies if the negligence of one or more defendants caused a brain or spinal cord injury resulting in paraplegia, hemiplegia, or quadriplegia; caused permanent cognitive impairment rendering the person incapable of making decisions or living independently; or damaged a reproductive organ resulting in the inability to procreate.)

Under the bill, these limits on noneconomic losses would not apply if the trier of fact (judge or jury) determined by a preponderance of the evidence that the defendant (or an individual for whose actions the defendant was liable) violated Section 492a of the Michigan Penal Code (MCL 750.492a), in relation to records describing the person's care or treatment. Under that section, it is a crime for a medical provider or another person to intentionally, willfully, or recklessly place misleading or inaccurate information in a patient's medical record (or to direct someone else to do this) knowing that the information is misleading or inaccurate. It is also a crime for a health care provider or another person to intentionally or willfully alter or destroy a patient's medical records (or to direct someone else to do this) for the purpose of concealing responsibility for the patient's injury, sickness, or death. Under the bill, in a case where the judge or jury found that medical records had been falsified or altered, the noneconomic losses suffered by the plaintiff would not be subject to the caps found in Section 1483.

MCL 600.1483

ARGUMENTS:

For:

Sometimes a patient's adverse outcome for treatment of a medical condition rises to the level of malpractice. Malpractice laws exist to protect the right of a patient to obtain compensation for injuries caused by the negligence of a medical provider. The bill would keep in place the current cap on noneconomic damages unless there was evidence to support that misleading or inaccurate information had been knowingly entered into the patient's medical records or that the medical records had been tampered with in an attempt to avoid liability. Supporters of the amendment believe that doctors and other medical staff should not enjoy the financial protection that the cap on noneconomic damages afford if they engage in unlawful, as well as unethical, conduct.

Against:

The penal code already prohibits and punishes any person who tampers with a patient's medical record. Depending on the elements of the crime and whether or not the person is a health care provider, penalties can range from a misdemeanor offense punishable by up

¹ These numbers, adjusted annually for inflation, are current as of January 20, 2010. See http://www.michigan.gov/documents/nonocolimit101_3658_7.pdf.

to 90 days in jail and/or a fine of more than \$500 to a felony punishable by up to four years in prison and/or a fine of not more than \$5,000. In addition, a health care provider can face administrative sanctions from a licensing board, including loss of license. Thus, a strong deterrent to falsifying or tampering with a patient's medical record is already provided in law.

Further, the bill would not require a criminal conviction as a basis for removing the cap on noneconomic damages; instead, a finding of guilt based on a preponderance of the evidence (instead of the level of proof needed for a criminal conviction – beyond a reasonable doubt) would suffice to remove the cap. If the cap on noneconomic losses was allowed to be removed, jury awards could once again skyrocket, leading to the problems that plagued Michigan before the cap was enacted – higher medical malpractice premiums and an exodus of physicians trying to escape the higher rates.

Response:

While there are criminal penalties on the books for falsifying or tampering with a medical record, many alleged cases are not investigated and prosecuted, due in part to defunded and overburdened law enforcement agencies and prosecutor's offices. Thus, to require a criminal conviction before the cap in a civil action could be removed would unfairly place some victims of medical malpractice at the mercy of the criminal justice system.

Moreover, there are numerous situations in which there are both criminal and civil remedies. Perhaps the best known example involved O.J. Simpson, who, though acquitted in a murder trial, was found guilty by a preponderance of the evidence in a civil action for the wrongful death of his ex-wife and her friend.

Besides, an allegation of records misfeasance would not be enough to remove the cap on noneconomic damages. The bill's provisions would only be triggered when the defendant's actions reached the level of criminal conduct. Assuming that unlawful conduct in regards to medical records happens in a small percentage of medical malpractice cases, coupled with the fact that insurance providers typically don't cover intentional actions, the bill is unlikely to have a dramatic increase in malpractice insurance premiums.

Against:

The bill remains flawed for several reasons. For instance, it doesn't link the falsified record to any harm done to the patient. Would evidence of tampering therefore allow an action to proceed even when the patient suffered no injuries? Also, by tying the removal of the cap on noneconomic damages to an intentional, criminal act, the bill may inadvertently make it more difficult for the plaintiffs bringing the civil suit to collect on a judgment. This is because most, if not all, malpractice insurance carriers exclude coverage for intentional acts. Unless a defendant had ample personal assets, the judgment may not be collectible. Furthermore, the cap could be removed in a case against a doctor for the action of a subordinate, even if the doctor had no knowledge or direct role in falsifying records.

POSITIONS:

A representative of Speckin Forensics testified in support of the bill. (3-10-10)

The Michigan Association for Justice (formerly the Association of Trial Lawyers) indicated support for the bill. (6-30-10)

A representative of the Michigan State Medical Society (MSMS) testified in opposition to the bill. (3-10-10)

The Insurance Institute of Michigan indicated opposition to the bill. (6-30-10)

ProAssurance indicated opposition to the bill. (6-30-10)

Beaumont Hospitals indicated opposition to the bill. (6-30-10)

Michigan Health & Hospital Association indicated opposition to the bill. (6-30-10)

The Michigan Chamber of Commerce indicated opposition to the bill. (6-30-10)

The Michigan Insurance Coalition indicated opposition to the bill. (6-30-10)

MidMichigan Health indicated opposition to the bill. (6-30-10)

Michigan Academy of Family Physicians indicated opposition to the bill. (6-30-10)

The American Physicians Assurance Corp. indicated opposition to the bill. (6-30-10)

The Property Casualty Insurance Association of America (PCI) indicated opposition to the bill. (6-30-10)

The Michigan Osteopathy Association indicated opposition to the bill. (6-30-10)

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.