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Medical Liability Reform Provisions: Defining the Terms

Non-Economic Damages

Non-economic damages are paid to compensate an individual for physical and emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other intangible, non-monetary losses. The United States is the only country in the world that provides unlimited compensation for non-economic damages. Non-economic damages are separate from, and do not include, compensation for medical costs, lost wages, or other out-of-pocket expenses (these are economic damages), and they do not include punitive damages. Therefore, reasonable limits on non-economic damages would not in any way limit the amount of money that an injured patient could receive to cover his or her hospital costs, doctor bills, other medical expenses, or lost wages.

HCLA's model provision: \$250,000 ceiling on non-economic damages. No limits on any economic damages.

Collateral Source Rule

Under the collateral source rule, a defendant is prohibited from introducing in court any evidence of payments received by the plaintiff from sources other than the defendant, which might remedy some of the plaintiff's economic loss. These sources could include health insurance reimbursement, workers' compensation, and disability insurance payments. The result: double recovery of damages by plaintiffs since both the defendant and another party, such as an insurance company, pay the plaintiff for the same loss. Eliminating the rule and allowing evidence of collateral source payments to be offered in court would allow the jury to decide the extent to which collateral source benefits should be factored into an award. The plaintiff would still be fully compensated for his injuries but would be less likely to receive a windfall; as would his attorney.

HCLA's model provision: make juries aware of collateral sources payments and allow offsets for those payments.

Joint and Several Liability

This rule allows any defendant in a lawsuit to be held liable for the entire amount of a claimant's damages, regardless of that defendant's proportion of fault. Courts have held defendants who have been judged to be responsible for only 1% of the cause of an injury responsible for 100% of the damages paid, solely because that defendant could pay. Joint and several liability encourages trial lawyers to ignore defendants who are truly responsible and focus on any "deep pocket" that is even tangentially related to a case. It separates responsibility for causing an injury from the responsibility to compensate for that injury.

HCLA's model provision: defendants should be held liable only for their own portion of the damages awarded to a victim, in direct proportion to their percentage of liability for the claim.

Periodic Payment of Future Damages

Future damages are the plaintiff's losses that are projected to occur in the future resulting from the injury at issue. They include, among other things, future medical expenses and lost earnings.

HCLA's model provision: allows the defendant to make periodic payments of future damages over \$50,000, if the court deems appropriate, instead of a single lump sum payment. The plaintiff still would receive full and immediate compensation for all out-of-pocket expenses, non-economic damages, punitive damages, if awarded, and future damages of \$50,000 or less. This provision would allow the defendant to pay for future losses with annuities or other financial instruments that have a lower "present value." It also would ensure that funds continue to be available to the plaintiff to cover these future damages as they occur by avoiding the possibility of mismanagement of a lump sum payment. In short, periodic payment vehicles are generally better for patients and save the health care system money.

Attorney Contingency Fees

When a personal injury lawyer agrees to take a case on a contingency fee basis, he or she agrees to charge the client a fixed percentage of the award or settlement, usually between 33 and 1/3% and 50%. If the plaintiff wins the case (or receives a settlement), the attorney's fee would be the agreed upon percentage of the award or settlement. If the plaintiff loses the case (receives no award), the personal injury lawyer does not receive a fee. Defense attorneys are not paid on a contingency fee basis. They charge their clients by the hour.

HCLA's model provision: establishes a sliding scale for attorneys' fees. This provision prohibits lawyers from collecting a contingent fee in excess of 40% of the first \$50,000; 33 1/3% of the next \$50,000; 25% of the next \$500,000; and 15% of any amount over \$600,000.

Punitive Damages

Punitive damages are awarded on top of economic or non-economic awards. They are aimed at punishing the defendant for egregious, malicious, or intentional misconduct. Every state has its own standard for determining when punitive damages are appropriate. A plaintiff who proves that his injuries were caused by the defendant's negligence will receive full compensation for his injuries regardless of whether punitive damages are limited or not awarded at all. Although punitive damages are rarely awarded in medical liability cases, personal injury lawyers routinely include punitive damage claims in their complaints. This hampers settlements. Where there are no reasonable guidelines to aid juries in determining the appropriate level of punitive damages, such awards could be limitless. This "lottery" atmosphere makes settlement negotiations difficult, since the parties are unable to make an accurate assessment of the value of a particular case.

HCLA's model provision: punitive damages should be awarded only if there is "clear and convincing" evidence that defendant acted with malicious intent or deliberately failed to avoid an injury that his/her actions were likely to cause. In those cases, damages should be limited to \$250,000, or twice compensatory damages (the total of economic plus non-economic losses), whichever is greater.

Procedural Reforms

Reforms to the process through which medical liability claims are brought and adjudicated are also necessary to reduce costs, the number of frivolous lawsuits, and to ensure physicians are not sued for using their skills and knowledge in determining the best course of treatment for a patient.

HCLA's model provision: 1) any medical liability lawsuit must be accompanied by a certificate of merit (the absence of which will subject the case to dismissal) declaring that a qualified expert had reviewed the claim and found the allegations therein to be legitimate; 2) expert witnesses must demonstrate an appropriate level of knowledge about the specific matter in question and a sufficient level of expertise in the applicable field of medicine; and 3) a healthcare provider's failure to follow a government guideline shall not be deemed, in and of itself, proof of negligence.