American Hospital Association

Protecting and Improving Care for Patients and Communities

Reforming Health Care Liability

Issue

The cost of medical liability coverage is a burden for hospitals, physicians and the patients they serve. For the fifth year in a row, hospitals are expected to face skyrocketing medical liability insurance costs. The reality of higher costs is reflected in a 2006 AHA survey of hospital leaders, where the majority of hospitals reported double-digit increases for medical liability coverage. In fact, 43 percent of respondents reported increases between 10 to 49 percent in the last two years; 14 percent said that they have seen an increase of 50 to 99 percent or more over the same period.

The survey again suggests that, as a consequence, physicians, especially those providing specialized care, are being forced to curtail services, retire early, move to a state with medical liability reform or simply abandon their practices altogether. And America's hospitals, in turn, are forced to curtail or discontinue services or consider alternative risk financing, such as self-insurance.

Many believe that the cause of the ongoing problem lies in excessive medical liability litigation and an inefficient legal system. However, evidence shows that the primary cause of the problem lies with the severity of verdicts (rather than the frequency of claims).

AHA View

Congress must pass meaningful medical liability reform legislation. In a recent survey by Harris Interactive, 76 percent of those Americans polled indicated that they wanted their senators and representatives to support medical liability reform legislation, while only 14 percent opposed congressional action. While the House of Representatives has passed reform legislation based on California's Medical Injury Compensation Reform Act of 1975 (MICRA) 10 times in the last 10 years, gaining Senate approval has proven to be an uphill battle.

The Senate is now poised to take a new approach on this issue during the week of May 1st, which is "Health Care Week" for the Senate. The Medical Care Access Protection Act of 2006 (S. 22), sponsored by Sen. John Ensign (R-NV), is based the MICRA model with some exceptions. For example, the new bill substitutes the $250,000 cap on non-economic damages (pain and suffering) found under MIRCA for a new non-economic damage cap modeled on the highly successful Texas "stacked-cap" approach.

Under S. 22, a health care provider's civil liability for non-economic damages is capped at $250,000. A health care institution's (e.g. hospital, nursing home, etc.) civil liability for non-economic damages also is capped at $250,000, and where a final judgment is rendered against more than one health care institution, the limit of civil liability for non-economic damages is limited to $250,000 for each institution or $500,000 for all unrelated institutions. The bill also preserve states' rights by keeping state medical liability statutes in place and by allowing future state laws to supersede federal limits on damages. The Texas law has reduced premiums by the largest carrier in the state by 22 percent.

The Senate also is expected to consider the Healthy Mothers and Healthy Babies Access to Care Act (S. 23), which would target medical liability reforms for Ob/Gyn services and is sponsored by Sens. Rick Santorum (R-PA) and Judd Gregg (R-NH).

(over)

The AHA is working to gain support for S. 22 and S. 23 from the senators listed below and urging these lawmakers to vote yes on these bills and yes on "cloture" (i.e., therefore move to end debate). Previous Senate reform measures have failed to obtain cloture and not been voted on for final passage. The senators are: George Allen (R-VA), Lindsey Graham (R-SC), Mike Crapo (R-ID), Mel Martinez (R-FL), Arlen Specter (R-PA), Richard Shelby (R-AL), Saxby Chambliss (R-GA), Robert Byrd (D-WV), Thomas Carper (D-DE), Kent Conrad (D-ND), Diane Feinstein (D-CA), Joe Leiberman (D-CT), Bill Nelson (D-FL), Ben Nelson (D-NE) and Robert Menendez (D-NJ).

Other AHA-supported reforms included:

- **A "fair share" rule.** We need to reform the "joint and several" rule, which allows any defendant to be liable for the entire amount of an award, regardless of how small that defendant's share of the fault may be. As a result, current law often punishes a co-defendant (or a sole defendant) who is fully insured or has substantial assets – the so-called "deep pocket." For some providers, this removes any incentive to carry full liability insurance coverage. By establishing a "fair share" rule in health care lawsuits, each party is liable solely for its respective share of damages and not for the share of any other party involved.

- **Periodic payments.** Periodic payments would allow compensation to be made in intervals rather than as a lump sum, permitting settlements to be geared to a plaintiff's needs over the course of his or her life. In addition, because periodic payments can be funded through an annuity, future needs can be fully met at a considerably lower cost to the health care system.

- **Limit attorneys' fees.** Under the current health care liability system, patients awarded compensation are often shortchanged. Money that should go toward their long-term care goes instead to pay attorneys' fees. This is because, traditionally, attorneys in liability cases are paid through contingency fees. As a result, a successful attorney receives a percentage of the plaintiff's award. Percentage limits should be applied to attorneys' fees.

The California and Texas experience after enacting changes like these have proven to be fairer to the medically injured. For example, while the number of health care liability claims brought by medically injured plaintiffs in California, on a per capita basis, is the same as before MICRA, the compensation received by the medically injured in California was higher after MICRA reform. The fundamental difference: patients, rather than their attorneys, have benefited from these reforms.

The AHA continues to work with state hospital associations, our member hospitals and our Health Care Liability Reform Task Force to push for reform in health care liability. In addition, the AHA is an active member of the Health Coalition on Liability and Access, a group of physicians, providers and insurers working together for liability reform, and the Coalition for Affordable and Reliable Health Care, an organization of health care providers and businesses dedicated to common-sense medical liability reform.