



House Seeks To Cap Malpractice Awards As Part Of Health Care Update

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June 27, 2017

Last week, a jury awarded a Pennsylvania man \$620,000 for pain and suffering in a medical malpractice lawsuit he filed against a surgeon who mistakenly removed his healthy testicle, leaving the painful, atrophied one intact.

However, if a bill before the House of Representatives passes, the maximum he would be able to receive for such “non-economic” damages would be \$250,000.

Non-economic damages cover losses that are hard to put a dollar amount on such as suffering, loss of a limb, pain, and loss of companionship. In addition, medical malpractice awards may include monetary damages to cover medical costs and loss of future wages. Sometimes punitive damages may be awarded as well as punishment for reckless or other harmful behavior.

The bill is part of a package of proposed reforms that supplement the American Health Care Act, the House measure to replace the Affordable Care Act that was narrowly approved in May. The Trump administration pledged to support the tort reform legislation.

Passage is far from certain. Groups across the political spectrum oppose the measure. Patients advocates say it would be unfair to seriously injured people whose lives are changed forever because of medical negligence. Many conservatives don’t embrace it either because it would impose federal standards on tort law, an area where states have traditionally determined the rules.

The Congressional Budget Office estimated that the bill would lower health care costs by reducing medical liability insurance premiums and the use of health care services by providers worried about being sued. This would lead to lower spending on federal health care programs and lower medical insurance liability premiums. The effect would be to reduce deficits by nearly \$50 billion over 10 years.

Supporters say caps on medical malpractice awards discourage frivolous lawsuits and reduce the cost of health care because providers no longer need to practice defensive medicine.

Yet research shows that costs from medical liability make up just 2 to 2.5 percent of total health care spending.

About half of states have a cap of some sort on non-economic damages in medical malpractice cases, according to Joanne Doroshow, executive director of the Center for Justice and Democracy, a consumer advocacy organization for civil justice issues.

Under the House bill, states that have caps on non-economic damage awards could keep those in place. In states without such caps, even if the state constitution prohibits them or state courts have struck them down, the federal \$250,000 cap would apply.

The case of the Pennsylvania man's surgery is a "never event," one that experts on patient safety say should never occur. Since that state doesn't have a cap on non-economic damages, if the House bill had been in effect, it would limit the amount that the jury could award the patient to \$250,000. The patient, Steven Hanes, 54, also was awarded \$250,000 in punitive damages.

Hanes declined to be interviewed, but his attorney, Braden Lepisto, said his client was shocked to learn of the proposed cap. "He felt that the \$250,000 cap was ridiculous because that amount would not compensate him for what he has gone through and will go through moving forward," Lepisto said in an email. He added, "The reality is that there are many individuals who are injured from medical negligence who do not have 'economic loss' as defined by the law. Nonetheless, their lives are altered from the pain and suffering, loss of life's pleasures, and the emotional effects of the injuries."

The House bill would also come into play in Florida, where earlier this month the state Supreme Court struck down caps on non-economic damages in medical negligence cases because the court ruled they violate the equal protection clause of the state constitution. The House bill would supersede the state court decision and impose the cap in Florida cases.

Although the damages cap is noteworthy, other elements of the House bill also trouble consumer advocates. For example, it would establish a three-year statute of limitations following an injury for consumers to bring a lawsuit, or a one-year limit from the date that the consumer discovers or should have discovered an injury.

"Because it's [worded as] whichever comes first, for all intents and purposes it's one year," said Doroshow. "That is a drastic change. Almost no state has a statute of limitations that severe."

The bill would also set limits on the amounts that lawyers can recover in contingency fees from consumer judgments. This seemingly consumer-friendly provision could actually harm patients, said Doroshow.

Medical malpractice cases are complex and expensive to bring, she noted. "If you have a law that caps the ability of the attorney to recover from the judgment, they'll think twice before taking a case," Doroshow said. "It hurts the patient's ability to have a competent attorney or any attorney at all."

Meanwhile, some supporters of tort reform say the House bill goes about it the wrong way.

"The federal government doesn't really have a legitimate role to play here," said Dr. Jeffrey Singer, a general surgeon in Phoenix who is an adjunct scholar at the libertarian Cato Institute, located in Washington, D.C.

Conservatives might be relying too much on the idea of tort reform to bring down health care costs, he said.

“It’s become almost a part of the canon of people who align themselves with the market-oriented conservative reforms school,” he said. “But it should be done at the state level and we’re fooling ourselves if we think that it’ll be the magic bullet.”