

## MEDICAL LIABILITY REFORM

### Issue

The long term care community is facing a litigation assault that threatens the very foundation of the health care system for our nation's most frail elderly.

Across the country, nursing facility and assisted living providers are experiencing dramatic and unprecedented increases in liability insurance premiums because of a growing number of lawsuits that result in huge settlements and excessive jury awards. Driving many of these lawsuits is the misuse of state and federal safety compliance regulations and state residents' rights laws as standards of medical care. An aggressive plaintiff's bar has compounded the problem with public relations campaigns targeting long term care and pushing the boundaries of these broad residents' rights laws.

Funds that go to patient care are diverted to pay for expensive liability insurance coverage. Liability insurers have fled the long term care market. Long term care facilities in certain areas of the country are now forced to go without insurance in order to keep their doors open.

### AHCA/NCAL Proposal

The severity of the professional liability insurance crisis and its impact on nursing homes and assisted living facilities necessitates the development and advocacy of a long term care specific legislative solution. The American Health Care Association (AHCA) and the National Center on Assisted Living (NCAL) are working to identify legislative solutions that address LTC quality improvement, patient safety, and the lack of predictability of risk that currently exists by addressing both the frequency and severity of liability claims and the need for insurance and evidentiary reform.

AHCA and NCAL have proposed the following:

- Straightforward, fair and comprehensive limits on medical liability awards that fully cover "alternative" state laws exploited by some to bring standard medical negligence cases against long term care providers. Comprehensive protections are essential to restoring a degree of predictability and fairness to the medical justice system. These reforms will serve both patients' and caregivers' best interests.
- Limit plaintiff's attorneys' contingency fees in health care actions. Attorneys, rather than their injured clients, currently receive the lion's share of awards in health care cases. In long term care, nearly all of these health care dollars are being siphoned out of the federal Medicare and Medicaid programs.
- Advocate for the use of medical review panels as a pre-litigation tool designed to reduce the frequency of frivolous claims.
- Limit use of data developed for quality improvement purposes in civil litigation. Self-reported documents used against nursing facilities in lawsuits run counter to the spirit of the quality movement and stifle discussion on quality care.
- In tandem with these protections, we recognize that common-sense insurance reforms and risk management efforts will play an important role in guaranteeing that liability insurance is available and affordable. Long term care has been a leader in developing and releasing benchmark "quality measures" that help consumers make informed choices regarding where to seek care and improve the overall public health. These quality improvement efforts are a key component of any enduring liability reform strategy.

### Background

The future of long term care is threatened by the massive increase of litigation that has spread to quality facilities. Trial attorneys have led the effort through legal maneuvering by providing incentives for residents to sue if a resident's right is "deprived or infringed." If the plaintiff prevails, then the plaintiff is entitled to damages plus attorneys' fees and costs. This allows plaintiffs' attorneys to receive higher fees due to the award of regular damages plus attorneys' fees and costs. These laws have led to the proliferation of lawsuits. According to the 2004 Aon Actuarial Analysis, the long term care profession is incurring more claims per bed every year. The number of lawsuits filed against nursing homes is now more than three times higher than it was in 1992, and has increased in each of the last twelve years. The study also shows that almost half of the total dollars generated by the lawsuits are paid to attorneys rather than to patients. What's more, liability claims are projected to absorb 5% of the countrywide average Medicaid reimbursement rate in 2003. The bottom line is that scarce resources are being siphoned out of the eldercare system at the expense of improved quality, staffing and clinical care.

AHCA and NCAL take a hard line against poorly provided care and believe it should not be tolerated. The survey and inspection system that states use to determine compliance with regulation is broken and does not measure quality. Plaintiff attorneys use the documents generated from the survey system against long term care facilities in these lawsuits. Federal and state compliance documents were never intended for use as a standard for negligence in lawsuits.

### **Status**

AHCA and NCAL have endorsed legislation that would safeguard patient access to quality care by making common sense reforms such as:

- Speedy resolution of claims by limiting the filing of health care lawsuits to three years after the date of an alleged incident;
- Allocates damages fairly – only in proportion to a party's degree of fault;
- Compensates patient injury by allowing the injured party to recover economic damages such as future medical expenses and loss of future earnings;
- Maximizes patient recovery by empowering the court to ensure that an unjust portion is not misdirected to his or her attorney;
- Puts reasonable limits on non-economic and punitive damages;
- Ensures payment of medical expenses by allowing funds for future medical expenses to be paid periodically – not in one lump sum; and,
- Allows state flexibility by allowing states that have already enacted damage caps, whether larger or smaller to retain such caps.

Last March, the House passed H.R. 5 in a 229-126 vote. The Senate Companion, S. 11, was narrowly defeated on a procedural motion early this summer. On February 10<sup>th</sup> the Healthy Mothers and Healthy Babies Access to Care Act of 2004, S. 2061, was introduced in the Senate and is scheduled for a vote on February 24<sup>th</sup>. Although this is a narrowly tailored tort reform bill, other bills will be introduced expanding the scope of tort reform protections.

### **Action**

AHCA and NCAL will continue to work with Congress to address long term care specific liability reforms. AHCA and NCAL call upon Congress to enact common sense medical liability reforms that improves quality, protect patients and staff, and addresses the frequency and severity of liability claims.

*For more information, please contact Ray Sierpina at 202-898-2801 or [rsierpina@ahca.org](mailto:rsierpina@ahca.org).*

August 12, 2003