



Arizona State Senate Issue Paper

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Note to Reader:

The Senate Research Staff provides nonpartisan, objective legislative research, policy analysis and related assistance to the members of the Arizona State Senate. The *Research Briefs* series, which includes the *Issue Brief*, *Background Brief* and *Issue Paper*, is intended to introduce a reader to various legislatively related issues and provide useful resources to assist the reader in learning more on a given topic. Because of frequent legislative and executive activity, topics may undergo frequent changes. Additionally, nothing in the *Brief* should be used to draw conclusions on the legality of an issue.

MEDICAL MALPRACTICE

INTRODUCTION

Medical malpractice is a civil court action taken when a patient sues a health care provider alleging a failure by the health care provider to exercise the degree of care and skill that a health care provider of the same medical specialty would use under similar circumstances. In order to prevail in court, a party must prove that the health care provider failed to provide adequate treatment to the patient resulting in a personal injury or substantial loss of income.

Historically, medical malpractice law was designed to accomplish certain specific social objectives, including addressing poor quality care, fairly compensating patients for injuries resulting from negligence and imposing justice in a manner that would make future occurrences less likely.

There are two types of damages that are applicable in a medical malpractice case – actual damages and punitive damages:

Actual damages are the cost of additional treatment, loss of wages, loss of future wages and pain and suffering.

Punitive damages are damages awarded when medical malpractice is the result of reckless or willful behavior on the part of the physician.

LAWS ATTEMPTING TO LIMIT MEDICAL MALPRACTICE COSTS

Statute of Limitations

In medical malpractice law, the statute of limitations refers to the period from the time an injury occurs or is discovered to the final date on which a medical malpractice lawsuit can be filed. If the statute of limitations expires before a malpractice lawsuit is filed, the judge can dismiss the case for being untimely.

In Arizona, a medical malpractice action must be commenced within two years after the cause of action accrues. Arizona courts have held that the limitations period does not begin to run until the manifestation of the injury. The statute of limitations does not begin to run until the claimant is 18 years of age and does not run while the claimant is mentally incompetent or is imprisoned.

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ul death claims accrue at the date of death and must be brought within two years.

Affidavit of Merit

There are several ways that states have attempted to limit the costs of medical malpractice claims. In Arizona, the “affidavit of merit” law requires anyone suing for medical malpractice, in which the lawsuit will require expert testimony to provide liability or a standard of care, to file a statement from a qualified health professional outside the case, asserting that it deserves to be heard in court. The affidavit must usually be filed within 60 days of filing a lawsuit. The law was passed in response to what Arizona doctors called a crisis situation regarding the increasing expense of liability premiums. Many doctors reportedly were forced to give up their practices, retire early or move to states where insurance is more affordable. According to the Mutual Insurance Company of Arizona—which insures about 5,500 doctors, or 90 percent of those practicing in Arizona—it spent close to \$6 million in 2003 defending doctors against more than 270 malpractice claims that were found by a court to be meritless.

In 2004, the Legislature added certain claims against health care professionals to the class of lawsuits that require expert certification before a case can proceed. Also in 2004, in response to an Auditor General report alleging that the Arizona Medical Board dismissed complaints of merit, the Legislature passed a law prohibiting the Executive Director of the Board from dismissing complaints when a medical malpractice judgment occurred (Laws 2004, Chapter 264).

Limitations on Recovery of Damages

A second method of limiting medical malpractice costs is to limit the amount of damages that a jury may award. According to the American Medical Association, at least 24 states limit “pain and suffering” payments in malpractice cases. The Arizona Constitution prohibits such limits. The drafters of the Arizona Constitution included provisions limiting the Legislature’s ability to diminish the right to sue

for damages. Specifically, Article 2, Section 31 provides “No law shall be enacted in this state limiting the amount of damages to be recovered for causing death or injury of any person.” Also, Article 18, Section 6 provides “The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation.” In 1986, 1990 and 1994, voters failed to amend the Constitution to change Arizona tort law.

Recent legislative attempts to bypass those provisions have also been unsuccessful. In 2003, the Arizona Supreme Court struck down a portion of the Arizona Medical Malpractice Act that eliminated a cause of action for battery in malpractice cases; the court held that such legislation “abrogates” a cause of action.

In 1989, legislation was enacted to mitigate the immediate impact of large jury awards by providing for payment of damages over time instead of via lump-sum awards (A.R.S. §§ 12-581 to -594). However, the Arizona Supreme Court held that the statutory scheme violated Article 2, Section 31 of the state Constitution because it limited the recovery of damages for death or personal injury (Laws 1989, Chapter 289).

In 2005, legislation was enacted allowing the court or jury in cases of vulnerable or incapacitated adult abuse to order the payment of punitive damages under common law principles that apply in other civil actions. The legislation also allowed the award of attorney fees in these cases but limited them to twice the amount of compensatory damages awarded unless the case meets certain circumstances. In these situations, the court may award additional attorney fees beyond the specified limit (Laws 2005, Chapter 101).

In any medical malpractice action against a licensed health care provider, the defendant (typically the health care provider or its insurer) may introduce evidence of any amount or other benefit that is or will be payable as a benefit to the plaintiff (patient or his or her descendants), as a result of the injury or death. This evidence is admissible for the purpose of considering the damages claimed by the plaintiff and the trier of fact may give it any amount of weight. Thus,

this is one instance where a plaintiff's damages may be limited.

If the defendant does introduce evidence of a collateral source of benefits, the plaintiff may introduce evidence of any amount that the plaintiff paid or contributed to ensure the right to benefits. For example, if the defendant introduces evidence that the plaintiff has received health benefits from an insurance company, the plaintiff may introduce evidence that he or she paid monthly premiums for those benefits. Additionally, the plaintiff may introduce evidence that the provider of benefits has a right to recovery against the plaintiff for those benefits from the damages the plaintiff recovers in a medical malpractice action. This law concerns the admissibility of evidence and does not give the provider of collateral benefits the right to recover any amount against the plaintiff as reimbursement for the benefits, unless the provider may already do so by statute.

Ability to Sue HMOs

The ability of Arizonans to sue health maintenance organizations (HMOs) for medical malpractice was severely restricted by a 2004 U.S. Supreme Court ruling. In a unanimous decision, the high court ruled against a pair of Texas patients, stating they could not pursue damages for pain and suffering in state court but had to seek redress in federal court, where they can recover only actual damages. The decision does not affect claims of malpractice by a doctor as patients may still sue health care providers for their alleged mistakes. The ruling also does not apply to individuals who buy their own health care coverage or to government workers. The ruling weakens a state patient protection law that gave Arizona residents the right to sue HMOs in state court. The court ruling was based on the language of the Employee Retirement Income Security Act (ERISA), which regulates employee benefits and provides a federal remedy for certain lawsuits. The ruling affects laws similar to Arizona's in California, Louisiana, Maine, New Jersey, Oklahoma, Washington and West Virginia.

Limitations on Negligence Actions

In 2003, in response to an Arizona Supreme Court decision allowing actions based on negligence to be filed under both the Arizona Medical Malpractice Act and the Adult Protective Services Act (APSA), the Legislature amended both acts to exempt certain health professionals from medical malpractice actions based on the abuse or exploitation of an incapacitated or vulnerable adult pursuant to APSA unless certain circumstances exist. The law also reduced the statute of limitations for APSA claims from seven years to two.

In 2005, the Legislature prescribed qualifications for expert witnesses in medical malpractice and vulnerable adult abuse cases. This Legislature also enacted laws making expressions of apology, responsibility, sympathy, commiseration or similar sentiments made by health care providers inadmissible in court as evidence of liability or an admission against interest (Laws 2005, Chapter 183).

A 2006 bill, H.B. 2315, would have specified that the necessary elements of proof required for medical malpractice cases in which the health professional was providing services to a patient in compliance with the Emergency Medical Treatment and Labor Act (EMTALA) (P.L. 99-272; 100 Stat. 164; 42 United States Code section 1395DD), or as a result of a disaster, be established by clear and convincing evidence. Statute already required the elements of proof for certain medical malpractice cases relating to emergency labor and delivery to be established by clear and convincing evidence but provided an exemption to this requirement in cases in which the patient's medical information is reasonably available to the physicians attending the emergency labor or delivery. H.B. 2315 also would have narrowed the exemption to cases in which the information is immediately available.

H.B. 2315 was approved by the Legislature but vetoed by the Governor. In her veto message, the Governor stated that she has not seen data suggesting the bill will solve the shortage of on-call specialists in emergency rooms and indicated concerns about the bill's constitutionality. The Governor, through an

Executive Order, also created the Emergency Medical Services Access Task Force to study the best ways to address the state's shortage of emergency department physicians and the problem of access to emergency care. In its final report, the Task Force made numerous recommendations relating to these issues, including increasing the burden of proof to clear and convincing evidence in civil and medical liability cases. Five of the eighteen Task Force members also issued a Minority Report objecting to this specific recommendation. The Minority Report expressed concern that the recommendation is not based on solid data, will eliminate legitimate cases of medical negligence from being heard in court and grants favored status to physicians or medical professionals who subsequently treat the patient outside the emergency department.

In 2009, the Legislature enacted and the Governor signed S.B. 1018, a bill identical to H.B. 2315 (Laws 2009, Chapter 110).

In addition, medical professionals are provided with limited liability in certain situations. A health professional who provides medical or dental treatment within the scope of the health professional's certificate or license at a nonprofit clinic where neither the professional nor the clinic receives compensation for any treatment provided at the clinic is not liable in a medical malpractice action, unless the health professional was grossly negligent. Additionally, a health professional who, within the professional's scope of practice, provides previously owned prescription eyeglasses free of charge through a charitable, nonprofit or fraternal organization is not liable for an injury to the recipient if the recipient or the recipient's parent or legal guardian has signed a medical malpractice release form and the injury is not a direct result of the health professional's intentional misconduct or gross negligence.

"Good Samaritan Laws," found in the majority of states, limit the liability of certain health care providers acting in emergencies. In Arizona, any health care provider licensed or certified to practice in Arizona or elsewhere or a licensed ambulance attendant, driver or pilot or any other person who renders emergency care at

a public gathering or at the scene of an emergency occurrence gratuitously and in good faith is not liable for any civil or other damages as the result of any act or omission by the person rendering the emergency care, or as the result of any act or failure to act to provide or arrange for further medical treatment or care for the injured persons, unless the person, while rendering emergency care, is guilty of gross negligence. Additionally, there are similar limitations on liability for licensed or certified health care providers who voluntarily and without pay attend an amateur athletic practice, contest or other event to be available to render emergency health care, within the scope of the profession's practice, to an injured athlete.

MEDICAL MALPRACTICE IN OTHER STATES

Numerous measures relating to medical malpractice have been introduced recently in state legislatures. Almost all states, including Arizona, have statutes or court rules relating to pretrial alternative dispute resolutions, such as arbitration, settlement conferences or mediation. These are frequently voluntary actions, although stipulations differ from state to state as to whether they are required or whether any associated decisions are binding. Also, many states statutorily provide for expert advisory panels, which conduct preliminary hearings before a malpractice trial to determine the legitimacy of a complaint. States have varying standards regarding whether the panels are mandatory and if their findings are admissible at trial.

Over 30 states place limits on the amount of damages a claimant can be awarded. Most of these laws limit noneconomic and/or punitive damages to between \$250,000 and \$500,000, and some limit the total compensatory damages. Also, over half of the states limit attorney fees in some way in medical malpractice cases. Seven states require fees to be reviewed or approved by the court, and five limit fees to a percentage of the total amount awarded, usually 33 1/3 percent. The other 14 states provide a sliding scale to limit fees, depending on the damages the claimant is awarded. For example, California specifies that fees cannot exceed 40 percent of

the first \$50,000 awarded; 33 1/3 percent of the next \$50,000; 25 percent of the following \$500,000; and 15 percent of damages above \$600,000.

Another way states have altered laws pertaining to medical malpractice is by creating insurance assistance funds for doctors ranging from aid in paying premiums to paying malpractice awards within parameters. They are funded by the state or by health care providers and managed by the state. Approximately ten states have implemented this legislation, and another three have enacted it without funding or applying the provisions. •

ADDITIONAL RESOURCES •

- “*Medical Malpractice Insurance: Multiple Factors Have Contributed to Increased Premium Rates,*” United States General Accounting Office, June 2003
- “*Medical Malpractice: Implications of Rising Premiums on Access to Health Care,*” United States General Accounting Office, August 2003
- “*Liability for Medical Malpractice: Issues and Evidence,*” Joint Economic Committee, United States Congress, May 2003
- “*Medical Malpractice: Multiple Factors Have Contributed to Increased Premium Rates,*” United States General Accounting Office, June 2003
<http://www.gao.gov/new.items/d03702.pdf>
- “*Doctors Call it Quits,*” Time, June 9, 2003
- “*Addressing the Medical Malpractice Insurance Crisis,*” National Governors’ Association, December 5, 2002
- “*Medical Malpractice: Implications of Rising Premiums on Access to Health Care,*” United States General Accounting Office, August 2003
<http://www.gao.gov/new.items/d03836.pdf>
- “*Medical Malpractice Reform, Perspectives on Recent Findings by the GAO,*” United States Congress, Joint Economic Policy Brief, December 2003
<http://www.house.gov/jec/tort/12-04-03.pdf>
- National Conference on State Legislatures
<http://www.ncsl.org/>
- American Medical Association
<http://www.ama-assn.org/>
- Health Affairs
<http://www.healthaffairs.org/>
- Arizona Governor Executive Order 2006-09
<http://www.lib.az.us/is/state/eo/2006-09.pdf>
- Emergency Medical Services Access Task Force Report, December 13, 2006.
http://www.azdhs.gov/bems/forms-pdf/12_13_06_final_report.pdf
 - Related Arizona Revised Statutes: A.R.S. §§ 12-2603, 12-2604, 12-2605, 32-1405, 46-455 and Title 12, Chapter 5.1, Articles 1 and 2.